A Reexamination of Administrative Detention in a Jewish and Democratic State

Elad Gil
Supervised by Mordechai Kremnitzer

THE ISRAEL DEMOCRACY INSTITUTE

Policy Paper 7E

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Introduction

On January 5, 1895, a Jewish captain in the French army was arrested in France for the offense of treason—spying for Germany. He was convicted, stripped of his rank in a humiliating ceremony in the presence of raging mobs, and condemned to life imprisonment on Devil's Island, near the shores of French Guiana. The evidence upon which Alfred Dreyfus's conviction was based was secret evidence that had been collected by the French intelligence agent, Marie Bastian. It consisted of one document, found in the office of the German military attaché in Paris. Dreyfus was not aware of the existence of this piece of evidence, and hence had no opportunity of challenging its authenticity or the reliability of its contents. It was only eleven years later that a Parisian court cleared his good name and restored his rank.

The Dreyfus affair is a symbol of unjust legal proceedings. It demonstrates the latent dangers in reliance on privileged material for the denial of a person's freedom, and vindicates the procedures and strict defenses of the rights of the accused that are insisted upon in modern criminal law. These safeguards are not available in the framework of administrative law, but the denial of liberty is definitely part of the proceeding.

The Emergency Powers (Detention) Act – 1979 (hereinafter: the Detention Act) grants the minister of defense the authority to detain an individual without trial in order to protect state security and public safety. A detention order may be issued for periods of up to six months, and consecutive orders make it possible to incarcerate a person for many years (theoretically, for an indefinite period) without

having been convicted of a criminal act. This authority is universally referred to as "administrative detention."

Administrative detention is not an Israeli invention, and Israel is not the only Western democracy that confers such far-reaching power upon the executive branch. Similar laws have been enacted, repealed and reenacted in a number of states, among them the United States and the United Kingdom. The question of the suitability of such powers to a democratic system of government has been discussed all over the world as part of the overall discourse concerning the legal boundaries of the struggle that a former president of the world's most powerful country has called "the war against terrorism."

Despite its worthwhile objective, the Detention Act severely infringes the basic tenets of reasonable judicial process as it enables the state to deprive individuals of their freedom and dignity by removing all the guarantees of a fair trial that are recognized under criminal law. In its present form, the act does not allow prisoners to know the reasons that led to their detention. Moreover, it does not allow them to defend themselves properly. In most cases, the evidence that leads to detention orders is kept hidden from the suspects and from their lawyers, and the proceedings are far more reminiscent of Kafka than of a trial taking place in a Jewish and democratic state.

The current legal arrangement in Israel is actually the legacy of security regulations that were established by the British authorities at the end of the Mandate period, which were directed, first and foremost, against the *yishuv* (the pre-state Jewish community). These provisions symbolized the arbitrary attitude of a cold, remote regime toward the residents of an occupied country and the glaring injustice inflicted on them, which only fanned the flames of Jewish resistance to Mandatory rule in the Land of Israel. The Detention Act was submitted to the Knesset in 1979 by then-Justice Minister Shmuel Tamir thirty-one years after he and forty-nine other underground fighters had been

exiled to Kenya under these same regulations. The act sought to temper the rigidity of the Mandatory security regulations and to dispel any doubts about the perversion of justice, which they had created. However, the act retained essential provisions that are unacceptable and that deviate from Israel's obligations under international law. As a result, and without delving into this issue, for about thirty years, there has been a legal arrangement in the statute book that rends the fabric of the fundamental principles of law and society in Israel, and erodes our international standing as a democratic, law-abiding state.

No one would dispute the fact that the State of Israel has been grappling for years with a tangible and plaguing threat of terrorism, which has taken the lives of numerous Israelis and has severely disrupted our way of life. Nonetheless, we must bear in mind that the best way to confront the gamut of terrorism offenses inside Israel's borders—from membership in a terrorist organization to murder—is within the framework of criminal law. It is necessary to emphasize that the Detention Act applies only to the State of Israel proper, and is not a basis of authority for carrying out administrative detentions in Judea and Samaria. Administrative detention is a "stepchild" that is intended to prevent potential dangers to state security from materializing, only when it is impossible to do so under criminal law.

This study seeks to examine the authority for administrative detention in Israeli law.[1] It inquires into its purpose and whether that

1 This study is an examination of the **Emergency Powers (Detention) Act** that confers the authority for administrative detentions within the borders of the State of Israel. This arrangement is supplemented by a military order conferring the authority for administrative detention in the West Bank. A brief survey of the military arrangement is presented in Chapter Two, section C. The arrangements are essentially similar, and a few of the examples cited are actually taken from judgments given in relation to military orders. Notably, despite their tremendous substantive similarity, in practice there

purpose is worthy of being realized. Above all, it considers whether realizing that purpose justifies its high price. This "price" includes the flawed division of power among the state authorities and the grave infringement of a person's undisputed fundamental right to liberty, dignity and due process under Israeli law.

An examination of administrative detention in Israel must be conducted against the background of the state's unique security situation, which will deservedly be dealt with at length in the framework of this study. The security reality of Israel may be summed up in the words of Justice Aharon Barak: "We had terrorism on September 10, 2001and many days before that, and we had terrorism on September 13th and for many days since then."[2]

Since its establishment, Israel has confronted substantial security threats, and the end is nowhere in sight. This reality is expressed in the balance that Israel strikes between ensuring individual rights and the protection of security interests. In Israel security is not a mere slogan—it is a real objective, daily addressed by the security establishment in its efforts to protect the lives of its citizens and enable them to maintain a normal daily life in a "tough neighborhood" of the Middle East.

A direct outcome of the unique security situation is that Israel is in a permanent state of emergency, pursuant to the proclamation annually renewed by the Knesset (the Israeli Parliament). This fact confers extensive powers to the executive branch by force of the

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is a significant difference between them, expressed primarily in terms of the frequency of their application. Far more frequent use is made of the military orders than is made of the statutorily conferred authority.

2 From the introduction written by Justice Barak to Prof. Emanuel Gross's book, The Struggle of Democracy against Terrorism 25 (2004) (Hebrew).

provisions of Basic Law: The Government.[3] Therefore, legislation seeking to realize a security objective should be restricted even when it is limited to a "state of emergency," because that definition does not attest to the law's being applicable exclusively during extreme states of emergency, and in reality, the significance of the limitation is negligible. It should be noted that norms that are desirable and worth introducing during temporary states of emergency in other countries are not necessarily appropriate for Israel. The issue of the Israeli state of emergency will be addressed in the course of this study.

The opening chapter analyzes the key provisions of the Detention Act, questioning its capacity, in its present form, to achieve the security objective that it seeks to promote due to its many shortcomings: The mechanism of administrative detention, as authorized by the Detention Act, is liable to lead to false arrests and to embody severe manifestations of governmental arbitrariness. Likewise, it strikes a severe blow to the proper distribution of power among the three branches of government. By making it possible to withhold from suspects the evidence that led to their arrests, it seriously undermines the fundamental right of individuals to respond to the charges made against them in fair judicial proceedings. The Detention Act effectively allows the authorities to incarcerate a person for an extended and indefinite number of years without filing any charges. It lacks a clear-cut definition that adequately specifies the purpose of administrative detention. Finally, it does not mention any other more moderate legal tools that could achieve the security objective upon which the act is grounded.

The second chapter is devoted to analyzing the provisions of the Detention Act. Along with a historical survey of the legislation, this

3 Basic Law: The Government. See §§38-39.

chapter also includes a discussion of the normative environment in which it operates (the state of emergency in Israel as declared by the Knesset) and its substantive provisions.

It is important to state at the outset that the number of administrative detentions under the Detention Act has been extremely small. However, in recent years, the proposal has been raised in Israeli public discourse to apply it to at least two additional cases, which would greatly expand its use. In the first case, just prior to the implementation of the Gaza disengagement plan in 2005, the proposal was made to impose preventive detention against persons suspected of being liable to act aggressively toward the evacuating forces. On another occasion, it was proposed that the act be expanded to apply to individuals suspected of involvement in organized crime. These examples indicate that the Detention Act, in its present form might, at some point in time, be further exploited. It is an easy solution for law enforcement authorities, since it enables them to "forego" addressing the defensive arguments of the accused in criminal proceedings. Opening this door even slightly to expand the application of this legal arrangement runs the risk of nullifying longstanding, elementary principles of our democratic form of government. It is not hard to imagine what will happen if administrative detentions are more widely employed, and there is no need to reach that point in order to demonstrate the great injustice of maintaining an arrangement that makes it possible to strip individuals of their freedom without minimally fair judicial process.

Furthermore, the Detention Act deviates from Israel's obligations under the International Covenant on Civil and Political Rights and is inconsistent with international law. It is unnecessary to elaborate on the resultant grave damage to Israel's image, in the past as well as in the future. There is a clear trend in the international arena to intensify

the isolation of states that (consistently) violate human rights laws, and Israel does not want to be counted among these states.

Chapter Three of this study offers an analysis of international law along with solutions adopted throughout the years by other Western democracies. Over the course of time and particularly after the September 11 attacks, democratic states adopted ill-advised laws and practices that clearly reflected the panic that gripped them. The attempt will be made here to draw certain conclusions and lessons from important rulings handed down and legal arrangements enacted in those states. In recent years, however, the pendulum has swung back and with the help of effective judicial oversight, each state has achieved a proper balance in dealing with terrorism without infringing the fundamental values of a liberal democratic society.

The fourth chapter presents an interim summary of the existing tension between the Detention Act, individual rights, and the rule of law. In that framework, this study subjects the act to a constitutional examination of its proportionality. While such an examination cannot be carried out by the Supreme Court due to the preservation of laws clause,[4] the issue is appropriately addressed in this study, in endeavoring to establish whether the existing arrangement is also the desired one.

The final chapter summarizes the conclusions of the research and contains an Epilogue by Professor Mordechai Kremnitzer.

4 See §10 of Basic Law: Human Dignity and Liberty, which determines that: This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law. The import of the preservation of laws section is that none of the provisions of a law enacted prior to the enactment of the Basic Law can be cancelled, even if they contradict the provisions of the Basic Law.

The time has come for the State of Israel to choose a more fitting legislative solution that will also reflect the changes in the attitude of the Knesset and the Israeli society as a whole toward the basic rights of the individual, as well as the fundamental principles that have guided the state since its founding, including the heritage of the Jewish people, which recognizes the sanctity of human life and the importance of a fair trial for Jew and non-Jew alike. This study concludes with a proposal for a new State of Emergency (Protection of State and Public Security) Bill in which is proposed the adoption of an alternative policy, in light of the arguments that have been laid out. The main points of this proposed new law are outlined below.

The proposed modifications are based on striking a different balance between the public interest in ensuring state security and public safety (whose importance should not be underestimated in a state locked in an endless struggle against terrorism within its borders) and the individual's fundamental rights to freedom, dignity, and due process. The aim is to significantly reduce the legal potential to enforce administrative detentions, while at the same time reserving this power for cases of a highly exceptional nature in which it is crucial to deprive an individual of his or her freedom for a limited period in order to avert a threat to state security. In addition, the proposed changes are intended to eliminate the basic injustice inherent in the current detention proceedings. It is the author's belief that the proposed balance is fully compatible with the fundamental principles of the judicial system in Israel, as well as in conformity with international law.

The following conclusions address the existing provisions of the Detention Act and their shortcomings, and offer a proposal for a new set of laws:

The present policy of automatically renewing the state of emergency each year in the Knesset should be completely revised.

In routine times, it is possible and indeed advisable to employ criminal law to thwart the objectives of terrorists. The court conviction of terrorists, followed by their incarceration, will avert the danger that administrative detention seeks to prevent, but in a much more appropriate manner. A state of emergency should be declared only in times of genuine emergency, that is, when the law enforcement and security authorities mobilize their resources, including non-conventional measures, to safeguard the foundations of the state and society. This revision alone will result in a proportional Detention Act, as opposed to the situation today, but this alone will not suffice.

Legal tools that are more moderate than detention, such as those adopted by other states, should be established by law in order to achieve the underlying security objective of the current law. For example, instead of placing a person in administrative detention, a surveillance warrant, a summons order, or a house arrest order could be issued, according to the varying circumstances and requirements. Without underestimating the infringement of the basic rights of an individual as a result of the use of these instruments, these tools offer more proportional solutions than those currently employed, and would serve to attain the desired security objective without employing the most severe measure at the government's disposal against an individual—incarceration. I would further propose that administrative detention orders not be issued without prior proof that the alternative measures are inadequate to thwart the threat to security.

In order to lessen the likelihood of perverting justice by not allowing suspects to defend themselves against evidence that cannot be disclosed to them, I propose appointing a special defense counsel, who may examine the classified evidentiary material and protect suspects' interests to the fullest extent possible. This is not a panacea,

but it can, to some degree, enhance the ability of suspects to defend themselves against administrative detention orders.

It is further proposed that the duration of administrative detention be limited to two months (instead of the current six), and that extensions by means of consecutive orders beyond a period of one year (a limitation that does not exist at present) not be allowed under any circumstances. It may be advisable to reduce this period even further. Everyone would agree that it is impossible to justify a state of affairs in which an individual is incarcerated indefinitely on the basis of suspicion that he or she might seek to commit an offense. This situation must be changed, and the sooner the better.

Judicial oversight of administrative detentions should be radically overhauled, and tools should be created to ensure that no suspect is deprived of the right to due process. Such proceedings would ensure that suspects are informed of the grounds for requesting their detention, and are given an effective opportunity to defend themselves in the face of the suspicions against them. These measures, coupled with other minor changes, would help establish a fairer and more proportional legal arrangement that would preserve the ability of the executive branch to deal with the security of the state's inhabitants, without undermining the basic consensual values at the heart of Israeli society and the Israeli legal system.

It is incumbent upon us to assimilate the lessons learned throughout the world: the end does not justify the means, and not all actions can be justified in the name of security. The war against terror cannot be waged with the same weapons used by terrorism itself and, therefore, a Jewish and democratic state must limit its use of force; otherwise, its core values, which are the basis of its strength, will be undermined.

Chapter One

Definition

Freedom of movement is one of the most basic human freedoms. It is a prerequisite for the realization of all the other rights and freedoms. This theme runs as a common thread through all of Israel's Supreme Court rulings, and is stressed in the Court's deliberations on the rights of administrative detainees. In a case concerning Lebanese citizens held in administrative detention for many years, the Court stated:

> Liberty and dignity are at the foundation of our social order. They are the basis of all the other basic rights… Therefore, protecting and safeguarding the liberty and dignity of the individual is an overarching basic value in all of the statutes.[5]

Indeed, denial of freedom of movement hinders a person's ability to realize his or her hopes and aspirations. Deny a person his or her personal freedom and his or her freedom of expression loses much of its meaning; his or her right of association is infringed, together with his or her right to engage in creative activity, to interact with the other members of society, and to maintain his or her daily routine.[6] The denial of freedom gravely harms the individual, and it is in the

5 CrimFH 7048/97 Anonymous v. Minister of Defense, 54(1) P.D. 721, 740 (2000).

6 See HCJ 6055/95 Zemach v. Minister of Defense, 53(5) P.D. 241, 261 (1999).

best interests of the state and its citizens that the freedom of all citizens and residents not be infringed without proper cause and without due process.

The gravest restriction of freedom is detention or imprisonment. The state has at its disposal a number of tools for limiting individual freedom. Some of them constitute a more severe infringement of human dignity while others impose less of a burden upon the daily routine but, of all the tools, detention and imprisonment are the most extreme.[7] A detainee is prevented from performing the majority of his routine activities. He cannot work; he cannot live with his spouse and children. His dignity is gravely violated and the consequences of his detainment in prison or under house arrest may continue to affect him long after the termination of the actual detention.

Nevertheless, a person's right to liberty is not absolute. Through the framework of criminal law, society determines the other values that it holds worthy of protection—even to the extent of occasionally justifying an infringement of human liberty. This denial of liberty generally takes the form of imprisonment, which represents the culmination of criminal proceedings, subject to rigorous evidentiary and procedural requirements. Criminal law defines a maximum punishment for each offense. The punishment of a person convicted of a criminal offense cannot be more severe than that which is prescribed by the law. Furthermore, the determination that a defendant committed a crime must be established beyond all reasonable doubt. The proceedings are public and subject to public scrutiny. The defendant has the opportunity

7 Ruth Gavison and Miri Gur-Aryeh, *Administrative Detentions*, 3 Citizen's Rights, 1, 2-3 (1982) (Hebrew). See further in the comments of the United States Supreme Court in Foucha v. Louisiana, 504 U.S. 71, 80 (1992): "Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."

to challenge and respond to the incriminating evidence with his own version of the events. The verdict and the sentence must be reasoned and substantiated by facts that were presented to the defendant. Criminal imprisonment may also be preceded by criminal arrest—a preliminary stage to deciding the defendant's case, imposed when necessary for the proper conduct of the criminal proceedings.

These rigid conditions are unique to criminal law. They reflect the fundamental value that the state and society accord to a person's right to liberty. Jewish law has long been familiar with the well known maxim of the Jewish Sages that it is "better to acquit a thousand guilty persons than to convict a single innocent person."[8] Israeli law has continued along that path, as former Chief Justice Aharon Barak stated:

> No security consideration, however lofty, can command greater weight among the relative weights of a given criminal proceeding, than the weight of convicting an innocent person […] the acquittal of a defendant whose guilt cannot be proved because of the need to disclose certain evidence, the disclosure of which would compromise security, is preferable to the conviction of a defendant whose innocence cannot be proved due to the need to avoid disclosure of privileged material.[9]

Considering all of the above, administrative detention is the exception, an anomaly on the legal horizons of the democratic state.

Administrative detention is a form of detention imposed by the executive in order to prevent the realization of a danger to

8 As stated by MK Dov Shilansky in the Knesset debate on the draft bill of Emergency Powers Law. See further D.K. 39, 3961 (5738 [1978]).

9 MApp 838/84 Livni et al. v. State of Israel, 38(3) P.D. 729, 738 (1984).

state security or public safety. This definition should be elaborated upon, noting the features of administrative detention that distinguish it from the criminal proceeding and which generate the tension between the administrative detention regime and the basic principles of a democratic regime. Accordingly, we will now present three core principles that explain the nature of administrative detention and that distinguish it from criminal imprisonment.

A. The Purpose of Detention

As noted, criminal imprisonment is consequential: it is the result of an offense committed in the past. An offender is imprisoned for violating values that society protects through criminal law. Such imprisonment must have a retributive justification.[10] Imprisonment is also necessary to deter the offender from repeating the offense as well as for the general deterrence of all members of society contemplating future unlawful conduct.[11] Administrative detention, on the other

10 The earliest rationale for punishment in criminal law is the **principle of retribution.** The most fundamental notion of justice in human society is that it is right that a person who committed an offense be punished. Support for this notion is already found in biblical law: "If a man maims his fellow, as he has done so shall it be done to him: fracture for fracture, eye for eye, tooth for tooth. The injury he inflicted on another shall be inflicted on him. One who kills a beast shall make restitution for it; but one who kills a human being shall be put to death" (Leviticus 24:19-21). In this context it is important to remember that the central foundation of the concept of retribution is the element of degree. Retribution is attained when the degree of the act is equivalent to the degree of the punishment. This principle distinguishes between retribution and revenge. For a discussion of the retribution principle, see Immanuel Kant, The Metaphysical Elements of Justice: Part 1 of the Metaphysics of Morals (John Ladd trans., 1965).

11 For an analysis of the various aspects of deterrence in sentencing, see Johannes Andenaes, *The Morality of Deterrence*, 37 U. Chi. L. Rev. 649

hand, serves an exclusively preventative purpose (and hence it is occasionally referred to as preventative detention). It has no punitive purpose. The detainee's liberty is curtailed by an anticipatory decision that seeks to prevent the commission of acts that may jeopardize public safety or state security.[12] In other words, the authority balances the detainee's right to liberty against the threat that his liberty poses to society. Having factored in the probability of the actualization of the risk, the authority decides whether or not the balance justifies detention in order to prevent the danger. The rationale underlying this arrangement was presented by former Supreme Court Chief Justice Shimon Agranat in one of the Supreme Court's first decisions on administrative detention:

> It is well known that during times of conflict or any other grave crisis during which the state is endangered by hostile elements, there may be knowledge concerning certain persons at large whose participation in hostilities against the state has yet to be proved, but in respect of whom there is material indicating the risk posed

(1970). On the justifications for punishment in terms of economic analysis, see Cento Velijanovsky, Economic Principles of Law (2007), and also see Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. Pol. Econ. 169 (1968). Along with these goals, there are additional legal justifications for punishment, such as isolating the criminal from society in order to protect society, and also the reinforcement of the social value that was breached, as a means of buttressing public trust in its validity. For a discussion of these issues, see Yaakov Bazak, Criminal Sentencing 19-39 (1998) (Hebrew).

12 See §2 of the Detention Act, and see Uniting and Strengthening America Act by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot) Act of 2001 Pub. L. No. 107-56, 115 stat. 272, 2001 §412.

> by their continued freedom of movement, due to the likelihood of their future commission of acts that may harm state security. In order to prevent the realization of this threat—once more, exclusively in a state of emergency—the legislature recognized a need for supervision of such people and the restriction of their movement. [13]

The security need is clearly articulated in Chief Justice Agranat's comments, but does this suffice to justify the measure adopted? Is this the only way of confronting those threats? These questions are at the center of an ongoing world-wide legal controversy regarding the institution of administrative detention. Further on in this work I will endeavor to examine this question with the tools provided by constitutional law and international law.

Chief Justice Agranat's comments also disclose another element—one that he repeatedly emphasizes and which commands significant weight in tilting the scales in favor of adopting the measure of administrative detention—**the existence of a state of emergency**. His comments indicate that a state of emergency may justify exceptional measures that should not be employed on a routine basis. Further on we will address the question of how the state of emergency influences the balances struck in administrative and constitutional law, but it should already be stressed that this distinction is apposite. The dangers that confront society and the state during a state of emergency are far graver than those posed in everyday life; they may in fact even be existential. As such, the danger posed by the commission of serious offenses specifically during such times is doubly acute, given their potential to aggravate security-based and even existential dangers.

13 HCJ 95/49 Al-Kuri v. Chief of General Staff, 4(34) P.D. 46 (1950).

In such times, extraordinary measures are justified to confront extraordinary threats. Moreover, it should be noted that at such times, most of the state's resources are dedicated to confronting the state of emergency, which may make it impossible to maintain peacetime measures of supervision and control.

B. The Authorized Official

An administrative detention order is issued by the minister of defense or the chief of the general staff (hereinafter [jointly]: "the Authorized Official") after examining a recommendation of the competent security agency, and without hearing the suspect's response to the suspicions. In other words, the authority to issue a detention order vests in an administrative rather than a judicial body, and does not meet the basic standards of the exercise of judicial authority.[14] In criminal proceedings, both in the case of extending the initial detention order and that of imprisonment, liberty is denied as the result of the exercise of judicial power, after a judge has examined the evidence and the witness testimony and has heard arguments from the state's attorney and from the defendant. As opposed to this, in the case of administrative detention, the authorized official issues a detention order on the basis of ex parte evidence,[15] so that the order is issued before hearing the detainee's response to the accusations.[16]

14 See Amnon Rubinstein and Barak Medina, 1 The Constitutional Law of the State of Israel, 127 (2005) (Hebrew). See further, Baruch Bracha, Administrative Law 53-72 (1986) (Hebrew).

15 Shimon Shetreet, *A Contemporary Model of Emergency Detention Law: An Assessment of the Israeli Law*, 14 Israel Yearbook on Human Rights, 182, 182 (1984).

16 It bears mention that according to the provisions of Criminal Procedure (Enforcement Powers-Arrests) Law, 5756-1996, a policeman has the

The defense counsel of the administrative detainee can only argue his case after the issuing of the order, when the suspect is brought before a judge. Here too, he is subject to the constraints that are detailed below. Under Israeli law, judicial review is an integral part of the

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authority to perform an arrest without a judicial warrant, but according to §23 of the same law, this authority is only granted when the policemen has reasonable grounds for assuming that a person committed an offense in the category of misdemeanor or felony and that one of the following grounds for arrest is applicable:

(1) the person committed an offense subject to arrest in his presence or in the recent past and he consequently believes that he is liable—because of that fact—to endanger the safety of any person, public security or endanger the safety of any person, public safety or national security;
(2) he has reasonable grounds to suspect that the suspect will not appear for investigative procedures;
(3) he has reasonable grounds to suspect that the suspect's release or non-arrest will result in the disruption of trial proceedings, including the concealment of property, influencing witnesses or some other impairment of evidence;
(4) he has reasonable grounds to suspect that the suspect will endanger the safety of any person, public security or national defense;
(5) the person is suspected of the commission of one of the following:
    (a) an offense for which he is liable to be sentenced to death or to life imprisonment;
    (b) a security offense as stated in §35(b);
    (c) an offense under the Dangerous Drugs Ordinance (New Version) 5733-1973, other than an offense that relates to using a drug or possession of a drug for one's own use;
    (d) an offense committed with severe violence or cruelty, or with a fire arm or with another weapon;
    (e) a violent offense against a relative within its meaning in the Prevention of Violence in the Family Law 5751-1991.

Section 28 of the law further prescribes that after bringing the arrestee to the police station he must first be given the opportunity of stating his case to the officer in charge (a condition that does not exist when an administrative detention order is issued). In addition, §29 limits the duration of the arrest to no more than 24 hours.

detention proceeding,[17] which prevents administrative detention from being exclusively administrative, but nonetheless, the exercise of this authority is essentially executive rather than judicial.[18]

This fact requires the establishment of guidelines and substantive restrictions for the exercise of authority by the executive. Proceedings in which evidence is evaluated and that may culminate in a decision to deny a person's liberty bear many of the hallmarks of judicial proceedings.[19] However, the executive is not the branch with the "expertise" for carrying out this particular governmental function. It is, therefore, appropriate that the matter be subject to strict supervision, and that the judiciary be empowered to intervene in proceedings of this kind to a greater degree than currently afforded it within the framework of regular administrative proceedings, where its role is only secondary—the post factum examination of whether there was any element of illegality in the executive's decision. [20]

17 Section 4 of the Detention Act.

18 Yitzchak Hans Klinghoffer, *Detention Orders for Reasons of Security* 11 Mishpatim 286 (1981) (Hebrew).

19 Regarding the difficulty of defining the government function being exercised, see Bracha, *supra* note 14, at 53-75.

20 It could further be claimed that this authority cannot be squared with the principle of separation of powers in its original sense. See Charles de Montesquieu, The Spirit of the Laws (Ido Basok trans., 1998) (Hebrew). All the same, it bears mention that the doctrine of full separation is somewhat of an anachronism, because contemporary society accepts an overlap of powers among the three governmental branches. See Aharon Barak, The Judge in a Democratic Society 103-104 (2004) (Hebrew). Barak claims that Montesquieu himself was not talking about a model of absolute separation. See further in Rubinstein and Medina, *supra* note 14, at 128-129. Both of them cite the famous decision of Justice Brandeis, in which he determined that the principle of separation of powers was not intended to prevent friction between the powers, but rather demanded that there be friction between them in order to realize its purpose. See Myers v. United States, 272 U.S. 52, 293 (1926).

C. Duration of Imprisonment

When a defendant is convicted and sentenced to prison, the duration of his imprisonment is defined and known in advance.[21] Even the criminal detainee knows when his period of detention will end—at the very most at the end of the judicial proceedings. Administrative detention, on the other hand, which is essentially preventative, is neither limited nor defined, and its duration is contingent upon the authorized official's determination that the danger that gave rise to the detention order has lapsed. The states that gave their executives the power of performing administrative detention specifically established "artificial" time restrictions, after which holding the detainee in the absence of a criminal proceeding is forbidden.[22] According to its accepted interpretation in Israel, the Detention Act enables the indefinite extension of the detention, subject to the statutory conditions.

This completes our survey of the core features of administrative detention, but it does not fully present the many difficulties and profound contradictions between an arrangement of this nature and a regime that aspires to establish human rights as a meta-principle of its legal system. The State of Israel, founded on Jewish heritage and the values of democracy, aspired to this already on the day of its establishment.

21 An exception to this rule is mandatory life imprisonment for murder, which may mean imprisonment until death.

22 See the English arrangement, for example: Prevention of Terrorism (Temporary Provisions) Act 1974 c.56 (Eng.); and the arrangement used in Australia: Anti-Terrorism Act (No. 2) 2005 No. 144 (Australia). See discussion in Chapter Three below.

> THE STATE OF ISRAEL […] will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.[23]

In 1992 these principles were reinforced and constitutionally entrenched with the legislation of Basic Law: Human Dignity and Liberty, which provides:

> The purpose of this Basic Law is to protect human dignity and liberty, in order to establish in a Basic Law the values of the State of Israel as a Jewish and democratic state.[24]

The following chapter will present the administrative detention arrangement as practiced in Israel in the framework of the Detention Act. I will analyze the provisions of the law, elaborate upon the difficulties that they present, and examine a number of the Supreme Court's rulings on the matter.

23 Declaration of Independence, 5th of Iyar, 5708; May 14, 1948.
24 Section 1A of Basic Law: Human Dignity and Liberty.

Chapter Two

State of Emergency (Detention) Act – The Normative Framework

A. Historical Background of the Enactment

When the State of Israel was established in 1948, the Provisional Council of State adopted the Law and Administration Ordinance, which included the adoption of the Mandate Law that governed Palestine during the period of the British Mandate. [25] In that framework Israeli law inherited Regulations 108 and 111 of the Defense (Emergency) Regulations 1945. These regulations authorized the High Commissioner and Military Commander to issue a detention order against a person for purposes of preserving public safety, state security, or public order. [26]

The Detention Act, enacted in 1979, replaced the arrangements under Regulations 108 and 111. Hence, it was not enacted in a legislative vacuum; rather it sought to replace the previous arrangement by repealing certain provisions and establishing other arrangements that sought to realize or emphasize other values.

This explains the importance of this chapter. In the following pages I will consider the processes that led to the enactment of the

25 Law and Administration Ordinance, 5708-1948, §11.

26 See Shetreet, *supra* note 15, and Gross, *supra* note 2, at 291-292. See further: H. Rudolph, *The Judicial Review of Administrative Detention in Israel*, 14 Israel Yearbook on Human Rights 148, 148-150 (1984).

law from which we can infer its intended legislative purposes. These insights will be helpful when suggestions will be raised concerning the construction that should guide the law's implementation. The legal community recognizes a number of interpretative doctrines, most of which give particular or even decisive weight to the legislative intent at the time the norm was enacted. This is also true of the interpretative doctrines employed in Israeli law, chief among them the doctrine of purposive interpretation. The nature of this doctrine and its application in the interpretation of the Detention Act will be elaborated below.[27]

Regulations 108 and 111

As noted, Regulation 111 authorized the High Commissioner, as well as any military commander, to issue an administrative detention order.[28] Sub-regulation 1 limited the duration of the detention to one year, and granted the Commander unlimited discretion for detention up to that period.[29] At a later stage, this restriction too was cancelled. Under sub-regulation 4, a detention order could be appealed before an advisory council appointed by the High Commissioner, which would make a recommendation (not an order!) to the authorized official to annul or shorten the order. Similarly, the military commander was fully

27 See Aharon Barak, Purposive Interpretation in Law (2003) (Hebrew). For a succinct explanation of the principles of this interpretative doctrine, see Chapter Two below: Duration of Detention.

28 Regulation 1 defined a general commander as "the officer from time to time in command of His Majesty's military forces in Palestine." Regulation 6(1) authorized the general officer in command to appoint a military commander for any place or area. This military commander of a lower rank had the authority to issue a detention order.

29 Gross, *supra* note 2, at 291.

authorized to delegate his power to issue an order.[30] Regulation 108 prescribed the conditions for exercising this power. Authority to issue an order was given for cases in which the detention was necessary or urgently required for protecting public safety, state security or public order, as well as for the prevention of rebellion, uprising or riots. The pre-state Jewish community (*yishuv*) adamantly opposed these regulations, especially by reason of their disproportional nature and the grave violation of individual rights they entailed.[31] For example, in 1946, Adv. Yaakov Shimshon Shapira, who would later serve as Israel's first attorney general, wrote the following:

> The regime established by the promulgation of the Defense Regulations in Palestine is without parallel in any enlightened country. Even **Nazi Germany** did not have laws of this nature, and acts like those perpetrated in **Majdanek** contravened the written law. Only one type of regime engendered these circumstances—the status of an occupied country. Although they allay our fears with the statement that the Regulations are only intended against criminals and not against the citizenry at large, the Nazi governor in occupied **Oslo** similarly declared that no misfortune would befall the citizen who pursued only his own affairs [...] We must declare to the entire world: The Defense Regulations of the Government of Palestine destroy the foundations of law in Palestine.[32]

30 Shetreet, *supra* note 15, at 184.

31 See Michal Tzur, Defense (State of Emergency) Regulations 1945 (Policy Paper No. 16), 5 (1999) (Hebrew).

32 Yaakov Shimshon Shapira, *Comments Made at "Protest Meeting against the Emergency Regulations*," 58 Hapraklit (February 1946) (Hebrew).

The young state inherited the arrangement with great misgivings, since it had previously been wielded primarily against members of the Jewish undergrounds.[33] The regulations remained in force, but the draconian powers conferred to military commanders were restricted under internal guidelines. It was determined that the advisory committee established pursuant to the regulations would include a justice of the Supreme Court. The authority to issue the order was limited to the chief of staff, the three area command generals, and the commander of the navy. An order's duration was limited to one month, unless issued by the chief of staff.[34] Furthermore, the authority was subject to judicial review, although at that time the grounds for judicial review were primarily limited to technical flaws and ultra vires.[35] As long as the authorized official operated within its powers, in good faith, and without extraneous considerations, the rule was that there would be no intervention in the decision of the authority issuing the order. In adopting this approach, the Court was following the then contemporary English law.[36] In its ruling in *Al-Ayoubi v. Minister of Defense*, the High Court of Justice explicitly ruled that the grounds

33 *Id.* at 185-186. It further bears mention that the same regulations prescribed arrangements intended to prevent the illegal immigration of Jews to Israel. Regulations 102C through 107 were repealed upon the establishment of the State by Section 13 of the Law and Administration Ordinance. See: State of Emergency Powers (Detention) Draft Law, 5739-1979, D.B. 1360 (hereinafter: Detention Draft Law).

34 Baruch Bracha, *Restriction of Personal Freedom without Due Process of Law according to Defence (Emergency) Regulations 1945*, 8 Israel Yearbook on Human Rights 296, 306-307 (1978).

35 HCJ 7/48 El-Carboteli v. Minister of Defense, 2(5) P.D. (1949). In that case Justice Ulshan annulled the detention order because the advisory committee was established after the order was issued, in contravention of sub-regulation 1 (13-14). See further HCJ Al-Kuri, *supra* note 13, at 46.

36 Shetreet, *supra* note 15, at 185.

for judicial review of the Defense Regulations were extremely limited.[37]

The Draft Bill and the Knesset Debates

In the preface to the draft bill (which eventually became the 1979 Law), the legislature explained the extremely difficult situation created by Israel's adoption of Regulations 108 and 111, and highlighted the need, after the passage of thirty years since the establishment of the State, to draft a bill "that would respond to security needs while adhering to important principles of the institutions of government." The bill was proposed in the Knesset by the Minister of Justice, Shmuel Tamir, who, thirty-one years earlier, had been deported to Kenya by force of those very same regulations, along with another forty-nine underground fighters. He emphasized the law's aim of maintaining the democratic principles of the rule of law and guaranteeing human rights, while protecting security needs. He further stressed the unacceptability of a categorical formula that dictated preference for the interest of the general public over the rights of the individual, because such a formula ultimately harms the general public too.[38] In the Knesset debate, the majority of the Knesset members praised the minister of justice for the many changes introduced by the proposed legislation as opposed to the draconian regulations that the State of Israel had inherited and adhered to for three decades. A number of reservations were voiced regarding the question of the identity of the authorized official. MK Meir Pa'il suggested conferring this authority upon three ministers, and that the order would be contingent upon the confirming signature

37 HCJ 46/50 Al-Ayoubi v. Minister of Defense, 7 P.D. 222 (1950).
38 D.K. 39, 3955 (1978).

of at least two of them. On the other hand, MK Gideon Hausner was wary of granting administrative detention authority to politicians, and proposed that the authorized official be the chief of staff.[39] MK Shulamit Aloni argued that a judicial body—such as the attorney general—should be involved at the initial decision-making stage.[40]

Regarding the incorporating of the judiciary in the decision-making process, the minister of justice emphasized the importance of the change whereby the advisory committee, which could merely make a recommendation to the authorized official, would be replaced by the chief justice of the district court, who would have the power to decide whether or not to confirm the detention order. MK Moshe Amar noted that "he [the judge] must be convinced, and must place himself in the position of the person issuing the order; in other words, he is not only required to ascertain whether the minister of justice acted appropriately and in good faith, but he must be convinced that the order was imperative for reasons of state security, national defense, or public safety. This judicial supervisory system is of great importance."[41] The minister of justice did not contest this position in his response.

B. Provisions of the Emergency Powers (Detention) Act

In what follows I will review the principal provisions of the legal arrangement established by the Knesset in 1979, which continues to serve as the legal basis for administrative detention.

39 *Id*. at 3959-3960.
40 *Id*. at 3958.
41 *Id*. at 3960. For a discussion on the role of judicial review, see below.

The Constituted Authority

Section 2(a) of the act establishes that the minister of defense is the authorized official empowered to issue the order, and the section emphasizes that he must personally sign the order. Section 11 prohibits the delegation of this authority to any other body. Section 2(c) establishes an exception for urgent cases. It confers limited authority upon the IDF chief of staff to order an administrative detention, where he believes that, under the circumstances, the minister of defense would have decided to order detention. A detention order issued by the chief of staff is restricted to a maximum period of forty-eight hours.

As mentioned, in the debates that preceded the adoption of the draft bill a number of proposals and incidental comments were made regarding the identity of the authority who was to issue the administrative detention order. Finally it was decided to confer exclusive authority upon the minister of defense (apart from the aforementioned authority of the chief of staff for a detention order for forty-eight hours). The underlying reason was that the minister of defense is the member of government with the greatest expertise in anything pertaining to state security needs, and at the same time he is not exclusively beholden to the military, (in respect of the military there is the concern that it will a priori prefer security considerations over any other competing interest worthy of protection, chief among them the defendant's rights).[42]

Two additional provisions concern the identity of the authorized official, and both are indicative of the law's general orientation. The

42 See D.K. 39, 3966 (5738 [1978]): Minister Tamir's response to MK Gideon Hausner's proposal to leave the authority for detention with the chief of staff, who does not hold a political position.

first is section 2(a) ("an order bearing his signature"). The intention is that in exercising his authority, not only must the minister be the one to evaluate the necessity of the order and its compliance with legal and constitutional criteria, but stresses that the authority to issue the order is exclusively the minister's. This terminology is rare in Israeli legislation, and characterizes legislation dealing with legal powers having the potential for a grave violation of human rights.[43] This provision is supplemented by section 11, which determines that the minister's authority cannot be delegated. The act is plainly intended to ensure that the authority be exercised exclusively by the minister, in the expectation that the minister's exercise of discretion will be balanced and independent.

Is this what actually occurs in practice? In a judgment in the appeal of two detainees (at the end of the eighties) the question of the independence of the defense minister's discretion was raised.[44] The two detainees were Israeli Arab village leaders, arrested because of the fear that they would spearhead violent acts on Land Day in 1988. Their attorneys claimed that the minister of defense had not discharged his duty under Article 2 insofar as he had relied on the discretion of others, had received fragmented, selective materials, and had not personally read all of the testimonies submitted by the sources of the information. Justice Shlomo Levine rejected the claim, and ruled that no defect attaches to the defense minister's receipt of edited material from his advisors, which already included their own, crystallized opinion.

Justice Shlomo Levine's reasoning evidently relies on the endorsement of the rules of administrative law pertaining to the

43 For example, see Military Justice Law, 5716-1955, and the Regulations for Treating the Mentally Ill, 5652-1992.

44 ADA 1/88 Rajou Agbaria v. State of Israel, 42(1) P.D. 840 (1988).

delegation of discretion from the holder of authority. These are the rules as determined by Justice Menachem Elon in the *Goldberg* case as follows:

> It is a fundamental principal that in exercising authority that involves an element of discretion, the person granted the authority must exercise it personally and is not permitted to delegate it to anyone else unless expressly authorized to do so.[45]

All the same, the Court was less strict in regard to this duty of the authorized official when it involved receiving assistance from others for purposes of exercising authority:

> Nevertheless, this rule is not rigid, because a distinction is made between performance of specific actions by way of others and the conferral of the entire task that must be performed by the person statutorily authorized for that purpose [...]
> If the conferral is essentially technical, and consists primarily of the clarifying of facts even with a restricted exercise of discretion by the transferee, the tendency is to permit the deviation (from the rule).[46]

Some thought should be given to whether the rules of public law should be applied in the current context. Perhaps strict independent discretion should be insisted upon rather than almost "blind" reliance

45 HCJ 702/79 Goldberg v. Sherman, Ramat HaSharon Council Head, 34(4) P.D. 85 (1980).

46 HCJ 136/84 Israeli Consumer Council v. Chairman of Antitrust Authority, 39(3) P.D. 265 (1985).

on the opinions of advisors and the security services when a person's freedom is at stake, when the authority is exceptional and grave, and when the law explicitly and unequivocally stipulates that the authority is exclusively that of the minister.

Indeed, Justice Levine himself apparently endorsed a different policy in another case that concerned a person suspected of membership in the Fatah Organization and of planning disturbances and incitement.[47] Finding that the detention order was tainted by technical defects (inter alia it was issued for a period of six months and two days, contrary to the statutory restrictions), Justice Levine criticized the proceedings (at the end of which the minister had signed the detention order), and ruled that there should be fixed procedures evidencing the minister's exercise of independent discretion. Following this recommendation, the Ministry of Defense personnel prepared a form to be submitted in the name of an assistant to the minister of defense or his military secretary, and which itemized the proceedings that had preceded the defense minister's signature. The document was called "Confirmation of Presentation of NSM [Negative Security Material] to the Minister of Defense" and included the General Security Service (GSS) recommendation to the minister, the minister's examination of the security material and a declaration on his part that he was convinced that the person whose detention was requested presented a danger to national security or public safety and that administrative detention was the only means of preventing the realization of the danger.

In certain cases the affiant is summoned to testify, and is questioned regarding the amount of time devoted by the minister to consideration of the recommendation presented to him. An attempt to invalidate an

47 ADA 7/88 Anonymous v. Minister of Defense, 42(3) P.D. 133, 137 (1988).

order based upon a failure to dedicate sufficient time for the exercise of discretion failed in another judgment given also in 1988 by Justice Dov Levin.[48] He ruled that the deciding factor was not the duration of the ministerial consideration, but rather the nature of the material with which he was presented. Justice Levin expressed the same view in another judgment issued two years later:

> Half an hour would suffice to examine the full contents of the material, given its rather limited scope. On the other hand, its contents are clear and detailed, and its various cross-checked sources indicate that the appellant's activities may substantially endanger national security and public safety.[49]

In this judgment an additional worrying phenomenon was exposed. It transpired that the protocol of the meeting was drafted in advance and was presented to the minister for his signature. In other words, a document purporting to confirm that a deliberation had taken place and that the order had been issued following deliberation, was drafted prior to the decision being taken. The judge did not set the order aside, but he did criticize the manner in which the proceedings were carried out. The judge opined that the defect was primarily one of appropriateness but did not attest to a substantive defect in the proceedings. One can certainly wonder at the judge's approach, but it should be noted that the judgment indicates that the judge himself was indeed presented with unequivocal evidence concerning the danger posed by the detainee.

48 ADA 16/88 Baransi v. Minister of Defense (not reported). See also Yehuda Weiss, *Administrative Detention, Trends, Procedure and Evidence*, 10 Idf L. Rev. 1 (1998) (Hebrew).

49 ADA 6/90 Anonymous v. Minister of Defense, TAK-EL 90(3) 790 (1990).

Either way, in our view stricter rules should be adopted for reviewing the independence of the defense minister's discretion. Naturally, one cannot expect the minister to form a personal impression of each and every intelligence agent who gathered testimony or from every interrogator who processed the material, but it is undesirable that the minister should receive a prepared order that lacks only his signature. There is no defect in consulting with experts, but exclusive reliance on the opinion of security personnel circumvents the legislative intention, which was to revoke the military commander's authority for issuing the order and to transfer that authority to the minister of defense.[50] Conceivably the legal advisor of the Ministry of Defense should also be involved in the consultation, so as to counterbalance the influence of security services. In view of the small number of detention proceedings actually conducted in the office, the additional burden should not be excessive, and the legal advisor's participation in the proceedings can be of crucial importance.

Grounds for Detention

The second subject covered by section 2 is the grounds upon which the minister may issue an administrative detention order. Section 2(a) states that an order for a person's detention may be issued if there is reasonable basis for assuming that considerations of national security or public safety necessitate his detention. The interpretation of this section by the courts presents a number of fundamental rules and principles governing the issue of grounds for detention.

50 See Minister Tamir's response to the proposal of MK Hausner, *supra* note 42.

a. Preventative Purpose: The Detention Order Anticipates the Future

First, the purpose of the detention must be prevention:

> The adoption of a measure under the act is not an act of punishment but rather a preventative measure in the face of a concrete danger that is foreseen as the outcome of the suspect's behavior.[51]

The criminal law is intended to punish a person for offenses committed, and in this context the Detention Act is not an alternative to be resorted to when the requirements of the penal law are not met. The law's goal is to prevent the realization of future danger posed by the detainee, and not to punish him for his past acts.[52] Exercising the authority for punitive purposes constitutes an abuse of authority and is illegal. In the words of Justice Isaac Kahan:

> Under the circumstances of this case as detailed above, the necessary conclusion must be that the minister of defense did not use his authority under section 2(a) of the act for the purpose for which the legislature granted the authority, but rather for another purpose. Use of authority for a purpose other than the one for which it was given disqualifies the authority's act. This is the case even if the authority could conceivably have based its act

51 ADA 4/94 Ben-Horin v. State of Israel, 48(5) P.D. 329, 336 (1994); and also ADA 8788/03 Federman v. Minister of Defense, 58(1) P.D. 176 (2003).

52 Guidelines of Attorney General: Guideline 21.927, §19. See also Eyal Nun, *Administrative Detention in Israel* 3 Pelilim 169, 188-189 (1993) (Hebrew).

> on other legitimate considerations within the framework of the authority conferred by the law.[53]

The *Kawasme* judgment was given in 1982. The appellant was detained by the Israel Defense Forces (IDF) and indicted before a court martial for forbidden association, and an attempt to lay an explosive. Two of the three judges convicted him but the Defense Regulations required that conviction before a court martial be unanimous. His defense counsel filed an application for his release and the state appealed. In order to prevent his release prior to the hearing of the appeal the minister of defense issued an administrative detention order. The Court held that the authority conferred by the act was preventative, meaning that a person could not be detained pending the results of an appeal. This orientation was stressed in many of the judgments given thereafter.[54]

Nevertheless, this does not mean that the detainee's actions in the past are of no relevance in assessing the legality of the detention order. A future danger posed by acts that he may perform can be inferred from a range of sources. The high road in the confirmation of a detention order naturally consists of the attainment of unequivocal evidence from a reliable source indicating an intention to violate state security or public safety. All the same, a position that has been cited in the case law and legal literature, and actually applied in the courts, is that a person's past conduct and acts and even his utterances may be indicative of a similar intention. Based on such a conclusion it is possible to issue a detention order, and the fact of its being based on past actions does not negate its legality. In the *Kawasme* case for example, the danger posed by the appellant could be deduced from

53 ADA 1/82 Kawasme v. Minister of Defense, 36(1) P.D. 666, 669 (1982).

54 ADA Ben-Horin, *supra* note 51, at 336; and see ADA Federman, *supra* note 51; ADA 8607/04 Fahima v. Minister of Defense, 59(3) P.D. 258 (2004).

his past acts: He had traveled to Damascus, joined the *Al-Saika* organization and specialized in the preparing and laying of explosives in public places. One could question this premise, claiming that in this case the detention order was canceled, but closer examination shows that it was the extraneous consideration that it rested on and not this particular fact that led to the disqualification. The Supreme Court clarified its position in the subsequent cases, ruling that a future danger can be inferred from previous acts. This was the ruling in *Anonymous*,[55] in *Federman*,[56] and in HCJ *Anonymous*.[57]

b. "State Security," "Public Safety"

The act enables a detention order to be given in order to prevent actions that are liable to endanger state security or public safety. This extreme measure is not a legitimate means for preventing any other kind of risk that may materialize and which the authorized official seeks to prevent. As mentioned, in addition to these grounds Regulation 108 also included the maintenance of public order, suppression of mutiny, rebellion, or riot.[58] In the *Agbaria* judgment, the Court ruled that the grounds enumerated in the act were sufficiently broad to include the wording of Regulation 108 in its entirety.[59]

55 ADA Anonymous, *supra* note 47.

56 ADA Federman, *supra* note 51, at 184.

57 HCJ 9441/07 Anonymous v. Commander of the IDF in Judea and Samaria, Note F of judgment of Justice Rubinstein (not yet reported, 11.28.2007).

58 In the Knesset debates that preceded the vote on the law, a number of reservations were expressed regarding the vagueness of the term "public safety." There were even those who requested its deletion from the law. See D.K. 85, 1735 (5739 [1979]); and see Nun, *supra* note 52, at 189.

59 ADA Agbaria, *supra* note 44, at 840, where Justice Dov Levin wrote the following:

> The appellants further claimed that the words "national security" and "public safety" in section 2 of the law should be given a narrow

The cloak of secrecy over most administrative detention hearings severely hampers any attempt to wrest a clear and well delineated definition of the limits of the grounds of detention, for even when the Court determines that a particular person's acts are liable to endanger state security it does not present the full factual foundation underlying that determination.

These terms were the subjects of extensive analysis in the further hearing in the matter of the Lebanese detainees ("CrimFH [Criminal Further Hearing] Anonymous).[60] The petitioners were citizens of Lebanon who were brought to Israel during the 1980s and tried for their membership in a hostile organizations and their involvement in terrorist attacks against the IDF and the South Lebanon Defense Forces. Over the years it transpired that most of them were suspected of minor offenses such as membership in an unlawful organization. Upon the termination of their imprisonment they were not released but remained in detention, initially in reliance upon deportation orders

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interpretation, and prove it from Regulation 108 of the Defense (Emergency) Regulations 1945, which was replaced by section 2, and in which the goals were worded in a far broader manner, its goals having been "to secure public peace, the defense of Israel, the existence of public order or the repression of uprising, rebellion or riot." They argued that this indicates that the goals of preserving public order or repression of uprising, rebellion or incitement were not contemplated in the language of section 2 of the law. This argument has no substance and section 2 of the law is not to be interpreted against the background of the previous legislation. Indeed, the words "national security" and "public safety" are sufficiently broad to include all of the components of Regulation 108 of the Regulations.

60 CrimFH Anonymous, *supra* note 5. The seeds of this further hearing were sown in the appeal that preceded the further hearing, where the Court stated that "the term 'national security' admits of many interpretations and meanings." See ADA 10/94 Anonymous v. Minister of Defense, 53(1) P.D. 97, 106 (1997).

that were issued against them and later by force of a detention order issued under the Detention Act.[61] In the further hearing, in which the Supreme Court reversed its earlier decision and ordered the release of the petitioners, there were a number of references to the interpretation of terms standing at the basis of the law. The relevant question for our purpose is whether the minister of defense's authority to detain a person on the grounds of state security and public safety also allows him to issue a detention order intended to hold the same detainees as "bargaining chips" for the purpose of negotiating the return of an Israeli prisoner or for the purpose of obtaining information about him, even if the detainees pose no direct danger to state security. The case thus turned on an interpretative question of whether the detention of bargaining chips constitutes legal grounds for detention under the Detention Act; that is, can the detention of bargaining chips be deemed as intended to prevent a danger to state security within the meaning of the law? Below, I will compare the position of Chief Justice Barak (as part of the majority opinion) to that of Justice Mishael Cheshin (as part of the minority position).

Chief Justice Barak's position was based on the doctrine of purposive interpretation. At the first stage, Chief Justice Barak concluded that textually, the term "state security" also encompasses the range of situations in which the danger does not stem directly from the detainee. In other words, the wording of the act allows for an interpretation whereby a person can be detained not only because his

61 For an extensive discussion of the Supreme Court's rulings, initially in the appeal and then in the further hearing, and a critique of the ruling, see Gross, *supra* note 2. For a counter argument and a survey of the detainees' background, see Eitan Barak, *With the Protection of Darkness: Ten Years of Playing with Human Beings as Bargaining Chips and the Supreme Court,* 8 Pelilim 77 (1999) (Hebrew).

roaming free gives rise to a danger of which he is the source. A person can also be detained because his detention is necessitated by other reasons related to state security, for example, in order to bring about the return of prisoners and missing persons—this being a subject subsumed by the concept of "state security." At the second stage Chief Justice Barak examined the goals of the law, and in accordance with the doctrine of purposive interpretation he addressed both the subjective and objective purpose of the law.[62] On the subjective level he held that one cannot discern any unequivocal legislative intention as to the interpretation of danger to state security. His conclusion was that the framers of the act had not considered the interpretative issue. On the objective level, however, Chief Justice Barak identified a dual purpose: The Detention Act is intended for safeguarding state security and safeguarding human dignity and liberty. The need to strike a balance between them indicates that it is permitted to detain a person who poses a danger to state security, but according to Chief Justice Barak, this does not legitimate the detention of a person for the purpose of serving as a bargaining chip:

> Indeed, the transition from the administrative detention of a person who poses a danger to state security to the administrative detention of a person who poses no danger to state security is not a "quantitative" transition but a "qualitative" one. The state, via the executive branch, detains a person who committed no crime, and who poses no danger, and whose only "sin" is that he is a "bargaining chip." The harm to liberty and dignity is so substantive and deep as to be intolerable in a state

62 For an explanation of purposive interpretation of the law, see Barak, *supra* note 20, at 190-199.

> that values liberty and dignity […] a person can be detained only for his own wrongdoing and can be held in administrative detention only for his own sin. One can place in administrative detention only a person who himself, by his own acts, poses a danger to state security. This was the situation prior to the legislation of Basic Law: Human Dignity and Liberty. It is certainly the case after the enactment of this Basic Law that raised human dignity and liberty to a constitutional, supra-legal level […] This interpretation leads to the conclusion that the (objective) purpose of the Detention Act cannot be construed to enable the administrative detention of a person who does not himself pose a risk.[63]

This analysis was supplemented by the interpretative presumption that local law accords with international law, and that presumption produces the same conclusion. I will return to this matter further on.

Justice Cheshin, as opposed to Chief Justice Barak, interprets the term "state security" in the context of the act as including the authority to continue holding the Lebanese detainees. While Cheshin, too, subscribes to the principle that "every man shall be put to death for his own sin," and he himself led the strict adherence to this principle in his ruling in *Ganimat*,[64] in the case at hand Cheshin determined

63 Anonymous*, supra* note 5, at 741-742.

64 HCJ 2006/97 Ganimat v. OC Central Command Maj-Gen. Uzi Dayan*,* 51(2) P.D. 651, 654-655 (1997). Justice Cheshin wrote as follows:

> In all these judgments I rooted myself in a basic legal principle, and from it I will not be swayed. This is a basic principle which our people have always recognized and reiterated: every man must pay for his own crimes. In the words of the Prophets: "The soul that sins, it shall die. The son shall not bear the iniquity of the father, neither

that the Hezbollah combatants who had knowingly and intentionally tied their fates to the fate of the battle with Israel cannot be viewed as belonging to the same category as the family members of a terrorist, (which was the basis of the analogy to *Ganimat*). According to Cheshin, the value of redeeming prisoners is part of the concept of "state security" and, as such, as long as the battle between Hezbollah and the State of Israel continues, it is permitted to hold the petitioners, in the same way as it is permitted to detain prisoners of war.

In the case at hand, it would seem that the argument focused on the treatment of the petitioners—as bargaining chips on the one hand, or as hostile combatants who can be held as prisoners for as long as the armed conflict persists, on the other hand. The judgment does not provide clear contours for defining the terms "state security" and "public safety" and the ruling that emerges from it is that holding bargaining chips cannot constitute grounds for detention. However, apart from the actual ruling, an analysis of the majority view may be instructive with respect to the interpretative doctrine used to interpret the law, which was presumably influenced by the enactment of Basic Law: Human Dignity and Liberty.

Is the trend reflected in this judgment consistent with Justice Dov Levin's ruling in *Agbaria* that there is no difference between the grounds stipulated in Regulation 108 and the grounds prescribed by the law? This is highly doubtful. The objective purpose of the

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shall the father bear the iniquity of the son; the righteousness of the righteous shall be upon him, and the wickedness of the wicked shall be upon him" (Ezekiel 18:20).

One should punish only cautiously, and one should strike the sinner himself alone. This is the Jewish way as prescribed in the Law of Moses: "The fathers shall not be put to death for the children, nor the children be put to death for the fathers; but every man shall be put to death for his own sin" (2 Kings 14:6).

act differs from that of Regulations 108 and 111, especially after the enactment of the Basic Laws. The regulations sought to ensure public order and the stability of the regime under foreign mandatory rule, whereas the Detention Act attempts to balance the security interests of democracy and individual freedom in a state governed by the rule of law. This difference may indicate that while any threat to state security (according to the phrasing of the law) endangers public safety (according to the phrasing of the regulations), not every threat to public safety harms state security. To be precise, any harm to state security has the potential for disturbing public order, but only a particularly grave disruption of public order may actually endanger state security. An illegal demonstration in the city center in the middle of the day will certainly disturb public order, but as a rule will not constitute a threat to state security. Presumably, had the legislature wished to maintain the same scope of mandatory authority it would have employed the same language. Having failed to do so, precisely the opposite intention must be inferred.

According to this interpretation, the discretion conferred upon the minister of defense in the normative framework of the Detention Act enables him to order a detention only when a danger is posed to public safety or state security in the narrow sense. It cannot be given a broad construction that would conform to the wording of the Defense Regulations.

This conclusion, however, provides no answer regarding the specific circumstances that may justify administrative detention. It is an interim conclusion that informs us that the grounds of "state security" and "public safety" are no longer identical to the previous arrangements as promulgated under the Mandatory Defense (Emergency) Regulations 108 and 111, and, as explained above, they apply in a narrower sense. What then is the nature of these definitions?

What dangers do they seek to prevent? What is the relationship between them? The language of the act provides no clear answers to these questions.

The terms chosen by the legislature are "open terms," in other words, they have no fixed meaning. Their content and meaning are determined by and change with the times and circumstances.[65] Their hallmark is that the wording does not limit the reader (or the listener) to an unequivocal content, determined in accordance with the interpreter's discretion (the judge or the executive authority). Rather, the discretion is the product of the values and principles accepted in a society at a particular point in time.[66] Over the years, and as more cases arise that require the interpretation of the open terms, they acquire concrete, clear substance that alleviates the ambiguity of the norm. Open terms are characterized by their flexibility, meaning that their contents may vary in accordance with the changing world views and values of a given society.

The use of open terms in law is both desirable and inevitable. Nevertheless, the process outlined here, in which practical reality induces the interpreter to confer clear and concrete content upon open terms, is difficult to apply in the current format of administrative detention. When the vast majority of detention orders are adjudicated under a veil of privilege, the result is that the language of the norm remains ambiguous. Indeed, despite the passage of almost thirty years since its enactment, there is no clear case-law definition of the terms "state security" and "public safety" or a determination of the relation between them. These questions ought to be answered, even if only to

65 See, Lon L. Fuller, The Morality of Law 63 (Rev. ed. 1969).

66 See Aharon Barak, Interpretation in Law: Statutory Interpretation 136-138 (1999) (Hebrew).

establish a defined range of circumstances on the basis of which the court can examine whether a detention order issued by force of the Detention Act actually fulfils its purpose.

What then constitutes a danger to state security? It should be determined that an action that may harm the physical existence of the state or gravely endanger it, should constitute grounds that justify administrative detention. Examples of this kind of action are provided by the offenses enumerated in Chapter 7 of the Penal Law, which treats the matter of offenses against state security. The wording of these offenses attests to a central characteristic of the expression "danger to state security" as reflected in Knesset legislation, namely security in terms of external threats. Acts that may assist an external enemy, i.e., an enemy state or terrorist organization,[67] in carrying out actions against the State of Israel, are acts that endanger state security. These would include attempts to aid the enemy in its war against Israel, passing on information, and revealing state secrets.

In view of the above, the term "public safety" would be interpreted in a complementary manner, namely as acts intended to harm public safety from within, such as acts intended to assist terrorist organizations operating inside the state, and that attempt to kill its citizens and sow terror and fear. A person seeking to harm public safety is one who joins

67 Section 91 of the Penal Law gives the following definition of enemy and terrorist organization:

> "Enemy" – any belligerent or anyone who maintains a state of war against Israel, or declares himself to be one of these, whether or not war has been declared and whether or not armed hostilities are in progress, and a terrorist organization;
> "Terrorist organization" – an organization, the aims or actions of which are intended to eliminate the state or to impair its national security or the safety of its residents or of Jews in other states.

and assists in subversive activities intended to kill people and to prevent routine daily life in population centers. This construction is consistent with conferring detention authority upon the minister of defense, and not upon the minister of internal security, and distinguishes it from the term "impairing public order," which the legislature sought to replace.

The Detention Act should not be used for purposes other than those that it intended to promote. In the course of implementing the Gaza disengagement plan (2005), certain political circles called for the administrative detention of those who aggressively opposed the disengagement, due to a concern that they might disrupt public order to a degree that could conceivably thwart the entire operation. Furthermore, in the wake of certain criminal acts that received extensive press coverage, some voices advocated the employment of administrative detention against the heads of crime families and drug dealers.[68] Resorting to administrative detention against such elements is inconsistent with the purpose of the law. It should be recalled that disturbance of public order was grounds for detention under the Defense Regulations, but was omitted from the Detention Act. It seems inconceivable that a drug dealer could be considered a danger to state or public security, and the same applies to various categories of criminal offenders. Furthermore, the authority for detention vests exclusively in the minister of defense, whereas the treatment of the aforementioned elements is in the purview of the minister for internal security, using the police. In that sense, the identity of the authorized official also indicates the kinds of situations that are suited to administrative detention.

68 See minutes of meeting 147 of the Constitution, Law and Justice Committee of the 14th Knesset, at 1-12 (1.26.2004).

c. "Reasonable Basis": The Probability Test for the Exercise of Discretion

Section 2(a) makes the issuance of a detention order conditional upon the minister of defense having a reasonable basis for assuming that the detention is imperative. The language of the section leads to the conclusion that the minister's discretion involves an element of evaluation or conjecture regarding a hypothetical future scenario, or in other words, the discretion involves a probability test.

The difficulty of resorting to probability tests for purposes of an essentially judicial decision is not unique to the specific issue of administrative detention or even to the broader category of constitutional law. Even so, when a probability test that anticipates the future may result in a serious violation of individual rights, this difficulty is aggravated. For example, when military censorship exercises its authority for the prior restraint of the publication of an article in the newspaper, the authority is exercised on the basis of a probability test that purports to evaluate the chances of the materialization of the danger that the censor seeks to prevent (danger to state security).[69] There are other examples too of cases in which the probability test was used, among them a case that discussed—albeit in a criminal context—the publication in a newspaper of a matter that was then pending in court,[70] and a case in which the petition of a candidates' list was granted after the Elections Committee had decided to prevent its participation in the elections.[71]

When a probability test is applied, its result largely depends upon the balancing formula chosen for its application. Is a detention order

69 HCJ 680/88 Shnitzer v. Chief Censor, 42(4) P.D. 617 (1989).

70 CrimA 126/82 Dissenchik v. The Attorney-General, 17 P.D. 169 (1963).

71 EA 11280/02 Central Elections Committee for the 16th Knesset v. Tibi, 57(4) P.D. 1 (2003).

legal if and only if the authorized official is convinced that failure to detain the suspect will almost certainly lead to realization of the danger to state security or public safety? Or is it sufficient that the authority surmises that there is a reasonable possibility of the danger materializing? Another question is whether the test should also include the time factor (in other words, the requirement that the danger be immediate).[72]

In Israeli law, particularly where prior restraint that violates basic rights is involved, the trend is to adopt the formula of near certainty.[73] This is similarly the case regarding administrative detention. In the earlier judgments the judges did not elaborate upon the causal connection between the danger and the possibility of its materialization[74] but in the *Federman* decision Deputy Chief Justice Barak ruled as follows:

> The administrative detention of the petitioners is based on their actions in the past, which against the background of their conduct in general creates an almost certain danger of substantial harm to security in the region. But it is stressed again: Administrative detention is not a sedative. It cannot be given to assuage the public. Administrative detention anticipates a substantial danger

72 This approach was adopted in the United States. See New York Times Co. v. United States, 403 U.S. 713 (1971). However, it was not accepted in Israeli case law. See HCJ 73/53 Kol-Ha'am v. Minister of the Interior, 7 P.D. 871 (1953).

73 Barak, *supra* note 61, at 271-274.

74 Nun, *supra* note 52, at 187; ADA 1/80 Rabbi Meir Kahane v. Minister of Defense, 35(2) P.D. 253, 259 (1980); ADA Agbaria, *supra* note 44, at 844.

> which may affect the security of the area with a high degree of probability.[75]

This decision was given in the context of an administrative detention issued in the Judea and Samaria region, but two years later, in her judgment in the *Ginsburg* case, which concerned a detention order issued in Israel, Justice Dalia Dorner ruled as follows:

> The issue of an administrative detention order is dependent upon the "near certainty" … that the failure to detain will cause real harm to state security and public safety.[76]

Since then, this formula has been adopted in a number of similar cases;[77] having become the accepted formula in Israel, notwithstanding that in the Lebanese detainees case the Court refrained from ruling that it was the only binding formula.[78] A balancing formula requiring near certainty of the materialization of the danger that it seeks to prevent recognizes the importance of a person's right to freedom, and is appropriate to the problematic nature of administrative detention. Nevertheless, the implementation of this formula, as well as the probability test in its entirety, creates two principal difficulties.

75 HCJ 3280/94 Federman v. Ilan Biran, IDF Commander of Judea, PADOR (not reported) 94(2) 384, in note 5 of the judgment of Deputy Chief Justice Barak (1994).

76 ADA 4/96 Ginzburg v. Minister of Defense and Prime Minister, 50(3) P.D. 221, 223 (1996).

77 See e.g., HCJ Anonymous, *supra* note 57, in ¶f. of the decision of Justice Rubinstein; ADA Federman, *supra* note 51, at 188; ADA Fahima, *supra* note 54, at 260.

78 Amnon Rubinstein and Barak Medina, 2 The Constitutional Law of the State of Israel 959 (2005) (Hebrew).

The first difficulty is one of implementation. The actual application of this formula encounters practical difficulties—as attested to by the large number of administrative orders in the Territories, a number which is incommensurate with a test that by definition is intended to limit the utilization of such a grave tool to only the most extreme cases.

The additional difficulty is a substantive one. A denial of freedom based on a forecast of future conduct is largely speculative, and the human ability to foresee future human conduct is limited. Even where there are solid grounds for the evaluation, a denial of freedom also denies that person a right that is afforded him under criminal law—the right to change one's mind. Criminal law presumes that a person who has yet to progress beyond the preparatory stage, has yet to reach the point of no return, and ultimately may not commit the offense. An order based on future conjecture denies the suspect the possibility of changing his mind before the detention is enacted. It seems that this problem is inherent to administrative detention, and cannot be separated from the very essence of this kind of detention. Nevertheless, it should serve as a warning signal that demands that the probability test be construed cautiously and narrowly.

Another interpretative question touching on the probability test is whether the requirement of a "reasonable basis" is objective or subjective. In other words, is it sufficient that the authorized official be subjectively convinced that there is a reasonable basis for his conclusion regarding the suspect's dangerousness, or must the conclusion be judged in terms of the objective standard of a "reasonable person"? The language of the act does not sufficiently explain the nature of the "reasonable foundation" in this context. Regulation 111, on the other hand, conditioned the legality of the order on the good faith of the authorized official (the military commander)—the commander must believe that there is a reasonable basis for assuming that the suspect is dangerous. Naturally, this approach confers tremendous power

upon the authorized official and impairs efficient judicial review. The question is therefore whether the Detention Act established a different arrangement for this subject too. Does it treat the reasonability test as an objective question? Would a reasonable authority have reached a similar conclusion?

This question was considered in the *Kahane*[79] case when the petitioner's defense counsel requested to question the minister of defense in Court in order to prove his lack of good faith in issuing the detention order. The Court rejected the request, ruling that the Detention Act, as opposed to the Defense Regulations, was based on the objective reasonable-person test. The discretion of the military commander under Regulation 111 of the Defense Regulations was based on a subjective test, and on this matter the Law went one step further. Subjective discretion in this context may be arbitrary and is not commensurate with the exercise of power that can mortally harm human rights.

In his article "Administrative Detention in Israel" (1992),[80] Eyal Nun argued that in view of "the loss of legal common sense in times of crisis" the presumption is that future judgments will tend more toward the direction of the subjective test. Nun does not substantiate his prediction and looking back with hindsight it was not borne out by reality.[81] In my comments below I will dwell upon the special role of judicial review in the Detention Act, but I will preface my comments by noting that the prevailing conception whereby the court reviews the order's legality from the perspective of a "complex organ" and not just from the perspective of reviewing the defense minister's exercise of authority, prevents a return to the subjective test dictated by Regulation 111.

79 ADA 1/80 Kahane*, supra* note 74, at 260-261.
80 Nun, *supra* note 52.
81 *Id.* at 185.

All the same, it bears mention that the objective nature of the test does not preclude judicial review of the subjective behavior of the minister of defense when reviewing his exercise of discretion. For example, were it proved that the minister of defense had considered objectives that were alien to the defined objectives of the law (extraneous consideration) or that he acted in bad faith, it would be possible to rule that the detention order was illegal, even without an objective assessment of the detention order.

d. Proportionality

The choice of administrative detention as a means of preventing the realization of a threat must satisfy the tests of proportionality. This requirement does not appear in the language of the Detention Act, but is an accepted criterion for examining the legality of any administrative act, and a fortiori an act that violates a person's liberty. The proportionality of a decision means that there is an appropriate relationship between the objective of the decision and the means employed for attaining it.[82] It has served as an important tool for reviewing detentions under the Detention Act, especially in regard to petitions filed since the second decade of the law's operation. This point was clearly articulated by Justice Ayala Procaccia in the judgment in the matter of *Tali Fahima*:

> Administrative detention requires that a balance must be struck between the values of individual liberty and dignity, and the need to defend state and public security […] In the framework of this balance caution must always be taken to ensure the proportionate use of

82 HCJ 3477/95 Ben Atiah v. Minister of Education, 49(5) P.D. 1, 11-12 (1996).

> administrative detention. Proportionality is examined in accordance with the objective that the detention is intended to achieve.[83]

Proportionality comprises three subtests, which originated in Canadian Law and were adopted in Israeli case law: (a) The person making the decision must ascertain that detention is the suitable means for realizing the preventative purpose of the (**suitability test**); (b) From among the range of measures available for achieving that purpose, he must choose the measure that is the least harmful (**least harmful measure test**); (c) He must consider the benefit gained from preventing the danger relative to the gravity of the harm caused to the individual (**relativity test**).[84]

The proportionality of administrative detentions must be examined on two distinct levels. On the constitutional level, the question should be whether the very existence of such a measure satisfies the proportionality test:[85] Does administrative detention assist in protecting state security and public safety; does another measure exist that would invariably be preferable to the extent that it causes less harm to the suspect; and does the benefit derived from the act exceed the harm caused to individuals whose freedom is denied without having the protective tools provided by the criminal law. I will elaborate on this further on. The second level is the administrative level, which examines whether the minister exercised his authority in a proportionate manner, considering the concrete circumstances.

83 ADA Fahima, *supra* note 54, at 262.

84 CrimFH Anonymous, *supra* note 5, at 744-745.

85 The Court is unable to adjudicate the constitutionality of the law, because it was enacted before Basic Law: Human Dignity and Liberty, and is subject to the "stability of laws" section.

Examination of Supreme Court rulings reveals a clear tendency toward partial application of the proportionality tests. In many of the cases, the judge conducting the proportionality tests resorts to the "least harmful measure test," but in doing so neglects the other components of the proportionality test, namely the suitability test and the relativity test.[86] Regarding the neglect of the suitability test, apparently the Court assumes its fulfillment, without elaboration. This approach is inconsistent with the way the Court uses the proportionality test in many of the other administrative petitions relating to acts of the public administration, which are not made by virtue of the Detention Act. In its treatment of other subjects it is the third test—the relativity test—that serves as the principal criterion for examining the legality of the administrative act.[87] The question—which remains unanswered—is why the judges have tended to abandon the relativity test, which as stated, is a particularly important filter in the examination of proportionality.

The more important question is whether a complete application of the proportionality tests could have altered the result in any of the appeals that were rejected. Arguably, the application of these tests would not have altered the results (given that the clash is between

86 See ADA 6183/06 Groner v. Minister of Defense, TAK-EL 2006(3) 1850 (2006). When Justice David Cheshin explained the operation of the proportionality test he only elaborated on the test of the less harmful means as one of the proportionality tests: "Even where he concludes that there is a near certainty, the chief justice must examine the proportionality of the detention, in other words, whether there is another measure which is less harmful to freedom and which still enables the achievement of the purpose of the detention" (¶6 of the decision). This trend is demonstrated in many of the judgments. See e.g., ADA Fahima, *supra* note 54, at 265; ADA Federman, *supra* note 51, at 175-176; ADA Ben Horin, *supra* note 51, at 335.

87 See e.g., HCJ 3648/97 Stamka v. Minister of Interior, 53(2) P.D. 728 (1999); and HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel, 58(5) P.D. 807 (2004).

an almost certain risk to human life and a serious infringement of freedom), but the opposite conclusion is also plausible. A rigorous examination of the benefits stemming from the detainee's removal and its contribution to the reduction of the danger as opposed to the harm caused to him may make the difference between legal and illegal discretion, between reasonable and unreasonable foundation, and between leaving a person in administrative detention and freeing him from detention or shortening its duration. Obligating the judge to give written expression to the relation between benefit and harm may influence his discretion and the result, and would certainly make the decision more persuasive.

An interesting question is whether, in applying the proportionality tests, the examination is limited to the "bare bones" of administrative detention, or whether the entire legal context is subject to examination, including the problematic elements of evidence law and due process. In my view, a truly comprehensive review requires the examination of all of the elements and the complete picture.

One of the important rules regarding proportionality of administrative detention was articulated by Chief Justice Barak in the *Anonymous* case:

> As the period of detention lengthens, considerations of greater weight are required to justify further extension of the detention. With the passage of time, the means of administrative detention becomes so burdensome as to cease to be proportionate.[88]

Indeed, balancing the considerations justifying the detention against the violation of the detainee's rights (namely, the implementation

88 CrimFH Anonymous, *supra* note 5, at 744.

of the relativity test) is a dynamic process. The vague duration of the detention is one of the factors militating most heavily against its legality, and its protraction should decisively influence the examination of proportionality. In future cases, the Court should examine proportionality in consideration of each of its three aspects.

Duration of Detention

Section 2(a) restricts the duration of the detention order to a maximum of six months. Section 2(b) authorizes the minister of defense to "order […] from time to time the extension of the validity of the original detention order for a period which shall not exceed six months." The parameters of the authority under section 2(a) are clear and unequivocal: the minister is authorized to issue a detention order for the period of time stipulated in the section—at the very most. Whereas the detention order can be shorter, as dictated by circumstances, the order can never be longer. In the *Anonymous* decision, a slip of the pen led to the issue of a detention order for a year and a half.[89] The Court allowed the request of the minister of defense and permitted the amendment of the order, but Justice Bejsky added the following comment:

> It is stressed, this does not mean that the issue of a detention order for a period exceeding the period prescribed in the aforementioned section 2 will be regarded as a technical error if it was intentionally issued for a period longer than that which was authorized by the law.[90]

89 ADA 2/86 Anonymous v. Minister of Defense, 41(2) P.D. 508 (1986).
90 *Id.* at 512.

Two years later, this ruling was put to the test in a detainee's appeal that came before Justice Shlomo Levin.[91] A detention order was issued for a period of six months and two days. The detainee therefore requested a ruling that the detention order was void by reason of illegality. The Court reviewed the proceedings that led the minister to sign a detention order for a period in excess of the prescribed time, and ultimately instructed that the detainee be released. All the same, it seems that the Court's decision may also have been motivated by other considerations. Either way, the authorized official must ensure that the duration of the order does not exceed the statutory limit (i.e., six months).

The second component of the authority for detention (i.e., its extension) raises numerous difficulties that were already addressed in Knesset deliberations when the bill was first brought up for debate. The central question is whether the authority to extend the order enables the minister to issue successive detention orders, each for a maximum of six months, so that (theoretically) there is a possibility of "life detention,"[92] or whether the extension authority is statutorily limited?

In the Knesset debate, MK Meir Pa'il (of the Sheli party) raised various reservations, one of which addressed the duration of the detention:

> I think that it could be added that an administrative order cannot be valid more than twice. The first time for six months, and then for another six months […] I think that the Knesset must establish a statutory ceiling for

91 ADA Anonymous, *supra* note 47.

92 In the words of Justice Bejsky. See ADA Anonymous, *supra* note 89, at 513.

> administrative detention […] Whatever happens after that period, if a legal proceeding is not possible, then the matter is finished.[93]

The minister of justice responded by saying that this was a "commendable desire" and added:

> And if the Israeli general security service receives clear, unequivocal intelligence that satisfies the chief justice of the district court, and on appeal, the Supreme Court, that a particular person is at the center of murderous plans and two successive periods of six months have elapsed, would you release him in the knowledge that tomorrow another bomb may be planted in Zion Square or in Mugrabi Square or in the heart of the Carmel, or in border settlements, as a direct result of that person's activities? […] I understand the thrust of your argument, but it just can't be done.[94]

The Court confronted this very question for the first time in the *Anonymous* case,[95] concerning a three-month administrative detention order issued against the appellant, a member of the Fatah organization's Force 17. The order had been extended twice, each time for three months. The appeal was filed after the third extension. Counsel for the appellant argued that the minister was only authorized to extend the detention order once, and that the authority for extension was for six additional months at the very most. In other words, he claimed that a

93 D.K. 39, 3955 (5738).
94 *Id*. at 3965.
95 ADA Anonymous*, supra* note 89.

person could not be administratively detained for more than one year. His position was rejected by Justice Bejski:

> If the text is clear and unequivocal, with no room for other options, it must be strictly complied with (CA 167/74 (2); ALA 4/72, 6 (3)). We only need to seek out the legislative intent when the plain meaning of the statute's language leaves a number of options, in which case the option that realizes the legislative intent should be chosen […] In using the words "…from time to time to direct the extension of the validity of the original detention order […]" the legislature left no doubt that the authority to extend the detention order was not limited to one extension only, for otherwise the words "from time to time" would be completely superfluous, and the legislature does not waste words. The interpretation suggested by Adv. Zichroni would only be plausible had the legislature omitted the words "from time to time." But the legislature's intentional, specific determination that the minister can extend the detention from time to time means that the only limitation is that any extension, whichever one it be, cannot exceed a period of six months.[96]

In his aforementioned article "Administrative Detention in Israel,"[97] Eyal Nun adopts a different approach. Distinguishing between two interpretative arguments made by the appellant, Nun claims that Justice Bejski answers only one. Nun concedes the impossibility

96 *Id.* at 511-512.
97 Nun, *supra* note 52, at 182-183.

of arguing that the minister can order the extension of the detention once only, because the wording "from time to time" does not admit of any other interpretation without betraying the wording itself. An important interpretative rule in law is that the language establishes the interpretative borders. The interpreter cannot give the text a meaning that is inconsistent with the text.[98] Nun further claims that even so, the language of the act does not preclude the appellant's second claim—that the minister of defense is not authorized to extend the order (irrespective of the number of extensions) for a period in excess of six additional months, for a period that exceeds a total of one year of detention. The wording allows the interpretation of both the appellant and the respondent. Nun argues that in deciding between the two interpretations—of the appellant and of the respondent—the scales are balanced: On the one hand, the explanatory note supports the restrictive interpretation, because under the title "Principal Changes in the Proposed Law" it states that the old act allowed a person's detention for an unlimited period.[99] On the other hand, when the legislature intended to restrict the period of time for which authority was conferred to detain suspects of security offences, it did so explicitly. Nun argues that the choice between the two possibilities should be based on the purpose and goal of the Detention Act, in other words, changing the rule that prevailed before the act's enactment.

With all due respect, I think that Nun's interpretation is mistaken and that a different interpretative process should be adopted—one which is truer to the interpretative principles applied in Israeli law. The distinction between the appellant's claims is correct, and regrettably the Court did not address it. The expression "from time to time" confers the authority for the minister to issue more than one order

98 Barak, *supra* note 61, at 294.

99 Draft Bill for Detention Act, *supra* note 33, at 180.

extending the detention. This, however, is unrelated to the question of whether the six-month period under section 2(b) establishes a limit that relates to the cumulative duration of all the detention orders issued by the minister, or whether it defines an individual limit for each and every extension. This is the question I now propose to examine.

Section 2(b) determines that "he [the minister] may from time to time, in an order signed by him, extend the validity of the original detention order for a period not exceeding six months." The question is whether section 2(b) means that the cumulative period of detention orders cannot total more than six months, or that the limitation applies only to each specific extension order. The answer depends on the interpretation given to the law. The law recognizes a number of doctrines of interpretation, and the accepted approach in Israel is the doctrine of purposive interpretation.[100] We will endeavor to examine section 2(b) in its light.

The theory of purposive interpretation assumes that the understanding of a text is the result of its interpretation. As such, the interpretation sought should be one that realizes the legislative purpose. The purpose of the law, or the function that it seeks to realize, consists of its objective and subjective purposes. The identification of these purposes is the first stage in the interpretation of a norm. We will initially attempt to pinpoint the subjective purpose of the Detention Act, after which we will attempt to identify its objective purpose.

Without going into excessive detail, it nevertheless bears mention that the subjective purpose reflects the legislature's actual intent at the time of the act's enactment. We discern this purpose, first and foremost,

100 See e.g., CrimFH 2316/95 Ganimat v. State of Israel, 49(4) P.D. 589 (1995); HCJ 4562/92 MK Eliezer Zanberg v. Broadcasting Authority, 50(2) P.D. 793 (1996); HCJ 1384/98 Gilad Avni v. Prime Minister Benjamin Netanyahu, 52(5) P.D. 206 (1998).

from the language of statute, but also from its legislative history, the explanatory notes, the Knesset debates, and the circumstances of its enactment. What was the subjective purpose in the case at hand? Nun argues that there is no clear-cut answer, and finds the basis for a restrictive interpretation in the explanatory note to the draft bill.[101] I think that a different interpretation is required. Firstly, section 3 of the explanatory note indeed describes the nature of the regulations that enabled unlimited detention, but the change in this context relates to the restriction of the original detention order and nothing else. The explanatory note reads as follows:

> According to the regulations, it is theoretically possible to order a person's detention for an indefinite period. By contrast, it is proposed that the defense minister not be authorized to order detention for a period in excess of six months, which, indeed, may be extended, but the extension order too requires legal confirmation.[102]

In other words, the regulations granted authority to order a detention for an unlimited period of time. The act sought to change this harmful arrangement, and now limits the order to six months. Should the minister wish to extend this period, he can only do so with the approval of a judicial body. The explanatory note contains no clear position regarding the restriction of the extension order, and the legislature's intention may be learned from the justice minister's comments, as cited above. The Knesset was divided, and there were those who proposed limiting the authority to extend the detention. Nonetheless, for various reasons, these proposals were rejected by the

101 Nun, *supra* note 52, at 182.
102 See Draft Bill: Detention Draft Law, *supra* note 33.

justice minister who represented the government in the presentation of the act. Accordingly, the assumption is that the legislative intent—the subjective purpose of the act—was to avoid any limitation of authority to extend the order.

The objective purpose of the act is the purpose to be attributed to this particular type of legislation and its character. It reflects the interests, goals, values, objectives and functions upon which a reasonable legislature would base the law, consistent with the foundational values of society.[103] What then is the objective purpose of the act? The overall purpose of the Detention Act may be learned from the Court's response to the question in the *Anonymous* case:

> The answer is that this purpose is twofold: On the one hand, safeguarding state security; on the other hand, safeguarding the dignity and liberty of every person. These purposes are apparent from different circles which surround the law. The inner circle, which focuses on the statute itself and its type of arrangements, comprises an integrated purpose that deals with protection of state security while ensuring human liberty and dignity.[104]

In that case, the Court noted that the two purposes were deeply contradictory, and decided that the legislative purpose in the concrete case required that a balance be struck. Accordingly, the Court concluded that the authority conferred by the act did not allow the continued detention of the detainees for their use as bargaining chips. It is difficult to determine whether the subject at hand invites a similar

103 HCJ 693/91 Dr. Michal Efrat v. Population Registry Commissioner, 47(1) P.D. 749 (1993).

104 CrimFH Anonymous, *supra* note 5, at 739.

conclusion. It must be remembered that a contemporary interpretation of the Detention Act is influenced (or should be influenced) by the enactment of Basic Law: Human Liberty and Dignity.[105] While the validity-of-laws section protects the constitutionality of the act from review, the interpretation of all legislative acts was influenced by the enactment of the Basic Laws. Arguably, the balancing of the purposes requires recognition of the administrative right to detain a person by force of the act's underlying security objective, but concomitantly, where it relates to the extension of the detention, we should choose the interpretation that favors human liberty. Ultimately, the Detention Act was enacted in order to replace Regulations 108 and 111, and certain provisions thereof disclose the intention of effecting a significant change of a kind that would restrict this kind of grave, harmful authority.

Following this interpretative approach, the act presents two conflicting purposes. Its subjective purpose favors the interpretative conclusion that would not limit the duration of the order, whereas its objective purpose favors an interpretation that would restrict the total duration of all the detention orders to six months at the most. This conclusion brings us to the second stage of the interpretative process, in which the two purposes are contrasted and the relationship between them is established for purposes of interpreting the law. Deciding between the two purposes is based on interpretative rules of thumb, which assist the interpreter in deciding between conflicting

105 See Dalia Dorner, *The Effect of Basic Law: Human Dignity and Liberty on the Laws of Detention*, Mishpat Umimshal – Law and Government in Israel, 13(1996) (Hebrew). The paper relates to criminal and not administrative detention, but it seems that its interpretative conclusions are applicable for our purposes too.

purposes in giving the text an appropriate meaning.[106] For example, to the extent that a greater period has elapsed since the law's enactment, greater weight will be given to the act's objective purposes, and to the extent that the act is more specific, greater weight will be given to its subjective purpose.

In interpreting the provisions of the Detention Act, the subjective purpose of the act should have the upper hand—in other words, the interpretation that acknowledges the defense minister's authority to extend the detention order for a period in excess of a year (six months of the original order and no more than six months for extension orders). The very fact that the Knesset raised and considered the issue carries tremendous significance for our purposes, and the legislature's will, which was clearly expressed in the current case, ought to be respected. The act seeks to realize a security interest that should be respected. The minister should not be prevented from confronting a situation in which the danger has yet to pass, and yet the detainee must be released even in the absence of alternative means for dealing with the matter. This should be determined to be the existing law.

Nevertheless, notwithstanding all of these reasons (which in fact describe the current normative reality in accordance with the provisions of the Law), my view is that there are other, better, more effective means for achieving the second purpose of the act in the context of the duration of the detention. These will be considered below. At present, it should be mentioned that the principle of proportionality, as explained above, may be more effective for limiting the duration of the detention and preventing a situation of "life detention" or even detention in excess of what is necessary. While there is also the possibility of amending the act (see below), the language of the act

106 Barak, *supra* note 61, at 196-198.

today dictates an interpretation that would not restrict the minister's authority to extend an order under section 2(b).

An exceptional example of judicial annulment of a decision to extend detention is the *El Amla* case.[107] That case concerned a detainee who was held under the Detention Order in force in the Judea and Samaria areas.[108] The appellant's detention was reduced by two weeks by order of the chief justice of the military court of appeals. One day before the anticipated release date, the military commander issued a new detention order. The appellant appealed the new detention order in the High Court of Justice on the grounds of illegality. In his judgment, Justice Yitzhak Zamir stated that the particular purpose of the Detention Order (which for this purpose he deemed as being comparable to the Detention Act) is subsumed within the general purpose of maintaining and promoting the fundamental values of the system. In accordance with these values, great importance attaches to the judicial review of administrative actions, which indeed is a condition for the protection of the other fundamental values. When a military commander decides to extend a detention order that was shortened by the court, it may prevent the possibility of judicial review. In this context, Justice Zamir distinguishes between two categories of cases. The first is where a radical change of circumstances creates a present reality that is entirely different from the reality that formed the basis of the original judicial decision. In this situation, the extension of the order may be legal, even though the authorized official would be bound to give weight to the fact that the court had already decided to shorten the order, and its subsequent extension impinges on the

107 HCJ 2320/98 El-Amla v. IDF Commander in Judea and Samaria, 52(3) P.D. 346 (1998).

108 Administrative Detention Order (Judea and Samaria) (Temporary Provision) (Number 1226), 1988.

result of a judicial proceeding. The second is where there was no radical change of circumstances after the court's original decision. Under these circumstances, the authorized official would be unable to extend the order, for otherwise:

> If he [the judge] concludes that the material does not justify a continuation of the detention, and the military commander was nonetheless permitted to decide immediately thereafter to continue the detention, the tables would be turned; the commander, who under the Detention Order is subject to judicial review, would actually be reviewing the judge. The judge's decision would be relegated to the level of a professional opinion which the commander can accept or reject, and the final decision would be that of the commander and not the judge. This kind of situation contravenes the very essence of judicial review. This is true of judicial review in general and especially so regarding the judicial review of administrative detention.[109]

Judicial Review

Judicial review of the exercise of the authority conferred by the Detention Act is one of the important innovations of the Administrative Detention Act. As mentioned, during the period of the Regulations, when a detainee sought to appeal his detention a committee would convene for the purpose of advising the authorized official regarding the legality of the detention. Its decision was not binding and, if not for the appeal, the matter would not have been

109 HCJ El-Amla, *supra* note 107, at 360.

given any consideration at all. Section 4 of the act established the status and authority of judicial review as an integral component of the detention. The section provides that no later than forty-eight hours after his arrest the detainee must be brought before the chief justice of the district court who hears the case and decides whether to confirm the order, to shorten it, or to set it aside. If the detainee is not brought before the chief justice, the order lapses and the detainee is released. Section 4(c) stipulates that in exercising his discretion the chief justice may consider the defense minister's good faith and the nature of the considerations underlying his decision. Most importantly, the chief justice of the district court is permitted to examine whether the order was issued based upon "objective reasons of state security or public safety." Moreover, the role of judicial review extends beyond the confirmation of the detention order. Under section 5 of the law, after a period not exceeding three months from the confirmation of the order, the chief justice of the district court must reconsider the detention, and should he fail to do so, the detainee must be released and the order cancelled. The district court's decision for purposes of sections 4 and 5 may be appealed by right before a justice of the Supreme Court. For this purpose, the Supreme Court justice holds all the powers given to the chief justice of the district court.

This comprehensive system of judicial review, which is renewed on a three-month basis, attempts to mitigate the authority to order administrative detention. The overall picture is thus one in which Israeli law grants the authority for detention to an administrative body—the minister of defense—but subjects it to judicial intervention intended to prevent arbitrariness in the exercise of that authority. My following comments are devoted to an assessment of the nature of the judicial review, at all of its stages.

a. Confirmation of the Detention Order

Judicial review of an administrative body's exercise of its authority is not alien to Israeli law. Over the years the judges of the High Court of Justice have developed tools and methods of judicial review based on the settled case law of the Supreme Court. These tools and means accommodated review of the legality of the exercise of administrative authority on a variety of levels, and did not require a statutory basis. Based on the Knesset proceedings describing the plenum deliberations preceding the adoption of the Detention Act, the emerging picture is that its framers intended to use the judicial review provisions as a means for inculcating a radically new approach toward the implementation of the law. The veracity of this impression was first tested when the act was subjected to judicial view for the first time before Justice (later Chief Justice) Yitzhak Kahan, in his judgment concerning Rabbi Meir Kahane who was detained for six months for planning terrorist actions against Arabs.[110] The Justice did not view section 4 of the act as conferring review authority that was substantively different from the classic High Court review of administrative authorities, and ruled:

> The provisions of section 4(c), however, make it clear that the court will not substitute its own considerations for those of the defense minister, and there are no grounds for comparing judicial review by the court under the Detention Act to the role of the court considering a criminal case.[111]

110 ADA Kahane, *supra* note 74.
111 *Id.* at 259.

This restrictive interpretation no longer reflects the accepted view. Following the judgment, Professor Yitzhak Hans Klinghoffer[112] published a critique in which he presented a different conception of the court's role under section 4.[113] Klinghoffer argued that the act established a format that compelled cooperation between the minister of defense and the chief justice of the district court in the creation of the detention order. Under the law, the detention order is not under the exclusive authority of the minister; rather it is the creation of a "composite organ," comprising two partial organs, the first from the executive branch and the second from the judiciary. The action (the order) results from their joint function so that the order is no longer exclusively administrative. This change in the law expresses the principle that a person's liberty cannot be denied without the consent of the judicial authority. The consent of the two "organs" is a necessary condition for the detention, but the order

112 Klinghoffer, *supra* note 18. The approach presented in the article was in essence adopted for purposes of review of the administrative detention in the Territories by force of Administrative Detention Order (Judea and Samaria) (Temporary Provision) (Number 1229), 5747-1988. See HCJ El-Amla, *supra* note 107. For a critique of this judgment see: Avinoam Sharon, *Administrative Detention: The Limits of the Authority and the Scope of Review* 13 Idf L. Rev. 205 (1999) (Hebrew). An intermediate approach to the scope of judicial review was presented by Prof. Shimon Shetreet, who rejects Klinghoffer's approach. According to Shetreet, the court is not part of the detention apparatus. In his view, the scope of judicial review of the Detention Act should be broader than in a regular administrative petition. See Shetreet, *supra* note 15, at 200-203.

113 This approach is supplemented by another approach which anchors the broadening of judicial review of administrative detention based on the wording of section 2 of the Law. The requirement for a "reasonable foundation" was interpreted by case law based on an objective foundation, and as such the court must examine the decision from the perspective of a reasonable minister of defense. See Gross, *supra* note 2, at 296.

can be annulled unilaterally by either party (the chief justice, in the course of confirming the order and by virtue of his periodic review, and the minister, at any time at all.)[114]

According to this approach, in confirming the order, the court is permitted, and indeed required to substitute its own discretion for that of the defense minister,[115] or more precisely, to apply its own discretion alongside that of the minister. The chief justice of the district court must confirm the order in two stages. Firstly, the legality of the action is examined in terms of the authority exercised by the minister. This means examining whether the order was based on foreign considerations, and whether the minister acted in good faith and in compliance with the statutory provisions and procedural rules established by the case law.[116] The court's job, however, does not end there. At the second stage, the court evaluates the grounds that necessitated the order and decides whether those grounds specifically necessitated resort to administrative detention. Klinghoffer elucidates:

> Conceivably, the chief justice of the district court may decide that despite the reasonableness of the defense minister's assessment that considerations of state security (or public safety) "necessitate" action in accordance with section 2(a), had he been in the minister's position he would have evaluated the circumstances differently. The court may estimate that a preventative measure is required in order to confront the security threat posed

114 Section 4(d) of the Detention Act.
115 See Klinghoffer, *supra* note 18, at 290.
116 For example, see ADA Anonymous, *supra* note 47, at 137.

> by the person concerned, but still prefer a less extreme measure.[117]

The Court endorsed this approach in the *Anonymous*[118] ruling, when Justice Bejski concurred with Klinghoffer's criticism of Justice Yitzhak Kahan's approach. Bejski ruled that the authority for review was broader than that of the High Court of Justice, and that the chief justice of the district court had independent discretion. He presented the following reasoning for reversing the case law:

> For according to its spirit, purpose, and language, the act established a system of periodic, continuous judicial review to examine not only the legality of the order, but also whether it was necessitated by the goals specified in section 2, including the period prescribed therein.[119]

This position was confirmed and became the accepted rule in a number of successive rulings over the past two decades.[120] Today, the court's confirmation of the order must be conducted in accordance with the two stages described above.

b. Reexamination of the Detention Order

Section 5 determines that no later than three months after confirming the order, the court must review the detention order. Originally Klinghoffer sought support for his thesis in the very existence of

117 Klinghoffer, *supra* note 18, at 291-292.
118 ADA Anonymous*, supra* note 89.
119 *Id.* at 516.
120 See e.g., HCJ 253/88 Sagadia v. Minister of Defense*,* 42(3) P.D. 801, 821 (1988); and see also ADA Ginzburg*, supra* note 76, at 223; ADA Federman*, supra* note 51, at 187-188; HCJ Anonymous*, supra* note 57.

section 5, for if the role of the chief justice of the district court is limited exclusively to examining the legality of the detention order, the question arises as to the need for the renewed examination. Presumably, if the detention order was originally legal, then the assumption should be that it remains legal. However, Klinghoffer rejected this interpretation, arguing that at the stage of the renewed examination there must be an examination of whether the present circumstances justify the continuation of the detention. This position was adopted in the case law[121] and today the rule is that in the framework of this reexamination, the court must examine the decision de novo.[122] In other words, every three months the court must reconsider the matter, balancing security needs and the detainee's rights in light of current circumstances, which include the element of the passage of time.

The reexamination plays an important role not only in assessing the existence of grounds for releasing the detainee, but also for purposes of considering the possibility of a transition from the administrative track to the criminal track.[123]

c. Appeal before the Supreme Court

Under section 7 of the act, in hearing an appeal the Supreme Court is vested with the same powers as the district court. This arrangement is unique to Israeli law, and as interpreted by the Supreme Court, requires the appellate judge to examine the totality of the evidence and form his own impression. The subject was raised in the *Ben Yosef* case, when Justice Gabriel Bach ruled:

121 Initially in case law in ADA 3/89 Anonymous v. State of Israel, 44(1) P.D. 221, 223-224 (1989).

122 HCJ Anonymous*, supra* note 57, ¶g of Justice Rubinstein's judgment.

123 HCJ 2233/07 Anonymous v. IDF Commander in Judea and Samaria, Note 8 of the judgment of Justice Procaccia (not yet reported, 3.15.2007).

> In hearing the appeal against the chief justice of the district court on this matter, my examination of the evidence was not limited to the perspective of a court of appeal reviewing a criminal trial, where the natural tendency is not to intervene in the factual findings of the trial court judge unless there appears to be a legal or fundamental error in the findings of the trial court judge or in the manner in which he conducted the trial. In the current matter, I felt obliged to reexamine the entirety of the evidence, and primarily the privileged material. This practice is particularly appropriate where we are concerned with evidence presented in written documents. It would also appear that this was the legislative intention.[124]

This approach was adopted in case law, and was given practical procedural expression when the Supreme Court ruled that in the course of its examination, the appeals forum must also consider any factual developments that materialized after judgment under appeal was given.[125] The Court reiterated this position in 2003 when Justice Asher Grunis heard the *Federman* appeal.[126]

Nonetheless, one may still question the relation between rhetoric and reality. The accepted approach in the case law today recognizes the court's inherent authority in its confirmation of a detention order and grants it extensive discretion, as mentioned above. The allocation of power between the two "organs" that are empowered to issue the

124 ADA 2/94 Ben Yosef v. Minister of Defense, TAK-EL 94 (1) 56, ¶10 of judgment of Justice G. Bach (1994).

125 ADA 5652/00 Sheikh abd-El Carim Obeid v. Minister of Defense, 55(4) P.D. 913, 921-922 (2000).

126 ADA Federman, *supra* note 51, at 189.

detention order is not dichotomous. The minister of defense is not limited to the consideration of security matters, and the court is not required to focus exclusively on the violation of the detainee's rights. Nonetheless, the differences between the minister and the court cannot be ignored. The minister of defense receives a professional opinion furnished to him by the security services, and the formulation of his opinion is usually influenced to a great degree by their world view. The world view of the security services, and primarily of the intelligence bodies, has already been written on extensively in the scholarly literature, to the effect that it evidences a tendency to be overly pessimistic and tends to exaggerate the degree of danger, power and intentions of the enemy.[127] Former GSS head Ami Ayalon presented the world view of the service and bolstered the tendency presented here in statements he made to the forum discussing the nature of Arab-Jewish relations in Israel in a series of discussions initiated by the Israel Democracy Institute:

> Not surprisingly, and quite naturally, the service prefers security over individual freedoms. Any organization prefers to act in a manner that strengthens the value that it represents or for which it is responsible, in our case—security, and attempts to remove any cause of restriction, or constraints, and for our purposes—individual rights. […] in the matter of political subversion—beyond the natural tendency, which is embedded in the information

127 Ben Ami Shiloni, *The Battle of the Pacific: Intelligence Failures and Damaging Confidentiality,* 85 Intelligence And National Security (1998) (Hebrew).

> conceptions of any intelligence-gathering body, to see the shadow of mountains as mountains.[128]

Judicial involvement in the detention proceeding, as established by the Detention Act, proceeds from the assumption that administrative military authority, by its very nature, lacks expertise in balancing the competing statutory objectives, and occasionally may fail to give requisite weight to the suspect's rights. Ensuring the consideration of these rights is the function of the court, and at least in theory, the court has willingly assumed this role.[129]

All the same, only in rare cases have detention orders been reversed in the wake of judicial review. There has been one case only—the case of the Lebanese detainees—in which the reversal was based upon balancing, and even there the balance related to the fundamental nature of the authorized official (or more precisely the lack of authority) as distinct from specific balancing made on the assumption that authority exists.[130] It is hard to say whether this indicates that despite the endorsement of the independent discretion on the rhetorical level, the chief justices of the district courts and the Supreme Court justices have, in practice, failed to fulfill their balancing role, and become subservient to security considerations. In the vast majority of hearings, judicial discretion is exercised on the basis of secret evidence. A less critical view might aver that only a few orders are actually issued according to the act, and the paucity of

128 Uzi Benziman, Whose land is it? A Quest for a Jewish-Arab Compact in Israel 116-117 (2006) (Hebrew).

129 On judicial intervention in matters that are essentially within the expertise of the security services, see HCJ 2056/04 Beit Sourik Village Council, *supra* note 87, at 841-845.

130 CrimFH Anonymous, *supra* note 5.

judicial review indicates that the holders of administrative authority have properly internalized the required rules of balancing.

Laws of Evidence

Section 6 of the act establishes evidentiary requirements that deviate from the accepted norms of criminal law. Furthermore, section 6(c) permits the court to accept secret evidence that is also withheld from the detainee. This option has become the norm in administrative detentions and is one of the main pitfalls in the attempt to preserve the detainee's right to due process. The evidentiary arrangement became one of the central elements of the law, because in most, and perhaps all of the cases, the main justification for adopting the administrative as opposed to the criminal track lies in one of two reasons: that the evidence providing the basis for the detention order is inadmissible under the rules of evidence applicable in criminal proceedings, or that the evidence was privileged, and that in accordance with section 44 of the Evidence Ordinance a certificate of privilege would presumably have been issued in the legal proceedings, preventing submission of the evidence in a criminal proceeding.[131] I will therefore proceed to discuss the central subject in the area of the laws of evidence.

a. The Evidentiary Foundation for Detention

The decision to issue an administrative detention order is adopted after the gathering, crystallization and processing of intelligence material that indicates that the suspect is liable to endanger state security or public safety. Most of the material, or at least some of it, does not qualify as evidence in legal proceedings conducted in accordance with the laws of evidence under the Evidence Ordinance [New Version] 5731-1971 (for example, there is extensive reliance

131 ADA Federman, *supra* note 51, at 186.

on hearsay). Strict compliance with the established rules of evidence would, for the most part, impede the state's ability to bring about a conviction in criminal law. Moreover, strict adherence to accepted evidentiary law would preclude the confirmation of this kind of detention order in a proceeding conducted before a judge.

The statutory solution to this difficulty appears in section 6(a), which permits deviation from the accepted rules of evidence. In considering a recommendation to issue a detention order, the minister of defense (naturally) exercises executive and not judicial authority, and in accordance with the tests of administrative evidence, he is permitted to rely on a factual foundation substantiated by evidence that would not otherwise be admissible in court. Section 6(a) permits the court, too, to rely on administrative evidence in its confirmation of the order, if it deems it right and proper to do so.[132]

The rule is that the detention order must be based on evidence that satisfies the tests of administrative evidence.[133] In explaining the meaning of this rule, Chief Justice Meir Shamgar wrote as follows:

> The evidence, which must provide the statutory authority with the basis for its decision, need not be in the form of admissible evidence in accordance with the laws of evidence, and neither is its submission necessarily in accordance with the rules normally applied in court […] Based on this principle, the tribunal or other statutorily empowered authority, may base their decision on non-corroborated evidence, when corroboration

132 HCJ 4400/98 Braham v. Military Judge Colonel Sheffi, 52(5) P.D. 337, 341-342 (1998).

133 ADA Federman, *supra* note 51, at 186.

> would have been required in court, or may accept evidence which would not have been admissible in regular legal proceedings (CA 292/66 (4) at p. 391; HCJ 245/66 (5) at p. 446). On the other hand, not every rumor (HCJ 1/49 (6), at p. 84) or unverified conjecture will be sufficient. The general rule is that the authority must receive evidence that a reasonable person would deem sufficient as a basis for his decision (HCJ 442/71 (7)), having consideration for the subject, the contents, and the person who gave it. **It is appropriate that the material be such as a reasonable person would regard it as possessing evidentiary value and would therefore rely on it** [author's emphasis, E.G.].[134]

On more than one occasion these rules enabled the court to accept first degree hearsay evidence, and occasionally even hearsay evidence at the second and third degrees.[135] It should be emphasized in this context that, contrary to accepted criminal proceedings, in these cases the court will examine the representative of the security services familiar with the evidence material and conversant with the intelligence material (see below).[136]

This evidentiary threshold is lower than the threshold required in a criminal proceeding. However, even with respect to this kind of evidence, case law has established a number of qualifications that indicate the reliability threshold required in order to legally permit consideration of certain kinds of evidence.

134 HCJ 159/84 Shahin v. Gaza IDF Commander, 39(1) P.D. 307, 327 (1985).
135 Weiss, *supra* note 48, at 14.
136 ADA Fahima, *supra* note 54, at 262.

Four guiding principles can be said to define the required nature of the evidence:

Crosschecking information from a number of sources. Multiple sources are important to the ability to rely upon evidence,[137] and information that can be verified against a number of independent sources attesting to the danger posed by the suspect is an important auxiliary tool for proving the legality of the arrest.[138] Information from an isolated source that has not been thoroughly investigated will not suffice.

Information conveyed by a human source. The court will consider whether the source of the information is human or technical.[139] In the *Federman* case, Justice Grunis discussed the fears regarding the reliability of a human source and the difficulty of identifying such a defect. The incentives that motivate secret agents may induce them to provide information at all costs, even when of questionable reliability. In addition, the agent may have other considerations, personal or otherwise, that cause him to incriminate the innocent.[140]

Information from a technical-electronic source. On the other hand, Justice Grunis did not note the possible difficulties that may be posed by exclusive reliance on technical sources, and this point bears emphasis. Electronic means of intelligence gathering have many advantages and extensive, valuable information may be derived from them, but their limitations should be borne in mind. It is important to distinguish what types of information electronic sources can provide,

137 ADA Federman, *supra* note 51, at 187.
138 Weiss, *supra* note 48, at 14-15.
139 ADA Federman, *supra* note 51, at 187.
140 Gadi Eshed, *Police Investigation and Human Intelligence*, 18 Idf L. Rev. 223 (2005).

and what the limitations of these sources are. For example, when an electronic source records oral conversation, one can precisely determine where the recording was made, and which phone lines were employed, but the identity of the speaker cannot be determined with absolute certainty because the electronic source does not supply that information. The identification is the interpretation of a human factor and as with all human factors it is subject to numerous cognitive biases. As such, technical-electronic sources should be treated with reservation, in the same manner as one relates to information originating in a human source.

Consideration of all the relevant data. Evidence that is selective and that has been edited cannot form the basis upon which a reasonable person can rely for proving the legality of the detention. The test of administrative evidence requires that all of the relevant data and considerations be taken into account.[141] This is a general rule of judicial review on administrative actions[142] and is also valid for purposes of the authority to detain and to extend an administrative detention. In the *Barghouti*[143] case for example, the security services were in possession of a report that contained statements of the appellant according to which he intended to change his ways and abandon his criminal, dangerous behavior. In the course of the hearing it transpired that the intelligence sources did not present this report to the military commander because it did not qualify as negative security material. The military court reacted as follows:

141 Gal Asael and Assam Haamad, Adminstrative Detention 30-31 (2002) (Hebrew).

142 See HCJ 987/94 Euronet Golden Lines (1992) Ltd. v. Minister of Communications, 48(5) P.D. 412 (1994).

143 ADA 29/00 Barghouti v. IDF Commander in Judea and Samaria (not reported, 2000).

> The material that must be examined in this context both by those making the recommendations and those who accept them is the "relevant material." Similar to the evidentiary material in a criminal case, that must be placed at the defense counsel's disposal, regardless of whether it supports the defendant's conviction or supports his acquittal, so too with administrative detention, in respect of which the detainee and his counsel have not had a real opportunity of examining the material, the recommending sources and in their wake, the military commanders, are duty bound to examine all of the material, whether positive or negative […] Our concern is not with punishment but rather with frustration and prevention.[144]

In conclusion, it must be remembered that the most important test for evaluating evidence, common to all of the aforementioned rules, is that of the ability of a reasonable person to rely upon the evidence. The minister of defense, and subsequently the court, must only consider evidence that satisfies this criterion, and must give each item of evidence its appropriate weight. The fact that a certain piece of evidence is admissible as administrative evidence does not exempt the court of its duty to assess its reliability, against the background of all the other evidence and the totality of circumstances in the particular case. The "administrative evidence" label does not release the judge from his duty to request and receive explanations from those able to provide them. Any other position would severely weaken the process of judicial review and would provide license for

144 *Id.*

protracted denial of freedom on the basis of inadequate, threadbare evidence.[145]

b. Permission to Use Secret Evidence: Section 6(c)

Section 6(c) permits the court to accept evidence without the detainee or his counsel being present, and to prevent them from examining the evidence and being apprised of its contents. From a procedural perspective, the court should examine the privileged material only after having seen the unprivileged evidence, and having decided whether the detention order could be based exclusively on the unprivileged evidence. The court should entertain a request for privilege only if the latter is inadequate to legally ground the detention order. The proceedings regarding the request for privilege are divided into two stages. At the first stage, when the claim or motion concerning the acceptance of evidence under section 6(c) is raised, the court will receive the evidence, examine it and hear the state's arguments pertaining to the request for privilege (ex parte). At the second stage, having examined the evidence and heard the arguments for privilege, the court will rule whether there are grounds for exercising its authority not to expose the evidence.[146]

The original intention was that, as a rule, the detainee would have access to the evidence and would be able to defend himself against the possibility of his detention being confirmed, while reliance on the provisions of section 6(c) would be the exception.[147] Reality, however, tells a different story. An examination of the administrative detentions carried out under the act shows that the request for

145 HCJ Braham*, supra* note 132, at 346.

146 ADA 2/82 Yoel Lerner v. Minister of Defense*,* 42(3) P.D. 529, 531 (1982).

147 See statements made by the minister of justice when the law was tabled in the Knesset, 39 D.K. 3955 (1978). See also Draft Bill: State of Emergency (Detention) Law 1979, *supra* note 33, at 295.

privilege has become an integral part of the process of confirming the detention. After the request is submitted, the court gives an interim decision on the matter of evidence, not in the detainee's presence, and the detainee is then returned to the courtroom. To the best of my knowledge the court has never denied a request for privilege of evidence under section 6(c); at the very most it limited the scope of the privilege and ordered minimal exposure of the evidence, so as to give the detainee an inkling of the suspicions against him.[148]

The practical application of this section has rendered it a key characteristic of administrative detention, and perhaps the central section of the act as a whole. It has been claimed that the desire to maintain the confidentiality of the evidence is the only serious claim that can justify resort to administrative detention.[149] Section 6(c) is central from the perspectives of both the detainee and the state. The duration of the detention, its purpose, and the authority to order it are all important and central elements that guarantee the link between the Detention Act and the rule of law, but from the detainee's perspective, the gravest issue is the privilege arrangement. Words can barely describe the helplessness felt by a person under detention for a protracted period, having no idea of the reasons behind it, and no real ability to contest the decision. Though seemingly taken from Kafka's *The Trial*, this depiction describes the all too frequent reality of detention proceedings in Israel. Admittedly, the executive authority does not resort to the Detention Act as a matter of course, and our region has yet to witness mass detentions of the kind that have occurred in other democracies around the world. Still, none of this will comfort the detainee who is incarcerated under lock and key

148 ADA 4794/05 Anonymous v. Minister of Defense, ¶5 of judgment of Justice Adiel (not reported, 9.6.2005).

149 Nun, *supra* note 52, at 170.

due to a factual error, which has not and will not be exposed because of the privilege of the evidence. Clarification of facts in this manner is not fitting for a democratic state.[150]

From the state's perspective too, section 6(c) plays a central role in the Detention Act. I already noted that the request for privilege is a standard component of any request for the confirmation of a detention order. Furthermore, the decision to take the administrative—and not the criminal—path, is usually made in cases in which authority seeks to prevent the exposure of evidence. This may explain why the implementation of the act with respect to the privilege of evidence deviates from the original legislative intention. The Detention Act was intended to prevent the realization of a future danger to state or public security; it was not intended to serve as an alternative avenue of punishment for acts committed in the past, in cases in which the state had difficulties on the evidentiary level.

What type of evidence might justify such a serious violation of the right to due process in the case of unwillingness to divulge it? Generally speaking, we are concerned with intelligence data. The fear of exposing such material derives from a fear for the well-being and the continued operation of intelligence agents and from the fear

150 See ADA Groner, *supra* note 86, ¶6 of judgment of Justice David Cheshin. On the damage caused by privileged evidence to the process of clarifying the truth, see MApp Livni*, supra* note 9, where Chief Justice Barak wrote the following:

> In order to expose the truth all of the investigative material must be disclosed to the defendant and to the court. This is of particular importance in our adversarial system, in which the litigants bear the onus of presenting the investigative material before the court [...] On the basis of this material the defendant may be able to prove his innocence, whether by presentation of his own version or by interrogating the witnesses for the prosecution and undermining the version of the prosecution.

that exposing intelligence gathering methods might preclude their future use.[151] In certain cases the exposure of the contents of the material will not endanger state security but will reveal the manner in which the material was obtained.[152] It will be recalled that this kind of evidence could not be submitted in the same format within the framework of a criminal trial. For example, an intelligence agent's testimony cannot be given in writing; he would have to be brought as a witness and his testimony would be subject to cross-examination. A grave scenario thus emerges: Not only does the detention decision necessitate an evaluation (an extremely hazardous venture) regarding future conduct, but this assessment itself relies on an evidentiary foundation that, in most cases, cannot be refuted. In what follows I propose to examine the court's role in this regard.

c. The Role of Judicial Review with Regard to Secret Evidence

In many cases, the court's decision in relation to preventing the exposure of evidence to the detainee and his counsel may be the decisive question in determining the legality of the detention. This dictates the need to articulate the position and role of the court in this procedure.

Firstly, the judge must define the appropriate balance when examining the request for privilege and decide accordingly. Secondly, having approved the request to submit secret evidence, he must employ different methods from those used in a regular, adversary process in assessing that secret evidence.[153]

151 See ADA 6/94 Ben Yosef v. State of Israel*,* PADOR (not published) 94(2) 292, ¶3 of Justice Kedmi's judgment (1994). See also Gross, *supra* note 2, at 299; and Nun, *supra* note 22, at 170-171.

152 MApp Livni*, supra* note 9, at 735-736.

153 Legal systems the world over have historically been divided between two separate approaches to the conduct of judicial proceedings and the role of the participants (judges, attorneys, litigants). The adversarial approach views

> This reality also imposes a special obligation on the court to be particularly strict in judicial review of the detention order and dictates special caution in its examination of the evidence, while attempting to independently examine the possible lines of defense that the detainee could have raised had he been able to personally examine the evidence against him.[154]

In that framework the judge will occasionally examine ex parte the representative of the security bodies who was responsible for gathering evidence, and who presumably is familiar with the sources.[155] Furthermore, in the hope of avoiding factual errors and in order to examine the possibility of bringing criminal charges, the case law has established that a detainee must be interrogated thoroughly prior to the minister of defense deciding on the detention.[156] The interrogation

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the judge as a passive agent who leaves the examinations and submission of evidence in the hands of the litigants' (rival) attorneys. According to this approach the judge's role consists exclusively of ensuring due process and deciding the dispute based on the claims and evidence presented. This approach is generally associated with legal systems based upon the common law tradition, primarily in the United States and the United Kingdom, but also in Israel. The other approach is the inquisitorial approach, in which the judge participates actively in the examination of witnesses and in searching for evidence and relevant facts. This approach is generally associated with the states of the European continent (apart from the British Isles), chief among them being France. See Konrad Zweigert and Hein Koetz, Introduction to Comparative Law (Tony Weir trans., 3rd rev. ed.) (1998).

154 ADA Fahima*, supra* note 54, at 263, and see also ADA Federman, *supra* note 51, at 187; HCJ Anonymous*, supra* note 57, ¶9(1); and ADA Groner, *supra* note 86, ¶6.

155 ADA Federman*, supra* note 51, at 189; and Weiss, *supra* note 48, at 9.

156 HCJ Anonymous *supra* note 57, ¶f of judgment of Justice Rubinstein. See also HCJ 1546/06 Gazawi v. IDF Commander in Judea and Samaria, ¶f of judgment of Justice Rubinstein (not yet reported, 3.6.2006).

must be conducted by a security body that is also familiar with the privileged material:

> It bears mention that while the interrogation of an administrative detainee must be based on the exposed material, the person conducting it must be familiar with the privileged material. There is no reason or significance in a futile interrogation. A proper interrogation must be substantive, reliable and effective, based on a sincere effort to attain evidence in order to indict the administrative detainee in a criminal proceeding. To that end the interrogator must be equipped with the privileged material relevant to the issue.[157]

The interrogation must also be thorough and immediate:

> The person must be interrogated immediately after his detention […] Apart from creating the possibility of claiming mistaken identity, a person must not be detained without having been given the opportunity, even if he fails to utilize it, to present his own version, which can refute the grounds for the detention, and to attempt to persuade […] An investigation is not a "show," as claimed by one of the plaintiffs in the hearing; nor is its conduct dependent upon its effectiveness. It is a fundamental right of a person whose freedom is denied. Procedural rights are not luxuries; they do not impose a significant burden on the system (in order to remove all

157 HCJ 5287/06 Zaatari v. Military Prosecutor, ¶8 of judgment of Justice David Cheshin (not yet reported, 7.19.2006).

> doubt, they would have to be maintained even if they were cumbersome).[158]

The rules presented above are part of the case law, and reflect a basic approach that requires the court to attempt to mitigate the violation of the detainee's rights to due process attendant to the application of section 6(c). This attempt, however, should be examined both in terms of the court's ability and in regard to actual implementation.

In terms of ability, the question is whether the court is even capable of "serving as the detainee's advocate"[159] in the context of the disclosing of evidence. One of the court's goals in examining privileged material is to determine whether and to what extent part of the material can be disclosed to the detainee. In that framework, the court must contend with a large quantity of evidentiary material, which may, at times, comprise hundreds of documents and even entire files of documentation covering a period of many years.[160] Faced with such quantities of material, one can certainly be skeptical as to the court's ability to examine each and every document with the same probing and defiant perspective that would be taken by a defendant's defense counsel in normal proceedings, especially when the court itself does not generally place much trust in the proceedings. It is not hard to imagine that under such circumstances a judge may be more disposed to adopt the position of the state in regard to the privileged status of the evidence and its concealment from the detainee. It should be stressed that this may be pure speculation only; we have almost no cases in which evidence was exposed and which would thus allow a retrospective evaluation of the decision, but our skeptical conclusion

158 HCJ Gazawi*, supra* note 156, ¶f (3) of judgment of Justice Rubinstein.
159 In the words of Justice Grunis. See ADA Federman*, supra* note 51, at 187.
160 Weiss, *supra* note 48, at 8.

finds support in the *Federman* appeal against the special supervision order issue against him.[161] In the HCJ hearing, Federman's defense counsel requested that the state expose secret evidence. The Court requested the state to consider the possibility of exposing part of the evidence and the state agreed. The material disclosed included inter alia the documentation of the petitioner's violations of the previous restrictive orders imposed on him, material that was published on the internet and an article published in the *Maariv* newspaper. Regarding material of this kind, the question is why it was defined as secret in the first place. It is unclear what the basis was that justified the concealment of material of which the petitioner was quite naturally aware. The price paid in terms of any particular security interest by reason of its exposure is totally negligible, given that the information was not confidential. At the same time the results of its exposure were significant because it enabled the petitioner to understand the basis of the denial of his freedom. It gave him the ability, albeit partial, to confront and contest the allegations against him and improved the measure of due process, which is naturally a fundamental value of our system.

Nevertheless, before reaching firm conclusions, the example cited above should be qualified as far as it relates to the court's ability to disclose as much evidence as possible for the detainee's benefit. It should be borne in mind that in this case the court made every effort to disclose the material, and fulfilled its role in exemplary fashion. We should further recall that in that particular case, the petition was in response to proceedings before the appeals commission that operates alongside the military appeals court in Judea and Samaria,

161 HCJ 5555/05 Noam Federman v. OC Central Command, 59(2) P.D. 865 (2005).

as opposed to proceedings for confirming an administrative order by the chief justice of the district court. What then are the conclusions to be drawn from the example cited? Firstly, that the discretion of the state in its request to conceal evidence was defective at the very least (and therefore the court must examine these requests meticulously), because it appears that requests of this kind have become the norm, as though they presented no problems from the perspective of the detainee's rights. Secondly, one cannot negate the possibility that the court will find it difficult to serve as the detainee's advocate. The very fact that this was a single case in which initially privileged material was ultimately exposed raises the fear that in confirming detention orders the court is not always able to fulfill its dual role of examining the evidence from the perspective of a court while simultaneously viewing it from the perspective of the detainee. One may also wonder how the court can serve as the detainee's advocate without the possibility of obtaining the detainee's response to the evidence against him.

Having reviewed the court's ability to redress the problems created by section 6(c) in terms of the right to due process, I will now examine the manner in which the court fulfills its task of being the detainee's advocate. The main thrust of the critique in this context concerns the court's failure to distinguish between the non-disclosure of evidence to the detainee and its non-exposure of the suspicions for which he is in detention. Section 6(c) permits the non-disclosure of evidence to a detainee, but did not authorize the minister or the court to prevent the detainee from being apprised of the reason for his being placed behind bars. These two issues are closely related. A complete disclosure of the suspicions against the detainee may severely compromise the privilege of the evidence and frustrate the intelligence network. An excessively low level of abstraction in disclosing the suspicions will ensure a greater realization of the detainee's right to due process,

but will render the decision on privilege irrelevant. The question of the degree of evidentiary exposure may be located on a continuum of the degree of abstraction. The point at which there is maximum disclosure of the evidence is at one extreme, where the detainee knows exactly what the suspicions are, why he is regarded as a danger to state security, and when and where the evidence was collected. This extreme maximizes the potential of clarifying the truth. At the other extreme of the abstraction continuum is the point at which the detainee is informed that he has been detained because the very fact of his being free poses a threat to state security or public safety. At this point, there is maximum, and even absolute protection of intelligence material, but the violation of the detainee's right to due process is likewise absolute, and adopting it as the standard may in many cases prevent the discovery of fundamental factual errors, (such as a mistake in the identity of the detainee). A distinction must be made between cases in which the authority determines that for security reasons and based on assessments indicating dangerousness, the petitioner must be detained[162] (high level of abstraction) and cases in which the court is informed of the "existence of evidentiary material indicating the appellant's intention to take part in terrorist acts directed against Israeli targets, together with Palestinian terrorists in the Jenin area, and by reason of her [the appellant's] attempts to procure combat means from terrorists"[163] (a lower level of abstraction). The court does not insist on a uniform level of abstraction and there are quite a few cases in which it approaches a point that is closer to the extreme of the first example.[164]

162 For example, HCJ Zaatari, *supra* note157, ¶2 of judgment of Justice David Cheshin.

163 ADA Fahima, *supra* note 54, at 259.

164 For example, HCJ Anonymous, *supra* note 57; HCJ Braham, *supra* note 132; ADA 1/86 Anonymous v. Minister of Defense, 41(2) 505 (1986).

I have two claims in this regard. The first is that analytically, even if we accept a position that favors hermetic safeguarding of the secret standing of the evidence, it does not entail the extreme position of giving the detainee information at a level of abstraction that precludes any possibility of refuting concrete claims. The evidence can also be protected at a lower level of abstraction. My second claim is that the choice is not necessarily a binary one. The picture emerging from the relevant case law is that the court does not always relate to the difference between secret evidence and failure to inform the detainee of the claims against him. These two claims are distinct and it is incumbent upon the court to pinpoint the appropriate balancing point at which the detainee will receive maximum information regarding the suspicions against him, within the framework of the required protection for the evidentiary material, which need not be hermetic. Withdrawing the cloak of secrecy with respect to a specific suspicion does not necessarily disclose the intelligence techniques and the intelligence agents in the state's employ. The critique leveled against this approach might be that the judge lacks the requisite expertise to skillfully make the razor sharp distinction between that which prejudices the intelligence work and that which doesn't. While the critique is legitimate and cannot be altogether rejected, it is no different from claims pertaining to judicial expertise (or its lack) in other areas (such as medical negligence, or the location of the separation fence). The solution lies in striking a careful balance, after the judge has appropriately clarified for himself, by way of the representatives of the state, the implications and ramifications of the various formulae for balancing and evaluating.

Were the courts to be careful to word the detention order so that it relates to a specific suspicion it would enhance the discretionary process exercised in the ministry of defense, because it would compel the authorized official issuing the order to confront the question of

the specific danger that the detention order attempts to prevent. When the authority issuing the order is required, as part of the confirmation process, to point out a specific suspicion of a danger posed by a particular detainee, it may ensure the timely avoidance of detention orders based on a general and remote danger. Failure to rely on a high level of abstraction will prevent situations in which the general wording of the act is a cover (even in good faith) for incomplete or even defective discretion.

How is it possible to ensure full adherence to these principles and distinctions? The rule which should guide the law is that already at the confirmation stage, the authorized official should apprise the suspect of the particulars that establish the grounds of detention, unless the exposure of these particulars are liable, at a level of near certainty, to harm state security or public safety; and provided that the detainee receives details that enable him to address the suspicions against him. The adoption of a sanction as sharp as the denial of freedom without having given the detainee a real possibility of defending himself is inconceivable in a democratic state, for two reasons. Firstly, the Kafkaesque situation in which the detainee finds himself amounts to a severe violation of his human dignity. One need only remember the Dreyfus case to understand the real danger of a miscarriage of justice, in other words, the detention of a person who does not pose any danger to the public. Regarding the disclosure of evidence, it would be possible to adopt less stringent criteria (in consideration of the obligation to apprise the detainee with the details that would enable him to mount a defense). Accordingly, the court would be permitted to accept evidence that would not be disclosed to the detainee and his defense counsel only if persuaded that the disclosure of the evidence, would, with a high degree of certainty, impair state security or public safety, and that the damage caused thereby would outweigh the damage to the suspect caused by its non-disclosure.

Other states too have recognized the connection between the scope of evidential disclosure and the detainee's right to due process. In the United States it was held that the State does not discharge its obligation to guarantee due process in procedures that enable the hiding of evidence from the suspect. It was therefore held that the Federal Court should be authorized to hear the suspect's claims in the framework of a habeas corpus order,[165] by force of which it can rule whether his constitutional rights were violated.[166] In Britain it was ruled that the court should direct a minimal disclosure of evidence that would uphold the detainee's rights under section 6 of the European Convention of Human Rights, and would enable him to attempt to refute the suspicions against him.[167] English law similarly recognized that the court was in the best position to rule on the appropriate balance between the revealed and secret evidence, in order to ensure due process. Later on I will elaborate on the evidentiary rules that have been adopted in the United States and the United Kingdom.

This principle should also be applied in Israel. The court should apply a test that balances between the provision of section 6(c) and the rule that the suspect must be informed of the basis of suspicions against him. The desired balancing formula should consist of a maximal disclosure of the reason for the detention and the basis of the suspicion, to the point at which there is almost definite certainty that exposure of the suspicion will undermine the privilege imposed

165 Habeas Corpus ("Bring the Body"): An order originating in the common law states, in which the court instructs the authorities to bring a detainee to judgment in order to examine the legality of his detention (as opposed to his concrete guilt).

166 See Boumediene v. Bush, 28 S. Ct. 2229 (2008) (hereinafter: Boumediene).

167 See Secretary of State for the Home Department v. MB [2007] UKHL 46, (hereinafter: *MB*), ¶¶85-86 of the judgment of Lord Carswell. For discussion of the judgment, see Chapter Three below, section C.

on the evidence, and provided that the suspect receives the particulars without which he is unable to defend himself against the suspicions ascribed to him. This test should only be applied after the court has determined whether there are grounds for granting the state's request to privilege the evidence and has decided the scope of evidence that is to be concealed. Needless to say, any evidence that is not classified information must be disclosed to the detainee irrespective of its contribution to exposing the grounds of the detention. In the fifth chapter I will present the desirable arrangement in full.

d. Parallel Arrangements in the Penal Law and in the Evidence Ordinance

The possibility of preventing the disclosure of evidence for reasons of state security and public safety is not exclusive to the Detention Act. It also appears in section 44 of the Evidence Ordinance [New Version] 5731-1971, and section 128 of the Penal Law, 5837-1971. The question that continues to arise from time to time is whether the balances established by these provisions are instructive with respect to the balance that the court must strike in the framework of section 6(c) of the Detention Act.

Evidence Ordinance, section 44. According to the Evidence Ordinance:

> A person is not bound to give and the court shall not admit, evidence regarding which the prime minister or the minister of defense, by certificate under his hand, has expressed the opinion that its giving is likely to impair the security of the State or […] that its giving is liable to impair the foreign relations of the State unless a judge of the Supreme Court, on the petition of a party who desires the disclosure of the evidence, finds that the necessity to

> disclose it for the purpose of doing justice outweighs the interest in its non-disclosure.

Section 44 establishes a reciprocal system of division of powers between the executive and the judiciary branches in which the decision of one body poses a question to be decided upon by the other body: The minister or the prime minister decides whether certain evidence should be considered as classified information. Having given an affirmative answer, the court has the authority to determine whether the need to disclose it outweighs the interest in its non-disclosure. Having made that decision, it becomes the state attorney's role to decide whether to disclose the evidence or discard it. The balance point chosen by the court was explained by Chief Justice Barak in the *Livni* case:

> The gravity and harm attaching to the conviction of an innocent person is such that it cannot be permitted under any circumstances. As such, if the secret evidence is central, and of crucial importance to the proof of the defendant's guilt or innocence, it should be disclosed.[168]

Section 128(1) of the Penal Law 1977 determines that in proceedings under Articles 2 and 4 of Chapter G (Offenses of Treason and Espionage) the court is permitted to withhold evidence from the defendant or his counsel if the security of the state so requires, provided that the defendant is assured an effective defense. The solution provided by the section is the appointment of a special counsel, chosen by the defendant or appointed by the court, who will be able to inspect the evidence.

168 MApp Livni, *supra* note 9, at 738.

The wording of the section poses a number of interpretative questions, because it seems to indicate that the court's primary role is to ensure the protection of the defendant's right to due process, but on the other hand it is clear that permitting the defense counsel to examine evidence that is denied to the defendant impairs his ability to effectively defend himself against the accusations against him.

Obviously, this arrangement is an exceptional one in the penal law, and as such is restricted to extreme and extraordinary offenses. It should be pointed out that the prosecution has not had recourse to it. Presumably, the source of the arrangement lies in the gravity of harm occasioned by these offenses to values that society seeks to protect. Nevertheless, here too, in providing the possibility of disclosing the evidence to special counsel the law ensures the defendant a fuller and more effective defense than that provided by the Detention Act.

Is it appropriate and is it possible to adopt these arrangements in the context of administrative detention? As for section 44, the Court addressed the question for the first time when hearing the petition against the legality of another administrative act—an expulsion order.[169] The petitioner's defense counsel claimed that the *Livni* ruling should also be implemented when the state seeks to prevent the disclosure of evidence in an administrative proceeding. He argued that the sanction of expulsion may be of greater gravity than the criminal sanction of imprisonment for a specific period, and in view of the fact that the *Livni* ruling established a balancing formula based on the tendency to disclose evidence that is crucial for the detainee, this solution should be chosen a fortiori in administrative proceedings that examine the legality of an expulsion. Justice Bach

169 HCJ 497/88 Balal Shakshir v. Commander of IDF Forces in the West Bank, 43(1) P.D. 529 (1989).

rejected the gist of this argument. He agreed that section 44 was not limited to the framework of criminal trials, but held that it was not applicable to matters in the category of expulsion orders. The main reason was the recognition that the facts at the core of the expulsion order are based on evidence that cannot be disclosed due to security considerations. The application of section 44 to expulsion orders (and for our purposes, the same applies to administrative detention) would prevent its use and void the entire arrangement of any content. Justice Bach sought to prevent the paradox, whereby the graver the evidence against the candidate for expulsion, the greater the incentive for the state to waive the expulsion, in order to protect the evidence.

A few years later the question cropped up again, this time in an appeal filed by Aryeh Friedman against an administrative detention order (AAA 2/96).[170] Justice Mishael Cheshin ruled that the balance prescribed by section 44 was included in the terms "public safety" and "state security":

> In the present context, the concepts of state security and public safety embody fundamental human rights, chief among them the right to freedom and the right to due process. The balancing and weighing of the various categories of rights and balancing is naturally conducted by the court, and the appropriate criterion is the one that generally serves for the purpose of secret evidence, under the provision of section 44 (and 45) of the Evidence Ordinance [New Version], 5731-1971. In deciding the question of whether to grant the state's request for the privilege of certain evidence, the court must weigh up

170 ADA 2/96 State of Israel v. Aryeh Friedman, TAK-EL 96(1) (1996), ¶6 of judgment of Justice Mishael Cheshin.

> the interests and rights pulling in various directions, and must finally rule whether "the necessity [to disclose it] for the purpose of doing justice outweighs the interest in its non-disclosure."[171]

All the same, in the case under consideration, the judge noted that the damage to the detainee's defense and to his ability to defend himself was minimal, whereas the damage liable to be caused by the disclosure of the evidence was immense. From a perspective of twelve years it seems that this ruling has remained largely rhetorical without having any practical effect on the balancing process engaged in by the court in deciding whether to disclose evidence.

As for section 128, I think that its limitation to offenses of treason and espionage prevents its use in most of the deliberations regarding administrative detention, because the dangers that the authority normally seeks to prevent are usually offenses of terror and violence. It is important to note that at this stage the question is whether the balance under section 6(c) can be struck in accordance with the criterion of section 128. For the moment I am not examining the possibility of using the offenses of the penal law as an alternative to the administrative detention arrangement (more on this below).

In terms of the actual law, these arrangements are not applicable to hearings conducted in accordance with the Detention Act. On the other hand, in formulating the interpretation of a norm, it is both possible and desirable to resort to the balances used in these arrangements and in the subsequent court rulings. I will relate to these in the framework of my conclusions regarding the formulation of a more appropriate evidentiary arrangement in the fifth chapter below.

171 *Id.*

e. The Desirable Balance on the Question of Secret Evidence

Concealing evidence constitutes a grave violation of the detainee's right to due process and impairs his ability to defend himself effectively against the request to confirm the detention order. In our comments above we noted that its efforts notwithstanding, the court has not been particularly successful in protecting the detainee's rights and in discharging its role as a quasi "father or guardian."[172] Rather, the critical question with respect to section 6(c) has been: how should the court rule on the state's request to repress evidence.

Under section 6(c) the question is answered in accordance with the importance of the privilege for the preservation of state security. In other words the balance is a vertical one[173] between the security interest, which has the preferred status under section 6(c) and the detainee's right to due process.

In ADA 2/96 cited above, Justice Cheshin attempted to apply the balancing formula dictated by section 44 of the Evidence Ordinance, but as mentioned, his approach was not adopted in subsequent case law. Even if it achieves a better balance between various interests, it represents the desirable law and is not consistent with the language of section 6(c). The interpretation of section 44 given in the *Livni* case represents a horizontal balance between the right to due process and security interests. The law "whittles" away at the defendant's right to

172 In the words of Weiss, *supra* note 48, at 9.

173 The horizontal balancing formula refers to the process by which the judge exercises discretion in deciding between an interest of public importance and an individual legal right. The judge weighs up the probability of the harm to the public interest in the event of the individual right being upheld, and based on that assessment decides whether it is appropriate to harm the rights of the individual in order to prevent the possibility of harm to the public interest.

due process to the point at which it becomes critical for him, and from that moment on it harms the security interest. As mentioned above however, section 6(c) establishes a different balance.

As I understand it, section 6(c) strikes a balance between two conflicting interests. The first is the security interest, which is safeguarded by concealing evidence that, if exposed, could seriously harm state security. The second interest is that of the detainee's right to due process. This interest derives both from the human right to dignity and the public interest in the integrity of the judicial process. What probability threshold is necessary for purposes of safeguarding the first interest while violating the second? Israeli case law has not given a direct answer to the question, and it seems that the courts have not really achieved the balance that the question addresses. Instead the tendency has been to examine the question of whether exposing the material would create a security threat.[174] If the answer is affirmative, the request for privilege of the evidence is approved.

In my opinion, this judicial policy is mistaken and it is inconsistent with the other statutory provisions. Conceivably, it stems from the courts' overconfidence in their ability to provide the detainee with an acceptable alternative to an effective defense against the suspicions against him. But the fact that section 6(c) does not instruct the courts to conduct a probability test in the framework of the balance of interests does not obviate the need for it. This need emerges from consideration of the act as a whole, against the background of Israeli law and its fundamental principles.

The practical meaning of withholding evidence is that in most (and perhaps all) of the cases, the detention order is confirmed. What this means is that denying the detainee's right to examine the evidence

174 See e.g., ADA Anonymous*, supra* note 148, ¶5 of Justice Adiel's judgment.

effectively prevents any possibility of preventing the confirmation of the order. Considering the importance of the evidentiary issue, the balancing formula employed in regard to confirming the order—is there a near certainty that state security or public safety will be harmed if the order is not confirmed—should also be applied, mutatis mutandis, to the evidentiary question.

According to this formula, the court should confirm the state's request to prevent the disclosure of evidence when there is a near certainty that its exposure would endanger state security or public safety, and the damage liable to be caused to security is graver than the damage to the detainee. As part of the second section of the formula, the consideration should be to what extent is it a conclusive piece of evidence against the detainee, the concealment of which severely impairs the detainee's defense, versus the risk of imprisoning a person who poses no danger at all. Only following this balancing procedure is it proper for the court to order that evidence be withheld. Having done so, it must work within the framework of possibilities and difficulties discussed above in order to enable the detainee to defend himself against the suspicions upon which the order is based.

Proof of this is that this approach was adopted in similar situations that required striking a balance between a security interest and an individual's basic rights, such as the freedom of speech.[175] It is also consistent with the language of section 6(c) and the language of the act as a whole, and herein lies its advantage over the attempt to adopt the *Livni* ruling and the provisions of section 44 of the Evidence Ordinance.

175 See HCJ Schnitzer, *supra* note 69; and HCJ Kol Ha-Am, *supra* note 72.

f. Appointment of a Special Advocate to Examine the Secret Evidence

Another solution that has been suggested to lessen the harm caused to the detainee by the concealing of evidence is the appointment of a special defense counsel who can examine the secret evidence and represent the detainee's interests in respect of the subjects of which the detainee has no knowledge due to the imposition of the privilege. This kind of arrangement is not problem-free. Indeed, despite its implementation in other areas of Israeli law,[176] as well as in other states,[177] it has been extensively criticized and its ability to "rectify" the inherent defect of secret evidence has been questioned.[178]

The question of reliance on the Detention Act was raised in the appeal of Baruch Ben-Yosef.[179] His counsel requested the appointment of a special defense counsel to examine the secret evidence on his behalf. He attempted to ground this request in the language of section 128 of the Penal Law. Justice Kedmi rejected the request on procedural and substantive grounds. Firstly, the judge ruled that the law lacks a procedural basis for the appointment of a special counsel, and one cannot draw an analogy from section 128 because the penal law assesses a person's guilt, whereas here "the issue is the examination of considerations for holding a person in administrative detention, and the difference speaks for itself."[180] Secondly, he ruled that a substantive examination of the idea of incorporating a special counsel would lead to the same conclusion. Such a solution is contrary to the purpose of section 6(c) which is to ensure the compartmentalization

176 Section 128 of the Penal Law, 5737-1977.
177 See, *MB* case, *supra* note 167.
178 *Id*.
179 ADA Ben Yosef*, supra* note 151.
180 *Id*, ¶4 of judgment of Justice Kedmi.

of sensitive material, whereas the appointment of a special counsel broadens the scope of those privy to the secret and hence the fear that information will be leaked.

This approach is not doubt-free. Are there really substantive reasons against the adoption of this arrangement in the Detention Act? Section 128 of the penal law provides for the appointment of a special defense counsel to examine the evidence in order to ensure the defendant the full defense denied to him by reason of the state's decision to conceal evidence for reasons of state security. Does this difference really speak for itself, in the words of Justice Kedmi? Does the examination of guilt as opposed to the examination of future danger justify the distinction? In my understanding, the answer is negative. A special defense counsel is appointed to "remedy" the defect encountered when requesting to deny a person's freedom while hiding the evidence from him. The same defect also exists in the context of administrative detention, and the remedy should therefore be identical. The legislature would do well to adopt this arrangement in the Detention Act, and obviate this difficulty in advance.

The reasons based upon the fear of leaking of information, as well as the violation of the purpose of section 6(c) do not rest on solid ground. Justice Kedmi held that the first rule in the context of section 6(c) is that of full adherence to compartmentalization. From this he infers that the disclosure of the evidence to another person undermines the purpose of the section. This would appear to focus entirely upon one aspect of the section's purpose at the expense of the overall balance that the Detention Act seeks to attain. The purpose of section 6(c) should be consistent with the purpose of the act in its entirety, in other words to safeguard the security interests protected by the secret evidence, while attempting to provide the detainee with the opportunity for as effective a defense as possible. In that framework, the question of what damage is liable to stem from the exposure of

one more person to the secret evidence should be placed on the scale alongside the question of what benefit is gained by the detainee's right to due process and to the public interest in a proceeding based on the disclosure of the truth.

In most cases the result yielded by this balance will be to favor the detainee's rights and the interest in due process. The confidentiality of the material can still be protected after the disclosure of the material to one more person. Tools do exist for reducing the danger attendant to increasing the number of those who are party to a secret, and a tool of this nature also appears in section 8(b) of the Detention Act, which limits the right of representation in proceedings under this act to persons authorized to serve as defense counsel in courts martial.[181] It should be borne in mind that the number of administrative detentions under this act is not great, and consideration should perhaps be given to enacting regulations establishing a pool of defense attorneys who have been suitably vetted by the defense establishment to represent detainees in this limited framework. Following the confirmation of the request for the privilege of evidence, the suspect will have the right to choose a defense counsel from that pool. Recently a bill was introduced in the Knesset in the matter of Participation in Classified Proceedings regarding State Security, 5769-2008. In the memorandum of the bill, it was suggested that, as part of the public defender's office, a pool of attorneys with varying levels of security clearance would be established, to represent suspects in classified

181 This limitation also appears in section 14 of the Criminal Procedure [Consolidated Version] Law, 5742-1982, which permits the minister of defense to limit the defendant's right of representation to defense counsels authorized by courts martial. The authorization is given by a committee chaired by a Supreme Court judge, pursuant to sections 317-318 of the Military Justice Law, 5716-1955.

proceedings. The bill explicitly stresses that it is intended to apply to administrative proceedings as well, but there is no specific mention of the need for such a solution regarding the Detention Act. The bill is not intended to solve the problem of the violation of the suspect's right to due process in the process of confirming an administrative detention order, but the pool created by it may provide an appropriate solution for the practical implementation of an amendment to the Detention Act that would recognize the right to representation by a special defense counsel.[182]

The question remains, however, whether the appointment of such a pool of defense counsel is desirable and whether it would truly assist in the detainee's defense, in the prevention of factual mistakes and in promoting the fairness of the proceedings for confirming administrative detention.

While the appointment of special defense counsel may be helpful, its value is limited. A special defense counsel cannot reveal the evidence to the detainee, and this frustrates his ability to make practical, effective use of the information to which he is privy. The detainee cannot give his own input regarding the character and the quality of the evidence, and this casts doubt upon the possibility of refuting it in a fair legal process. On the other hand, the special defense counsel is certainly better positioned than the judge to serve "as the detainee's advocate," inasmuch as he reads the material and evaluates it from the perspective of the detainee's best interests. He will question the value of unconvincing evidence, and will delve into the evidence in order to discover contradictions or factual errors (to

182 This arrangement was adopted by other states and will be presented in the third chapter below which discusses comparative law. See *infra*, for example, in the Canadian Law: The Immigration and Refugee Protection Act (Bill c-27) (Statutes of Canada 2001).

the extent possible without involving the detainee in the process). He can attempt to persuade the court to permit the exposure of as much material as possible, and may ultimately succeed in making the entire proceeding that much fairer. An attorney experienced in appearing in such proceedings would be able to serve as a go-between, bridging the gap between the evidence and the detainee, and by investigating and questioning he may be able to prevent factual errors that would not be discovered within the existing framework.

Nevertheless, the arrangement permitting the appointment of a special defense counsel may exact a heavy toll. De facto, the existence of a defense counsel will not eliminate the grave shortcomings inherent to this kind of proceeding, and his contribution will not rectify the serious fundamental defects, but may at the most, and only in a limited number of cases, be of peripheral value in defending the detainee's rights. It is now widely acknowledged by all those involved, from the authorized official to the courts, that resorting to administrative detention should be as restricted as possible, inter alia because of the exceptional procedure in the framework of which it is carried out. This fact itself operates as a restraining factor in the exercise of detention authority. The real fear, however, is that the appointment of a special defense counsel will lull the parties concerned into believing that the defects have been remedied, and that the appropriate balance required in the legal proceedings confirming the detention has been restored. The result may be a lessening or the total disappearance of self-restraint, with the practical result of increased detentions (including the extension of detentions).

What conclusion should be drawn from the above discussion? It is difficult to say. One cannot predict whether and to what extent the authorized authority and the courts will be motivated by that belief and the extent to which it may harm future suspects. At the same time, in the absence of precise factual details, it is questionable how helpful

the defense counsel can be in protecting the detainee's rights. I think that an attempt should be made, even for a limited period, to have such a practice instituted, and evaluate how it works in practice.

C. Comparative Survey: Administrative Detention in the West Bank

The authority for administrative detention in the areas of Judea and Samaria is currently based on the provisions of the Administrative Detention Order (Judea and Samaria) (Temporary Provision) (Number 1226)—an order published in 1988 that has since undergone numerous amendments, (hereinafter: Order 1226). Its most recent amendment appears in the Administrative Detention Order (Temporary Provision) (Judea and Samaria) (Amendment No. 30) (Number 1555) 5765-2005. The arrangement is essentially the same as that under the Detention Act, the differences between them being primarily formal ones that relate to the identity of the agency exercising the authority.[183]

I shall now review the differences between the arrangements, after which I will discuss the most important difference between the Detention Act and Order 1226, which cannot be found in their provisions—the quantitative difference. Administrative detention in Judea and Samaria is a routine measure that is employed by the security forces in enforcing order and security in the area. Finally this arrangement will be examined in comparison with the provisions of international humanitarian law, which does not apply in Israel and which cannot influence the legality of the Detention Act. It bears emphasis that the proposed survey is exclusively for purpose of presenting a complete picture of administrative detention in Israel,

183 Regarding this see HCJ Anonymous, *supra* note 57.

and this work does not suggest any kind of alternative arrangement to the law currently applied in Judea and Samaria.

Order 1226: Principal Provisions

The many amendments to Order 1226 attest to the intention to establish a legal regime similar to the regime under the Detention, in which the executive authority is vested with the power to issue the detention order, while the court conducts a review within a few days and decides whether or not to confirm it.[184] All the same, a number of differences between the arrangements remain.

The first difference appears in section 1(a) of the Order, which confers detention authority upon the commander of the IDF forces in the region, as well as any military commander authorized by him for that purpose. In addition to the formal difference between the minister of defense, on the one hand, and the IDF commander on the other, the section also substantively extends the authority by permitting its delegation to any military commander. Presumably, this extension originates in the scope of potential threats to the security of the region or of the population, but the difference itself certainly affects the number of detention orders.

Section 3 of the detention order, which was part of the original text of Order 1226, states that the military commander may not use his power unless, "he deems it necessary for imperative security reasons."

184 There are a number of exceptions to this trend, including arrangements established during times of proliferation of security dangers, when security services sought to introduce harsher security arrangements. Regarding this, see i.e., Detention in Time of Warfare (Temporary Provision) (*Judea and Samaria*). (Number *1500*), 5762-2002. These arrangements are presented and analyzed below in Chapter Three, section C – The International Law.

This provision makes the proportionality rule directly applicable to the exercise of authority.

The judicial review exercised by force of Order 1226 has undergone extensive changes since its original version of 1988. In the past, the detainee could apply to an appeals committee, which was empowered to give a recommendation to the military commander whether to shorten or even cancel the Order. The regime was actually based on Regulations 108 and 111 of the Mandate Regulations, which applied before the enactment of the Detention Act. The guidelines for judicial review of Order 1226 are now based on the Detention Act, subject to certain differences. The proceedings for confirming the detention are conducted before a military judge (ranking major and upwards), who can confirm, shorten, or cancel the order. The detainee must be brought before the judge within eight days of the detention date, which is significantly longer than the two-day period prescribed by the Detention Act. In a time of real emergency (such as the Defensive Shield campaign – 2002) this period was extended to eighteen days but was again shortened when the security situation became relatively calmer.[185] A detainee's appeal is heard by a military court of appeal whose authority is equivalent to that of the Supreme Court under the Detention Act. Under section 5b of the Order, even when deciding to release a detainee (within the framework of a confirmation or appeal proceeding) the court is authorized to suspend his release for a period of seventy-two hours, and the appellant court is permitted to

185 See HCJ 3239/02, Marab v. IDF Commander in Judea and Samaria, 57(2) P.D. 349, (2000). It bears mention that Order No. 1500, which was the focus of the case, concerned the extension of the period of criminal detention of suspects of offenses in the Judea and Samaria regions. It was issued instead of Order 378 due to the slew of detentions at the beginning of Operation Defensive Shield.

suspend the release pending a decision on the appeal. In addition to the provisions of Order 1226, a detainee can bring a petition before the High Court of Justice challenging the legality of the exercise of authority, whether on the part of the military commander or the court. Although this does not, strictly speaking, constitute an appeal, it is a method frequently adopted by detainees under this Order. In most cases, the Court addresses each claim separately, due to the severity of the authority of administrative detention. In the words of Justice Rubinstein:

> For this reason we must also show patience in hearing these petitions which are frequently brought before us, even though in fact they are essentially a kind of application for a second appeal, and among them are also petitions that are entirely frivolous.[186]

Frequency of Administrative Detention in the West Bank

Although the detention arrangements in Israel and in Judea and Samaria are very similar, there is a huge disparity between the numbers of detentions executed under each arrangement. Since the beginning of the first intifada (December 9, 1987) thousands of Palestinians have been placed under administrative arrest for periods ranging from six months to a number of years. During that time nine Israeli citizens living in the settlements of Judea and Samaria have been administratively detained for periods of up to six months. At the end

186 See HCJ Anonymous, *supra* note 57, ¶f of the judgment of Justice Rubinstein.

of January 2010, 264 detainees[187] were under administrative arrest in the Territories. By contrast, each of those years saw only a handful of administrative arrests, if any, executed under the Detention Act. Clearly, the difference stems primarily from the fact that Order 1226 is applied in a region under belligerent occupation, and naturally there are numerous entities seeking to undermine Israeli control of the Territories and to harm the settlers. Nevertheless, the sheer quantity of detentions, over such a protracted period, provides substantial grounds for the concern that the administrative detention arrangement is used for punitive purposes too, and not just for preventative purposes. This tendency finds expression in the number of judgments given in the military courts in which complaints were made that the evidence providing grounds for the detention order was weak, creating concern that the detention was intended for punishment for membership in various organizations.[188]

The International Law

The fundamental point of departure for our purposes is that the Judea and Samaria region is subject to international humanitarian law and specifically, the laws of occupation, both of which regulate the conduct of a military force in territory that it captured.[189] International

187 The data is based on the information center of the B'Tselem organization; see www.btselem.org/Hebrew/Administrative_Detention/Statistics.asp (accessed on 2.19.2010). It bears mention that despite the large number of detainees, the last four years have seen a decrease in their numbers.

188 See e.g., A.D. 2698/06 IDF Commander for Judea and Samaria v. Barghouti (not yet reported, 8.9.2006) and ADA 1449/08 Alhiah v. Military Prosecutor (not yet reported, 3.10.2008).

189 See HCJ 7015/02 Ajuri v. IDF Commander for Judea and Samaria, 56(6) P.D. 352, 358 (2002), (translation available http://62.90.71.124/mishpat/html/en/system/index.html, and 2002 Isr L R 1).

humanitarian law seeks to establish rules for the protection of human rights under conditions of war, and thereby reduce the impact of violent disputes upon people and minimize their suffering. The laws and rules developed obligate the occupying power to protect the civilian population in the occupied area and maintain basic governmental services that protect the interests of the previous sovereign.[190] In the *Security Fence* case, the Supreme Court held that the duty of the military force was broader, and included the duty to protect the entire population in the occupied territory.[191] Where the rules of humanitarian law are silent, international human rights law fills the vacuum.[192] This establishes the difference for our purposes. Even though acts under the Detention Act are governed by international human rights law, acts carried out in accordance with Order 1226 are governed by international humanitarian law, supplemented by the international human rights law where the two do not conflict.

Further on we will survey the basic provisions of human rights law, and we will address the question of whether they allow the state to utilize administrative detentions. At this stage I will relate

190 See HCJ 393/82 Jamaiyat Iskan v. IDF Commander of Judea and Samaria, 37(4) P.D. (1983); HCJ 4764/04 Physicians for Human Rights v. IDF Commander in Gaza, 58(3) P.D. 385(2004). Translation available at: elyon1.court.gov.il/files_eng/04/640/047/a03/04047640.a03.pdf and in 2004 Isr L R at 200.

191 HCJ 7957/04 Maarabe v. Prime Minister of Israel, TAK-EL, 2005(3) 3333(2005). Translation available at: elyon1.court.gov.il/files_eng/04/570/079/a14/04079570.a14.pdf

192 See HCJ 769/02, Public Committee against Torture v. Government of Israel, in ¶18 of Chief Justice Barak's judgment (not yet reported, 12.14.2006). Translation available at: elyon1.court.gov.il/files_eng/02/690/007/a34/02007690.a34.pdf

to humanitarian law and its position regarding the legality of administrative detention in the Judea and Samaria region.[193]

The pertinent rules of international humanitarian law in this context are the Hague Regulations of 1907 and the provisions of the Fourth Geneva Convention of 1949, concerning the rights of protected persons in occupied territory. It should be noted that in contrast to The Hague Convention and the first three Geneva Conventions, which were incorporated into Israeli law as customary law, the Fourth Geneva Convention does not apply directly in Israel to the extent that it represents conventional law. On the other hand, the case law of the Supreme Court has applied it de facto by force of the undertaking of the Israeli government to implement its humanitarian provisions in the territories.[194]

Section 43 of The Hague Regulations presents the essential obligations applying to an occupying power in respect to the occupied population—the obligation to maintain public life and to see to the welfare of the local population:

> Art. 43. The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in its power to restore, and ensure, as far as possible, public life and order, while respecting the laws in force in the country unless absolutely prevented from so doing.[195]

193 For a broad survey of the implementation of international human rights law in Israel, see Ronit Pesso, *Even When the Cannons Thunder…. Human Rights in Wartime*, EZRAHUT (2006) (Hebrew).

194 See e.g., HCJ Ajur*i, supra* note 189, at 364.

195 See Hague Convention on Land Warfare (1907), and Hague Regulation 43: www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6 (accessed 6.10.2008).

The duty to protect the local population is not just a "negative right," i.e., refraining from doing harm, but also a positive duty to adopt appropriate means to protect it.[196]

Section 4 of the Geneva Convention defines the conditions for a person's identification as "a protected person" and the definition includes those who find themselves, at any time and in any manner, in a situation of being occupied by one of the parties to the dispute or by one of the occupying powers, but who are not the citizens of the disputant power or the occupying power. It should be stressed that during times of belligerence certain protections granted to citizens may be suspended, but only weighty security considerations will justify the violation of rights granted by the Convention.[197]

The Fourth Geneva Convention permits an occupying power to resort to administrative detention. Section 78 states:

> Art. 78. If the Occupying Power considers it necessary, for imperative reasons of security, to take safety measures concerning protected persons, it may, at the most, subject them to assigned residence or to internment. Decisions regarding such assigned residence or internment shall be made according to a regular procedure to be prescribed by the Occupying Power in accordance with the provisions of the present Convention. This procedure shall include the right of appeal for the parties concerned. Appeals shall be decided with the least possible delay. In the event of the decision being upheld, it shall be subject

196 See HCJ Physicians for Human Rights*, supra* note 190, at 395.

197 On this subject see HCJ 794/98 Obeid v. Minister of Defense, 55(5) P.D. 769, 774-775 (2001); and HCJ Public Committee against Torture, *supra* note 192, ¶¶23-29 of Chief Justice Barak's judgment.

> to periodical review, if possible every six months, by a competent body set up by the said Power. Protected persons made subject to assigned residence and thus required to leave their homes shall enjoy the full benefit of Article 39 of the present Convention.[198]

The section permits the occupying power to detain a protected person if it is necessary for protecting the security of the occupied territory. This provision relies on the normative framework regulating the status and rights of protected persons, under section 27 of the Convention:

> Art. 27. Protected persons are entitled, in all circumstances, to respect for their persons, their honor, their family rights, their religious convictions and practices, and their manners and customs. They shall at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity. Women shall be especially protected against any attack on their honor, in particular against rape, enforced prostitution, or any form of indecent assault. Without prejudice to the provisions relating to their state of health, age and sex, all protected persons shall be treated with the same consideration by the Party to the conflict in whose power they are, without any adverse distinction based, in particular, on race, religion or political opinion. **However, the Parties to the conflict may take such**

198 Convention (IV) Relative to the Protection of Civilian Persons in Time of War. Geneva, 12 August, 1949.

> **measures of control and security in regard to protected persons as may be necessary as a result of the war** [author's emphasis, E.G.].[199]

The measures of control and security that are permitted to the occupying power include administrative detention as specified in section 42 (concerning the detention of aliens in the sovereign territory of a party to the conflict) and as stated in section 78 with respect to the occupying power. According to the accepted interpretation, detention in occupied territory must be extremely rare because of the severe harm it causes to the local population living in those areas (as mentioned, the number of detentions in the territories is far larger than the number of detentions in sovereign Israel). Accordingly, section 78 requires "imperative reasons of security" as a condition for detention, and according to Jean S. Pictet, the reason must be a specific danger posed by the suspect:

> To justify recourse to such measures, the state must have good reason to think that the person concerned, by his activities, knowledge or qualifications, represents a real threat to its present or future security.[200]

Pictet goes on to emphasize that in any event, these measures may only be used for substantive, urgent security reasons. The exceptional nature of the detentions must be maintained.

199 *Id.*

200 Jean S. Pictet, IV Geneva Convention: Relative to the Protection of Civilian Persons in Time of War 256-259, 367-369 (1958). Significant portions of this commentary appear in the site of the Red Cross: www.icrc.org/ihl.nsf/COM/380-600085?OpenDocument (accessed 9.24.2008).

Detention must be subject to the detainee's right of appeal before a judicial body, and it must be judicially reviewed periodically, once every six months. These protections apply to the detainee by force of the convention, along with the protections normally reserved for prisoners of war. The duties imposed on the detaining power include the duty to provide the detainee with minimal sanitary conditions, health services, and religious freedom, and the duty to release the detainee when the danger posed by him has lapsed.[201] On the other hand, as opposed to the law applying to prisoners of war, there is nothing to prevent the indictment of detainees for violation of the domestic law that applies in the occupied territory.[202]

Section 78 of the Fourth Geneva Convention is therefore both the source of protection of the detainee's rights and the source of the possibility of violating those rights. The military commander can exercise his power only when there is an appropriate factual basis indicating that the freedom of movement of the suspect himself constitutes a danger to the security of the region, and that his detention will help remove that danger. Furthermore, he must act proportionately.[203]

The sanction given by the International Law to administrative detention in an area under military control does not attest to its general legitimacy in other contexts. The need for administrative detention in

201 Sections 132-134 of the Fourth Geneva Convention, *supra* note 198.

202 See Orna Ben-Naftali and Yuval Shany, International Law between War and Peace 184 (2006) (Hebrew).

203 See Ajuri, *supra* note 189, at 366-371. The rules concerning the exercise of the authority were initially intended for the additional authority under section 78 – the delineation of residential borders. Nevertheless, Chief Justice Barak notes in his judgment that they are also applicable to the manner in which authority for administrative detention is exercised (*id*. at 371).

an occupied area is a clear consequence of the fact that at the beginning of an occupation there is no normative framework for offenses against the occupier (in other words, there is no organized system of law that defines the rights and obligations of the residents under the rule of the occupying power), and the occupier does not have the normal means for enforcing the criminal law that are available to the sovereign.

D. "Only in a period in which a state of emergency exists in the State…"

Under section 1 of the Detention Act, the act comes into force only upon the existence of a state of emergency. This condition is an additional innovation of the law. It was an attempt to mitigate the draconian scope of Mandate regulations, although this attempt is universally acknowledged as having failed. The Israeli reality is one in which "a state of emergency" has prevailed since the state's inception, initially by force of the government's authority under section 9 of the Act and Administration Ordinance,[204] and, as of 1992, by force of section 38 of Basic Law: The Government.

In this section I will survey the normative framework of the Detention Act (the declaration of the existence of a state of emergency). I will present the additional ramifications of the routine under a state of emergency and question whether this reality is appropriate and necessary today. Further on, I will examine how these conclusions could influence the implementation of the Detention Act.

The manner in which a democratic state should cope with the ongoing need to protect its physical existence along with the daily confrontation with threats of terror is a subject that extends beyond

204 Law and Administration Ordinance, 5708-1948.

the scope of this work.[205] In this section we do not intend to address the substantive and important questions that originate in the need to balance human rights and security needs in different areas of law, but rather to examine the implications and ramifications of legal arrangements (specifically, the Detention Act) in the "emergency routine," i.e., the permanent situation of a state of emergency. This examination will enable us to ask whether it is justified to maintain an arrangement that permits administrative detention when the declaration of a state of emergency is a permanent state of affairs. Further on we will ask whether it is appropriate for the State of Israel to continue maintaining a routine state of emergency as the default, six decades after its establishment.

The Normative Framework

In routine situations, a state operates in accordance with rules that reflect the society's attitude toward the optimal balance between public interests and human rights, and among the various human rights. In a democratic state, the law endeavors, as far as possible, to protect a person's life, freedom, and right to self-expression. When the state is threatened, whether by war, terrorist incidents, or extreme acts of violence, or whether by natural disasters, the need may arise for the adoption of exceptional measures that reflect different balancing formulae. In times of crisis, when the very existence of the state is threatened, the need to confront these dangers justifies infringements of human rights that would not be justified in routine situations. Nevertheless, the approach adopted by Israeli law is that the war

205 On this subject see: Menachem Hofnung, Israel – Security Needs vs. The Rule of Law 1948-1991 (1991) (Hebrew); Rubinstein and Medina, *supra* note 78, at 936-977.

against terror, and recourse to means that would not be acceptable in normal circumstances, must be waged within the framework of the law, and not external to it. This means that the state's battle against the enemy and against terror is fought in accordance with rules and law.[206]

Legally, the special legal tools for confronting a state of emergency can be categorized by two main characteristics:

The first characteristic is the recognition that in a state of emergency legislative and executive powers are exercised in a different manner, perhaps even from a different perspective. This perspective confers greater weight to the need to confront the state of emergency and thus assigns diminished significance to other considerations, including those pertaining to human rights,[207] the aim being to terminate the state of emergency and to enable a return to normalcy. This means that a decision or legislative act that is not legal or constitutional during normal times may be deemed legal during a time of emergency. This characteristic directly affects the judicial review of administrative acts.[208] Presumably the range of reasonableness will broaden and the judicial review will be more restrained.

206 HCJ Public Committee against Torture*, supra* note 192, ¶61 of judgment of Chief Justice Barak: "It is when the cannons roar that we especially need the laws [...] Every struggle of the state—against terrorism or any other enemy—is conducted according to rules and law. There is always law which the state must comply with. There are no 'black holes.'" See also: HCJ 168/91 Morcos v. The Minister of Defense, 45(1) P.D. 467, 470 (1991): "Even when the cannons speak, the military commander must uphold the law. The power of society to stand against its enemies is based on its recognition that it is fighting for values that deserve protection."

207 Rubinstein and Medina, *supra* note 78, at 936-937.

208 *Id.* at 939.

The second characteristic is the conferral of legislative powers that are reserved for times of emergency. We are concerned, here, with laws that confer specific powers that the legislature would not deem appropriate to normal times due to their disproportionate infringement of individual freedoms and their extreme conflict with the substantive rule of law. The Detention Act is a prime example of this type of legislation. Another example is the government's authority to enact emergency regulations that can contradict the law.[209] The second characteristic is a result of the first one, because it is the recognition of the principle that a particular norm can be reasonable only during a state of emergency but not in peacetime that led the legislature to enact special legislation for a state of emergency.

In Israel, a state of emergency has prevailed since 1939, when the Mandate government declared a state of emergency, pursuant to section 9 of the Administration and Law Ordinance. In 1992, Basic Law: The Government was amended in an attempt to prevent the state of emergency from becoming a permanent component of the Israeli regime. It was determined that the Knesset is vested with the authority to declare a state of emergency, the duration of which shall not exceed one year.[210] The Knesset Rules of Procedure prescribed the method for declaring and extending a state of emergency:

209 Section 39 of Basic Law: The Government.
210 *Id.* §38.

Declaration of state of emergency based on Government proposal

133b. (a) Should there not have been a state of emergency in the state, and the Government has proposed to declare a state of emergency, it shall submit its proposal to the Speaker of the Knesset.

(b) The Speaker shall immediately bring the Government's request for deliberation before a joint committee of the Foreign Affairs and Defense Committee and the Constitution, Law and Justice Committee of the Knesset (hereinafter - the Joint Committee).

(c) The Joint Committee shall examine the need to declare a state of emergency, and shall present its recommendations to the Knesset.

(d) The period of the declaration's validity shall be as stated therein, but shall not exceed one year.

Repeated declaration of state of emergency

133c. (a) Should the Government request that the Knesset repeat the declaration of a state of emergency, it shall inform the Speaker thereof no later than sixty days before the end of the state of emergency.

(b) The Speaker shall bring the Government's request for deliberation before the Joint Committee.

(c) The Joint Committee shall examine the need to repeat the declaration of a state of emergency, and shall bring its recommendations before the Knesset, no later than fourteen days before the end of the state of emergency.

(d) The Joint Committee shall examine, inter alia, the Emergency Regulations promulgated by virtue of the previous declaration of the Knesset of a state of emergency, and the legislation the force of which is contingent upon the existence of the state of emergency, and shall bring its conclusions before the Knesset.

The Knesset rules comprise additional arrangements for the declaration of a state of emergency at the initiative of members of Knesset, and arrangements regulating the requirement of publication and the possibilities for annulling the declaration.[211]

The difference between a declaration made under the Law and Administration Ordinance and a declaration under the current law derives from the Knesset's duty to reexamine the state of emergency on a yearly basis. However, this duty has yet to yield any concrete evidence of a real intention to annul the state of emergency. At the end of the 1990s Justice Minister Yossi Beilin declared his intention not to renew the state of emergency, but the replacement of the government of Prime Minister Barak by that of Prime Minister Sharon halted that process. In 2004, a joint committee of the Foreign Affairs and Security Committee and the Constitution, Law and Justice Committee submitted a proposal to extend the validity of the declaration by six months only. The reason given was that "over the last six months the government has almost totally failed to promote any of the matters that it gave an undertaking to the committee to promote one year previously."[212] These undertakings concerned ending reliance on emergency legislation in civilian realms. The aim of the limited extension was to induce the government to enact laws that would replace the emergency arrangements. Despite a number of objections, the proposal was passed by a majority of twenty-one in favor and three opposed. Since then almost four years have passed and the state

211 Knesset Rules, §§133e – 133g: See Knesset site: www.knesset.gov.il/rules/heb/Template.asp?sFileNm=bchap7.1.htm (accessed on 26.2.2008).

212 Statements of MK Ehud Yatom during the presentation of the Bill to the Knesset on May 24, 2004. Knesset site: www.knesset.gov.il/plenum/heb/plenum_search.aspx (accessed 26.2.2008).

of emergency persists. This reality has been criticized by the High Court of Justice, even though a petition against the legality of the declaration of a state of emergency is still pending.[213]

The authority granted the government under the state of emergency can be divided into four central provisions.[214] The first provision appears in section 39 of Basic Law: The Government, which authorizes the government to promulgate emergency regulations. These regulations have extensive force inasmuch as section 39(c) states that they can "alter any law, temporarily suspend its effect or introduce conditions, and may also impose or increase taxes or other compulsory payments."[215] In addition, section 12 of Basic Law:

213 See HCJ 3091/99 Association for Civil Rights in Israel v. The Knesset (not yet reported, 9.25.2006).

214 The other laws that depend on the existence of a state of emergency, apart from the main ones mentioned in this chapter are:

- Emergency Regulations (Foreign Travel) (Extension of Validity) Ordinance, 1949
- Emergency Regulations (Control of Vessels), 1973
- Prevention of Infiltration (Offenses and Jurisdiction) Law, 1954
- Emergency Regulations (Registration and Mobilization of Equipment to IDF) (Extension of Validity) Law, 1987
- Ships (Transfer and Mortgage Restriction) Ordinance, 1949
- Emergency Regulations (Regulation of Legal and Administrative Matters - Further Provisions) (Extension of Validity) Law, 1969
- Emergency Land Requisition (Regulation) Law, 1949.
- Night Baking (Prohibition) Law, 1951
- Firearms Law, 1949
- Civil Wrongs (New Version) Ordinance, section 37A
- Patents and Designs Ordinance, Part Five

215 For more on the grave significance of the exercising of the authority to enact regulations for a state of emergency, see HCJ 6971/98 Joseph Paritzky Adv. v. Dan Darin, 53(1) P.D. 763 (1999). It bears noting that the regulations cannot contradict statutory provisions which expressly provide

Human Liberty and Dignity states that emergency regulations may deny or restrict rights conferred under the Basic Law, provided that the denial or restriction are for a proper purpose, for a defined period and to an extent no greater than is required.[216] The second provision appears in the Inspection (Commodities and Services) Law,[217] and it authorizes the ministers to impose far reaching restrictions on a variety of civilian services.[218] The third provision is the Detention Act, and the fourth provision appears in the form of the Prevention of Terror Ordinance, which authorizes the government to impose restrictions on the freedom of association, freedom of speech, and property rights as part of its authority to declare a group of persons as constituting a terrorist organization.

The Absence of a Statutory Definition of "State of Emergency"

The proclamation of a state of emergency has numerous ramifications, all of which have far-reaching implications for the allocation of powers among the authorities, and the ability to lawfully violate individual

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that their validity cannot be suspended by the regulations, for example, the provisions appearing in section 22 of Basic Law: The Judiciary and section 44 of Basic Law: The Knesset.

216 Regarding the violation of human dignity caused by emergency regulations: there is a contradiction between this section and section 39(d) of Basic Law: The Government, which states that "Emergency regulations may not prevent recourse to legal action, prescribe retroactive punishment or allow infringement upon human dignity." This contradiction was addressed by Rubinstein and Medina, *supra* note 78, at 952-953; Emanuel Gross, *Criminal Code in Time of Emergency*, 3 Mishpat Umimshal – Law and Government in Israel 263, 264-270 (1995) (Hebrew).

217 Commodities and Services (Supervision) Law, 5718-1958.

218 For a broader survey see Shetreet, *supra* note 15, at 188-189.

rights. Notwithstanding, the law lacks any definition that delineates the limits of the state of emergency. Presumably, this lacuna has contributed to the deadlock on the question of the legal effect of the state of emergency in Israel, and especially frustrates attempts to repeal it. Lacking knowledge of the particular circumstances that gave rise to the need to proclaim a state of emergency, it is understandably difficult to pinpoint the circumstances indicating that the need has passed.

The case law addressed this question to a limited extent in the *Paritzky* case, in which Chief Justice Barak and Justice Dorner agreed that a state of emergency is not limited solely to a war-related security crisis.

> My colleague Chief Justice Barak noted in his judgment that even though, as a rule, the situation is that of a security crisis such as war, there may also be crisis periods that are not security related, in the wake of which the Knesset is prevented from fulfilling legislative proceedings. I agree. Indeed, the Government's authority to fulfill the roles of the legislative branch is intended, first and foremost, to address grave security situations that prevent the regular functioning of the Knesset. This was also hinted at in the concluding part of section 50(a) of the Basic Law [now section 39(a)], [...] all the same conceivably there may be emergency situations that do not arise against a security background and which prevent the regular functioning of the Knesset, such as a plague, natural disaster, or mass riots that prevent access to the Knesset building. Even situations of this kind may fall into the category of "state of emergency" within the

> meaning of Basic Law: The Government.[219]

This is but a partial examination of the issue that does not make it possible to delineate a definition of the term. We now know that a state of emergency is not limited to a state of war, but no real definition is proposed. An attempt to define the term was made in Basic Law: Legislation that was tabled in the Knesset in 2000, and was rejected in the first reading. Another attempt was made in the framework of an attempt to frame a state constitution, as it appears in the draft proposal of the Israel Democracy Institute.[220]

The following definition of a state of emergency was proposed in the Draft Bill for Basic Law: Legislation:

> "State of emergency" – a situation or event that poses a threat of grave harm to state security, public order or public safety, due to one or more of the following:
> War, or military hostilities;
> Natural disaster, plague, or environmental hazard on a broad scale;
> Armed uprising, civil war, rebellion, or large scale disturbances;
> A serious crisis in the state economy, or grave disruption in the supply and provision of critical services to the public.[221]

219 HCJ Paritzky, *supra* note 215, at 817.

220 On the draft proposal for the constitution, see www.e-q-m.com/clients/Huka/huka_01.htm (accessed 4.15.2010).

221 See section 13 of Basic Law: Legislation, mentioned in the petition filed in the Supreme Court in HCJ 3091/99, the Citizen's Rights Bureau v. Government of Israel, §49 (not reported, 1999): www.acri.org.il/Story.aspx?id=81 (accessed 4.15.2010).

The proposal for a constitution drawn up by the Israel Democracy Institute suggests a narrower definition in section 185.

> "Emergency conditions" – a state of war or a serious and immediate threat to the existence of the state, its security, its constitutional regime, or the lives of the residents due to a natural disaster or health hazard.[222]

Defining the characteristics of a state of emergency is appropriate and necessary in Israel's legal and security reality. The definition proposed by the Israel Democracy Institute is a fuller one than the vague alternative in subsection 1 of the draft bill for the Basic Law ("Hostile Military Acts"), which in the Israeli reality may become a source of excessive extensions of the state of emergency. As shall be explained below, the continuous state of emergency over a period of almost sixty years is a negative, disturbing phenomenon in a state that declares its intention to protect individual freedoms. Therefore a text that more readily facilitates distinguishing between "real" states of emergency and "routine" is desirable.

"Routine of Emergency" during the State of Israel's Sixty-One Years

Life in the shadow of a permanent state of emergency is inappropriate by any standard: linguistically[223] it is an oxymoron, it also contradicts

222 Draft proposal, *supra* note 220.

223 A state of emergency is the precise opposite of normal peacetime, as defined in the Even-Shoshan dictionary: "time of calamity and dangers, tension and shortage." This is also its meaning in Talmudic sources: "the condition of the relations between Judea and Galilee is usually as in a time of emergency" (Ketuboth 18:71), describing how inhabitants gathered food

the fundamental principles of public law,[224] and above all it is grave in the substantive sense. These claims will be explained below, beginning with the substantive sense, which will best allow us to clarify the shortcomings of the current arrangement. The powers granted to the government exclusively for times of emergency cannot be at its disposal at all times. The very fact of their limitation to a state of emergency is intended to prevent their abuse in a manner that undermines the fundamental principles of a democracy, inter alia, the rule of law and the separation of powers.[225] The fact that the government has permanent authorization to promulgate regulations that can contradict the legislative acts of the legislature attests to a severe governmental failure. It places the executive above the legislature, in contravention of the fundamental nature of a parliamentary regime in which the elected representatives of the people, whose will finds expression in the legislature, stand above the executive, which is bound by the laws enacted by the legislature.[226]

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for emergencies. The context is a Talmudic debate regarding the validity of a landlord's protest against adverse possession of land during a time of war, when the possessor lives in one province (i.e., Judea) and the landlord in another (i.e., Galilee). The question is whether a landlord's protest against such possession would reach the possessor during a time of war, when there is no communication between the provinces.

224 See the petition of the Association for Civil Rights in Israel, HCJ 3091/99 Association for Civil Rights v. Israeli Government, *supra* note 221.

225 See Chana Avnor, *Legislative Policy for State of Emergency,* 23 Hapraklit 528-529 (1967) (Hebrew).

226 See Rubinstein and Medina, *supra* note 78, at 941-942. In addition to the authorities validated pursuant to the declaration of a state of emergency, the Government also has draconian powers by force of the Defense (State of Emergency) Regulations, 1945. These regulations are not contingent upon a declaration of state of emergency. On the contents and significance of this arrangement, see Tzur, *supra* note 31.

The conferral of the authority to enact emergency regulations and implement statutory provisions for a state of emergency is intended to further specific, important objectives—objectives that are considered important enough to justify the "high price" that society is prepared to pay for their realization, including the possible violation of individual rights, and a deviation from fundamental principles of a functioning democratic regime. Using these powers when in reality there is no state of emergency, or to promote extraneous objectives even during an emergency, means the "price" is paid in vain, because no purpose is served by its payment. Regarding our specific context of interest: In passing the Detention Act, the Knesset decided that during a state of emergency it would be appropriate to grant the authorized official (the minister of defense) the power to detain a person for an unlimited period, and without trial. The basic assumption was that Israeli society was prepared to accept an acute violation of the detainee's rights at a time when a state of emergency threatened the existence of the state and its social order. In other words, during an emergency, society is willing to pay the price (violation of the suspect's rights) as consideration for realizing a more important goal (prevention of severe security threats). When the government is permanently authorized to exercise a power that was supposed to be granted to it for a restricted period, it distorts the relationship between the price and the objective. Concededly, Israeli governments have generally been cautious and have avoided making extensive use of their emergency powers, but this does not make it right.[227] The protection of human rights should not be dependent upon the good will of any particular government. The existence of a permanent state of emergency disrupts the governmental balance and is undesirable.

227 See Shetreet, *supra* note 15, at 194.

It is clear that when the government exercises its emergency authority in order to introduce arrangements that are unrelated to the state of emergency, it makes a bad situation worse.[228] Thus, for example, emergency regulations were used to compel Broadcasting Authority employees to go back to work when they called a strike that prevented election campaign broadcasts.[229]

Along with these explanations the permanent state of emergency also has another shortcoming: when emergency legislation is valid de facto even in the absence of a real state of emergency (such as war, natural disaster, etc.), it effectively becomes regular legislation. As such, during a time of real emergency, the arrangements originally intended for a state of emergency are neglected in favor of far more restrictive arrangements that are largely the product of discretion exercised during times of panic.[230]

For example, during the **First Lebanon War** (1982) emergency regulations were enacted, the Emergency Regulations (Detention in Time of Special Emergency) 1982, which abrogated the Detention Act. The arrangement they prescribed was far stricter because it effectively abrogated judicial review and conferred powers of detention upon officers of the rank of brigadier-general.[231] In the First Intifada **(**1988), the Administrative Detention Order (Temporary Provision) (Judea and Samaria) (No. 1226), 1988, under which the review of administrative detention assigned to an Appeals Committee that was empowered only to make a recommendation to the military commander to release

228 Petition of the Citizen's Rights Association, *supra* note 221.

229 HCJ 372/84 Klopfer-Naveh v. Minister of Education and Culture, 38(3) P.D. 223 (1984).

230 See Hofnung, *supra* note 205, at 61. For an extensive explanation of the phenomenon referred to as "Patchwork Emergency Legislation," see Margit Cohen, 29 Mishpatim 623 (1999) (Hebrew).

231 See Shetreet, *supra* note 15, at 191; Gross, *supra* note 216, at 269-270.

a detainee or to shorten the detention period (similar to the Mandate Regulations).[232] This arrangement was abrogated in 1999,[233] at which time Amendment 13 to the Order determined that a detainee was entitled to appeal before a judge, and required periodic examination, similar to that of the Detention Act. In the Second Intifada (2001), the Order for Arrest in Times of Warfare (Temporary Provision) (Judea and Samaria) (No. 1500) 2002 was enacted. The order provided that any officer had the authority to place a person under arrest for eighteen days. Furthermore, during the period of his arrest, a person would be granted the right to a hearing only after eight days, and his right to consult with an attorney would be suspended. The order was to be in force for two months, at the end of which a new order (No. 1505) was promulgated, which extended the arrangement, along with additional changes, including shortening the duration of arrest to twelve days and restricting the suspension of the right to counsel to four days from the date of the arrest. The legality of the arrest orders was challenged before the Supreme Court[234] The petition was granted in part, and the Court ordered that a suspect be brought before a judge at an earlier date (given that the period of twelve days was illegal), and that he be granted a hearing at an earlier date. In 2003, following a relative lull in hostilities, and with the conclusion of Operation Defensive Shield, the orders were not extended. [235]

232 Section 5 of the Administrative Detention Order (Temporary Order) (Judea and Samaria) (Number 1226) 5748-1988.

233 Administrative Detention Order (Temporary Order) (Amendment No. 13) (Judea and Samaria) (Number 1466) 5759-1999.

234 See HCJ Marab, *supra* note 185.

235 Even during the Gulf War (1991) regulations were promulgated that related to a "special" state of emergency, for example, Emergency Regulations (Special Situation in Civil Defense), 1991 and the Court and Execution Office Regulations (Procedures in Special State of Emergency) 1991.

In accordance with the "routine" state of emergency in Israel, the arrangements originally intended for a state of emergency have become the accepted norm. The result is that in cases of genuine emergency exceptionally draconian arrangements are adopted that abrogate the original emergency arrangements. This situation is both undesirable and intolerable. A law enacted for a time of emergency should be implemented exclusively in times of emergency. It might be argued that times of emergency may vary in their severity, and thus arrangements based on different balancing formulae may be justified. But, while this may well be true, every effort should still be made to ensure that the substantive arrangements for periods of emergency be determined in advance, and not under the psychological stress engendered by the state of emergency. In my opinion, even the security events referred to above did not warrant the inadequacy of the existing emergency arrangements and the creation of a special arrangement.

While it is the Knesset that declares the state of emergency, it is in essence an administrative act and not a legislative act.[236] As such it must comply with the rules of administrative law. In a petition by the Association for Civil Rights in Israel against the continuation of the state of emergency,[237] it was argued that the declaration was illegal on a number of grounds, including unreasonableness, extraneous purposes and lack of factual foundation. Arguably, reasonableness diminishes the longer the declaration is maintained, and to the extent that it is not adjusted to the present reality and the substantive nature of the "state of emergency" (I will focus on this subject toward the end of this chapter). However, the argument of extraneous purposes

236 Petition of Association for Civil Rights*, supra* note 221, at 8.
237 HCJ Association for Civil Rights*, supra* note 213.

would appear to be firmly based. The state's response to the petition, the hearing itself, and the Knesset debates that preceded the vote on the extension of the declaration[238] indicate that the continuation of the declaration relies largely on the fear of waiving many other laws that rely on the continuation of the state of emergency, and that are widely used for security, economic and social purposes.[239] Maintaining a state of emergency for such purposes would definitely be considered an extraneous purpose.

The existence of a state of emergency has severe repercussions on the Israeli political regime, on the regulation of powers between governmental authorities, and on the ability to protect human rights in the state. The government is acting to replace the emergency legislation, but it is a slow process. Presumably, termination of the state of emergency would provide an incentive for the responsible authorities to expedite the completion of the legislative procedures, which is both desirable and efficient. For example, State of Emergency Powers for Searches (Temporary Provision), 5729-1969, was replaced by an act that was not intended for a state of emergency (Protection of Public Safety [Searches] Law, 5765-2005). The fact that old laws remain valid by virtue of the "preservation of laws" provision should not justify their retention. New laws that are made subject to the Basic Law will be worded in a manner that renders their purpose appropriate and presents a more proportionate arrangement. In any case, the reliance on this explanation for the purpose of maintaining the state of emergency is not legal.

238 D.K. of May 24, 2004: www.knesset.gov.il/plenum/heb/plenum_search.aspx (accessed 2.29.2008).

239 For example, see Emergency Land Requisition Law, 5710-1949, and Youth Labor Law, 5713-1953.

Declaration of a State of Emergency in International Law

International law acknowledges that a state may infringe human rights to a certain extent during a state of emergency (Derogation Clause), but only when necessary for the protection of state security. In what follows, I will review the definitions that relate to circumstances under which a state may declare a state of emergency, and I will examine their suitability to the security situation in the State of Israel.

International Covenant on Civil and Political Rights

The principle convention for the definition of human rights and their protection[240] was first promulgated in 1966, and to date has been signed by 161 states, including Israel. This convention establishes and defines the primary human rights (including the right to liberty, the right to a fair trial, and the right to dignity), and together with Article 4 the Covenant, establishes the criteria for the existence of a state of emergency during which a state is permitted to deviate from its undertakings under the Convention, subject to the limitations established in the Covenant:

> **Article 4**
> 1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided

240 International Covenant on Political and Civil Rights 21, 31, 269 (opened for signing in 1966). See: www.unhchr.ch/html/menu3/b/a_ccpr.htm (accessed on 2.29.2008).

> that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the grounds of race, color, sex, language, religion or social origin.
> […]
> 3. Any State Party to the present Covenant availing itself of the right of derogation shall immediately inform the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date on which it terminates such derogation.[241]

The article relates to situations that threaten the life and existence of a nation, and it allows the adoption of harmful measures to the extent that they enable immediate assistance in confronting the circumstances of the danger. In addition, the section also qualifies the means permitted to those that do not violate the state's other obligations under international law, and which will not involve discrimination for reasons of race, color, sex, language, religion or social origin. The Covenant also prohibits the derogation of certain enumerated nuclear rights—the right to life, the prohibition on torture, the right to freedom of religion, and other rights enumerated in the Covenant. According to the procedure outlined in the Covenant, a state must immediately inform the Secretary General of the United Nations of the existence of a state of emergency, and must specify the rights infringed as a result thereof.

241 *Id.*

The definition is not sufficiently specific and fails to address the question of the duration of the state of emergency. The interpretation given to it highlights a number of principles that restrict the state's ability to derogate from certain basic rights. In General Comment 29 of 2001, the United Nations Human Rights Committee (operating by virtue of the Covenant) stated that the state of emergency must be of a temporary and exceptional nature.[242] A more detailed commentary was suggested by the Economic and Social Council of the United Nations (the Siracusa Principles),[243] according to which a "threat to the life of the nation" must satisfy two cumulative conditions: (a) that the threat affects the whole of the population and either the whole or part of the territory of the State, and (b) that the situation threatens the physical integrity of the population, the political independence or the territorial integrity of the State, or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the Covenant.

As opposed to the general thrust of these commentaries, it would appear from the cases brought before the European Court of Human Rights and the British House of Lords that where a state of emergency was declared in order to confront acts of terrorism against the State, the courts tended to allow the states a large margin of flexibility in

242 Human Rights Committee, General Comment 29, States of Emergency (article 4),) UN Doc. CCPR/C/21/Rev.1/Add.11 (2001)).

243 The Siracusa principles are the interpretative principles for international law and the Covenant on Civil and Political Rights that were formulated by senior jurists in a convention that was conducted in Siracusa, Italy. These principles have no binding status in international law, but their prestige confers tremendous weight to their interpretation. See *The Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights* 7 HRQ 3 (1985); and see also United Nations, Economic and Social Council, UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, Siracusa Principles on the Limitation and Derogation of Provisions in the International Covenant on Civil and Political Rights, Annex, UN Doc E/CN.4/1984/4 (1984).

determining the conditions justifying a declaration of a state of emergency. The *Lawless* case (1961)[244] concerned the acts of Gerald Lawless who had been active in the Irish underground.[245] He was arrested on July 11, 1957, pursuant to an order issued by the Irish minister of justice under the Offences Against the State Act 1940, and was held in detention until December 1957. Lawless filed suit in the European Court of Human Rights in order to receive compensation for his period of illegal detention, claiming that the detention was in violation of Ireland's obligations under the European Convention on Human Rights (Articles 5 – 7: the right to liberty and security of person, the right to fair hearing, and the prohibition upon retrospective legislation). The judicial hearing itself focused on a reservation filed by Ireland under Article 15 of the Convention (parallel to Article 4 of the International Covenant on Civil and Political Rights (ICCPR)) claiming the existence of a state of emergency. The Court dismissed the suit, ruling that the conditions of Article 15 permitting a declaration of a state of emergency had been fulfilled, and that the acts of detention executed by the Irish Government were commensurate with the degree of urgency dictated by the state of emergency. The *Brannigan and McBride* case (1993)[246] was decided in a similar manner. That case focused on the arrest of two Irish citizens by the British Police in their home in January 1989, pursuant to Prevention of Terrorism Act [Temporary Provisions] 1984. Brannigan was arrested for six days and fourteen hours and McBride was arrested for four days and six hours. Brannigan and McBride claimed before the European Court that Britain had violated its obligations under Article 5 of the Convention

244 Lawless v. Ireland (1961) 332/576 ECHR.

245 IRA or under its full name "Irish Republican Army" The Irish underground operated to liberate Northern Ireland from British rule and disarmed in 2005 when the peace agreements were signed with the British Isles.

246 Brannigan and McBride v. UK (1993) 14553/89 ECHR, ¶12, 47.

(the right to freedom and security). As in *Lawless*, the Court ruled that Britain's deviation from its obligations was in accordance with Article 15 of the Convention. The Court ruled that Britain had not deviated from the legitimate discretionary margin that was granted to it under this Article, but its rationale relied largely upon the short duration of the detention, a restriction which does not exist in Israeli legislation. In 2004, the British House of Lords heard the case of *A and Others*[247] that related to detainees who were held in detention for two years pursuant to the Anti-Terrorism Crime and Security Act 2001. Even though the House of Lords ultimately ruled that the act was unconstitutional by reason of being disproportionate and superfluous (see discussion in Chapter Three, section C below), it endorsed the broad definition of a state of emergency, which indeed had been the policy of the British government since the September 11 attacks. Under this definition, a state of emergency is a state in which an armed body threatens the integrity of the state and causes a loss of human life.

When Israel ratified the Covenant, it submitted notice of derogation, as required, regarding section 9 (which prohibits arbitrary arrest and detention) on the grounds that Israel is under a state of emergency. In its notice, Israel stated, inter alia, that since the establishment of the State it has been a target for unceasing attacks and threats against its very existence and against the lives and property of its citizens.[248] The Council for Human Rights rejected these claims, ruling that Israel should reconsider the need for renewing the declaration of a state of emergency in order to reduce the extent of the derogation of human rights in Israel.[249]

247 A (FC) and Others (FC) v. Secretary State for the Home Department, [2004] UKHL 56 (hereinafter: the *A* case).

248 31 Kitvei Amana (Israel Treaty Series), 1040.

249 Concluding Observations of the Human Rights Committee: Israel, 21.08.2003, ¶12.

The American and European Conventions comprise similar arrangements regarding human rights: Section 27 of the American Convention on Human Rights[250] states with respect to the suspension of commitments, that in time of war, public danger, or other emergency that threatens the independence or security of a state party, the state parties may take measures derogating from rights. This section contains a long list of rights that are inviolable under any circumstances. Article 15 of the European Convention for Protection of Human Rights[251] likewise determines a rather unclear definition that relates to situations of war or public emergency that threaten the life of the nation.

The Paris Minimum Standards of Human Rights Norms in a State of Emergency[252] addresses the nature and duration of the state of emergency, and gives the following definition of a state of emergency:

> An exceptional situation of crisis or public danger, actual or imminent, which affects the whole population or the whole population of the area to which the declaration applies and constitutes a threat to the life of the community of which the state is composed.[253]

250 American Convention on Human Rights, O.A.S. Treaty Series No. 36, 1144 U.N.T.S. 123 (came into force July 18, 1978). www1.umn.edu/humanrts/oasinstr/zoas3con.htm (accessed 2.29.2008)

251 European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocol No. 11 Rome, 4.XI.1950: http://conventions.coe.int/Treaty/en/Treaties/Html/005.htm (accessed 2.29.2008) (hereinafter: European Convention on Human Rights).

252 *The Paris Minimum Standards of Human Rights Norms in a State of Emergency* 79 American Journal of International Law 1072 (1985); see also Gross, *supra* note 2, at 303-304.

253 *Id.*

Further on, it contains basic guidelines regarding the possibility of extending the state of emergency. It stipulates that the declaration of the state of emergency cannot be continued for a period exceeding the minimum period required in order to restore the original situation. A decision to extend the state of emergency must be declared prior to the expiry of the previous state of emergency. Such a declaration must be made by the legislature.

Therefore, the arrangement extending a state of emergency in Basic Law: The Government is consistent with the legal principles of the international law. Nevertheless, Israel has maintained a state of emergency for dozens of years, contrary to the fundamental conditions determined by the Human Rights Council that a state of emergency be temporary and exceptional.

Is it Preferable to Avoid the Renewal of the Proclamation of a State of Emergency in Israel?

In this chapter we discussed the severe ramifications of a protracted state of emergency in a democratic state. We saw how the existence of the state of emergency distorts the appropriate relationship among the branches of government and enables grave and protracted harm to the rule of law in the substantive sense, primarily in terms of the ability to protect human rights. All the same, undeniably, the State of Israel is in an exceptional security situation.[254] The need to confront continuous threats and attempts of harm over a period of six decades is almost without parallel among the other states of the world. This begs the question of whether the perpetual proclamation of a state of emergency in Israel is simply the product of necessity and a price that must be paid to guarantee the existence and security of the state.

254 HCJ 3091/99, Association for Civil Rights in Israel v. The Knesset, *supra* note 213, ¶f of Justice Rubinstein's judgment.

My answer to this question is negative. In past Knesset deliberations concerning the extension of the proclamation and even today, it has been argued that the security reality of the State of Israel forces it to struggle, and that struggle requires that the state authorities be granted the tools that are designated for emergency situations.[255] I take issue with the second part of this contention.

The State of Israel faces many enemies. Its struggle is an existential one that has continued at varying levels of intensity day after day, year after year, since the establishment of the state. It is indisputable that the state authorities in general, and specifically the security authorities, must be granted the optimal tools that the law can allow for purposes of that struggle. However, these circumstances are and will apparently continue to provide the background for the continued struggle in the coming years as a matter of routine. Confronting that reality, we cannot accept a situation in which emergency laws are adopted as the norm and in the framework of which the government can enact regulations that supersede (almost) every other legal provision.

The war against terror can be waged without proclaiming a state of emergency. Over the years of its existence, Israel has defended itself against a variety of enemies and at varying levels of intensity. States of emergency should be restricted to situations in which the need for statutory arrangements necessitating a state of emergency exceeds the harm caused by those laws to the normal social fabric and to the rule of law. For example, during a state of war or when facing a massive wave of terrorism it is both possible and appropriate to confer upon the executive the authority to detain people who jeopardize state security, similar to the power conferred today. On the

255 See D.K. May 24, 2004, *supra* note 238; statements of MK Ehud Yatom, at 66; statements of MK Ayoob Kara, at 73; statements of MK Nissim Zeev, at 77.

other hand, during times of relative calm, in which the threat level is lower, such authority should not be granted.

The question that arises is how the security forces will act once deprived of the tools intended for states of emergency. In the Israeli reality, even such periods of relative calm are not what most Western states would define as peacetime. In my opinion, the ability to confront dangers would be somewhat lessened in such a situation, but this could be compensated for in the framework of regular legislation. The legislature would have an incentive to enact laws with a similar purpose, but that would not be dependent upon the existence of a state of emergency. These laws would be subject to the review of the Supreme Court, and would comprise more moderate arrangements. A more relaxed atmosphere should be reflected in legal arrangements that attribute greater importance to human rights when compared to a state of emergency. Therefore, a law serving the same purposes as the Detention Act (i.e., preventing danger to state security or public safety) would adopt a more gentle approach toward suspects, such as employing surveillance or moderate restrictions on freedom of movement under particular circumstances.[256]

Along with a restriction upon the length of emergency periods, the areas subject to the state of emergency should also be restricted. There is no justification for implementing measures designated for states of emergency in areas in which the daily routine is unaffected. A territorially limited proclamation also accords with the accepted definitions and norms of international law, discussed above. [257]

In addition to these advantages, the distinction between peacetime legislation and emergency legislation enhances the certainty of the

256 For an extensive discussion of the alternative measures, see Chapter Four below.

257 Section 1(b) of *The Paris Minimum Standards of Human Rights Norms in a State of Emergency, supra* note 252.

law during real times of emergency. Thus, during times of war the state will be able to resort to laws established by the Knesset, and will not be forced to resort to regulations enacted by the executive without appropriate procedures for due consideration and examination of the suitability of the means to the objective, as demonstrated above, and as has been the reality in all of the wars and periods of belligerency in the State of Israel during the past few decades.

We end this chapter with one last comment regarding the power to declare a state of emergency, which should properly be in the Knesset's domain. Our discussion thus far indicates the need to terminate the situation in which a state of emergency constitutes a permanent state of affairs that is renewed from time to time. However, we do not have any clear criterion for distinguishing between a state of emergency and normal peacetime. In my opinion, this problem highlights the need for a clear definition of a state of emergency in a Basic Law, and ultimately, in the constitution. Such a definition would provide a framework for the Knesset deliberations, and along with a shortening of the duration of the declaration to half a year,[258] would contribute to the quality of the Knesset deliberations on the declaration of a state of emergency. Furthermore, legislation should be enacted to establish a structured process of evaluation and debate prior to deciding upon the extension of a state of emergency. Such an evaluation should be conducted in consultation with the security services and outside experts, to provide an up-to-date evaluation of the security situation, the current state of readiness, and expected short-term threats. The assumption is that this kind of process, conducted on an appropriate factual basis, would assist in the making of intelligent decisions.

258 Draft proposal for constitution, Israel Democracy Institute, *supra* note 220, §187.

Chapter Three

International Law and Comparative Law

A. The International Law

The following discussion will focus on the position of international law regarding preventative arrest and the extent to which such arrests infringe upon human rights. It will also continue our discussion of the definition of a state of emergency. The starting point of the international conventions on this subject is one that combines permission to infringe certain human rights during a state of emergency with the entrenchment of certain fundamental rights that the state must not violate under any condition.

My aim here is to examine whether or not international law acknowledges the legality of administrative detention in certain circumstances, and if so, to clarify whether the Detention Act fulfills the required criteria.

The International Covenant on Civil and Political Rights

Article 9 of the International Covenant on Civil and Political Rights establishes specific conditions for restricting the right to liberty by means of arrest, and for guaranteeing the basic rights of every detainee:

1. Everyone has the right to liberty and security of person. **No one shall be subjected to arbitrary arrest or detention**. No one shall be deprived of his

liberty except on such grounds and in accordance with such procedure as are established by law.

2. Anyone who is arrested **shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him.**
3. Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and, should occasion arise, for execution of the judgment.
4. **Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court**, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation [author's emphasis, E.G.].[259]

The Covenant guarantees that the right to personal freedom may be restricted only to a degree that maintains its status as a basic right. The Covenant prohibits arbitrary arrest and arrest in which the detainee is not informed of the circumstances of his arrest and of the charges against him. It secures judicial review of the lawfulness of the arrest

259 The International Covenant on Civil and Political Rights, *supra* note 40.

warrant (writ of habeas corpus), and awards damages to a person who is subjected to unlawful arrest.

Does this mean that administrative detention is illegal? It would not appear that the section absolutely proscribes detention for preventative purposes, although it limits it to an extent that would seem incompatible with the Israeli Detention Act and the manner of its implementation. Administrative detention in Israel is not arbitrary. It is anchored in law, but section 6 of the act enables the court to refrain from apprising a detainee of the nature of the evidence underlying the detention. This is routinely translated into withholding even the basic grounds of the detention from the detainee and his attorney. Furthermore, in Israel there is no assurance that the detainee will either be indicted or released within a reasonable period of time (because the detainee is not awaiting trial), and there is no mechanism for ensuring compensation in the event of unlawful detention. This view however is not endorsed by Prof. Shimon Shetreet, who argues that section 6 does comply with the threshold conditions, apart from the need to establish a compensation mechanism.[260] For the reasons noted above, this approach is imprecise in view of the manner in which the norm is actually implemented at present. It must also be remembered that Shetreet presented his approach at the beginning of the eighties, when the implementation of the act in general and section 6 in particular were still in their early stages.

Over the years, UN human rights bodies have stressed that to the extent that the section can be construed as permitting preventative detention, it should be reserved exclusively for exceptional, extreme situations, viz., states of emergency.[261] Furthermore, in the Human

260 Shetreet, *supra* note 15, at 207-208.

261 See e.g., Concluding Observations of the Human Rights Committee: Ukraine, 11.12.2001 CCPR/CO/73/UKR.

Rights Committee's most recent report to the UN General Assembly, a very detailed interpretation was given to the right to due process of a person held under arrest.[262] The committee determined that a person's right to receive information in a language that he understands regarding the proceedings against him is part of the duty to apprise him of the legal nature of the suspicions (i.e., which section of the Criminal Law he violated), and of the facts grounding his arrest.[263] The wording of Article 9 indicates that it is an arrangement intended to protect the rights of a person under regular arrest, but it is clear that a similar arrangement, based primarily on the right to due process, should also apply to an administrative detainee. There is much sense in the approach adopted by the British House of Lords according to which the nature of the arrangements intended to ensure the right to due process should correlate to the severity of the sanction in question. From this perspective, protracted detention would require a level of due process approaching, although not identical to, that required in criminal proceedings.

Regarding Israel, and without reference to the question of the legality of the declaration of a state of emergency discussed above, the Committee expressed its concern regarding the extensive use made in Israel of administrative detention in the areas held under belligerent occupation, and noted the serious infringement of the detainee's right to due process:

> As to measures derogating from article 9 itself, *the Committee is concerned about the frequent use of*

262 Report of the Human Rights Committee, 9th Session Supplement No. 40(A/62/40):http://daccessdds.un.org/doc/UNDOC/GEN/G07/443/06/PDF/G0744306.pdf?OpenElement (accessed 3.9.2008).

263 *Id.* at 195.

> *various forms of administrative detention, particularly for Palestinians from the Occupied Territories, entailing restrictions on access to counsel and to the disclose of full reasons of the detention*.
> These features limit the effectiveness of judicial review, thus endangering the protection against torture and other inhuman treatment prohibited under article 7 and derogating from article 9.[264]

To sum up, even though Israeli law prevents arbitrary detention and ensures judicial review as an integral part of the detention order,[265] its actual implementation contravenes the provisions of the International Covenant on Civil and Political Rights, and is not legal under international law. It must be remembered that in its ratification of the Covenant, Israel submitted a reservation regarding Article 9.[266] The Human Rights Committee held that even had it been possible to accept the Israeli declaration regarding the existence of a state of emergency, Israel's reliance on that reservation cannot justify the manner in which administrative arrests are carried out in Israel and in the Occupied Territories.

264 Concluding Observations of the Human Rights Committee: Israel, 21.8.2003, CCPR/CO/78/ISR. www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.CO.78.ISR.En?OpenDocument (accessed 3.9.2008).

265 The Human Rights Committee viewed the requirement in section 9 for judicial review to examine the legality of the detention order as an essential element in guaranteeing the right to due process and in the prevention of arbitrary detention, and as such it cannot be deviated from, even during a state of emergency. See General Comment No. 29: States of Emergency (art. 4) 8.31.2008.

266 The notification dated October 3, 1991 was appended to the ratifying notification submitted by Israel.

B. The Struggle against International Terrorism in Domestic Law

Since its establishment, the security reality of the State of Israel has compelled it to confront the problem of balancing the right to security and life of every resident, and the security interest of the populace as a whole, against the rights of the individual and the permissible degree of their violation. Over the years, the balancing discourse has undergone considerable changes. The general trend is toward attaching increased weight to individual rights while diminishing the weight attributed to the sanctity of security needs.[267] Apparently, the passage of time has sharpened the human-rights dialogue in Israel, too, and its relationship to the security discourse.[268]

Most of the Western states do not operate in such a reality. No other Western state is plagued by such palpable existential fears; no other Western state has been compelled to confront terror on a daily basis for almost one hundred years (if one includes the struggle of the Jewish community in Palestine during the pre-State years). Until 2001, the experience of most Western states with the threat of terror (during which the legal issues all surface) was limited both in duration and in scope. The consequences of this reality ranged from persistent, if not always successful efforts to provide a legislative response to the security threat, to unbridled ad hoc reactions meant to provide a security response (for example, the mass internment of Japanese Americans following the attack on Pearl Harbor, based on the fear

267 See Elyakim Rubinstein, *On Security and Human Rights While Fighting Terrorism* 16 Idf L. Rev. 765 (2003) (Hebrew).

268 See Dorit Beinisch, *The Rule of Law in Times of Armed Conflict*, 18 Idf L. Rev. 21-27 (2004) (Hebrew).

that they posed a potential threat of sabotage or espionage against the United States).

The twenty-first century ushered in a new reality. The terrorist acts of September 11, 2001, and the policy of the American administration that became known as the "War on Terror,"[269] were the opening shots of two wars, thousands of arrests, substantial legislation, and a large number of legal decisions treating the balance between civil rights and the security interests of states seeking to protect their sovereignty and their citizens. There is a profound dispute surrounding the legality and wisdom of the measures adopted by governments the world over, led by the American administration, but there can be no doubt that the international discourse concerning the measures that states may and must adopt to confront the scourge of terror has taken a different turn since that day in September. However, it must be noted that the rights discourse was also influenced by other legal and regional factors,

269 On September 18, 2001 the President of the United States confirmed the decision of the Congress of September 14, 2001 that authorized him to use military force against those responsible for the September 11th attack. See: Authorization for Use of Military Force against Terrorists, 115 Stat. 224 and 225 (hereinafter: AUMF). The decision merited broad approval of the members of Congress, having been supported by an overwhelming majority in both the Senate and the House of Representatives. In section 2(a) it granted the President the authority:

> To use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons.

See: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_public_laws&docid=f:publ040.107 (accessed 3.9.2008).

among them the adoption of the Human Rights Act[270] in the United Kingdom (enacted in 1998 and coming into force in 2000), which subjected the legislation of the Commonwealth to constitutional review under the European Convention on Human Rights.[271]

In what follows, I shall survey the approaches of the United States and the United Kingdom to different versions of administrative arrests in their own territories, and to comparable arrangements in other states. I will first present a general survey of the legislative arrangements that directly or indirectly confer power to the administrative authority to perform administrative arrests, after which I will focus on the specific issues that are germane in the context of this study. In doing so, I will avail myself of decisions handed down in the states concerned, in order to draw conclusions as to the appropriate law for the State of Israel.

C. The United Kingdom

The need for preventative detention arose in two periods in British history in the context of two struggles. First and foremost, we find interest in the laws that were enacted for the purpose of battling against Irish terrorist organizations, the modern version of which began in the 1960s and came to an end in 2005, when the Irish

270 Human Rights Act 1998 (c.42). The Law has been valid in Scotland since 1998, and in other parts of Britain since September 2, 2000: www.opsi.gov.uk/acts/acts1998/ukpga_19980042_en_1 (accessed 3.9.2008).

271 Officially, the law does not authorize the court to invalidate laws, but rather to rule that a particular law is inconsistent with the European Covenant, and that Parliament is therefore recommended to reconsider the matter. The expectation is that the British political tradition will motivate Parliament to respond by amending or altogether abolishing the offending law.

underground announced that it would lay down its arms. In response, the British parliament decided to dismantle its military bases in Northern Island. At a later stage, arrangements were enacted as part of the war against terror being conducted since September 11th. It bears mention in this context that, at an earlier stage, during the 1940s, Great Britain adopted a policy of widespread preventative arrests of Jewish refugees from Germany and Austria. During those years, the number of Jewish refugees who reached the British Isles totaled some fifty thousand, many of whom were interned for varying periods in detention camps after being defined as enemy aliens. At a later stage of the war they were released, and some were even permitted to enlist in the British army.

The arrangements that I will review below enable administrative detention as an anticipatory stage to the criminal indictment of the detainee, or for purposes of expelling suspects. Britain does not have a parallel arrangement identical to the Israeli law that purports to give authority for exclusively preventative detention.[272] Nonetheless, these arrangements may be highly instructive for us, because they confront similar legal questions that are largely the product of situations resembling those prevailing in Israel.

272 For the Israeli law concerning the pretrial detention of suspects of security offences, see Criminal Procedure (Enforcement Powers – Detention) (Detainee Suspected of Security Offence) (Temporary Provision) Law, 5766-2006. The HCJ is currently considering a petition against the constitutionality of this arrangement, which inter alia permits the detention of the suspect for 96 hours without judicial oversight. See HCJ 2028/08 The Public Committee Against Torture in Israel v. The State of Israel.

Stages of Legislation against Terrorism from the 1970s until the Present

At the beginning of the 1970s, it appeared as though the struggle between the Irish undergrounds and Britain had taken a particularly violent turn. During the first half of the decade some 1,100 people were killed, more than ten thousand were injured and widespread damage was caused to property.[273] Particularly noteworthy is the series of attacks in Birmingham in 1974, when twenty-one people were killed and two hundred injured, and the events of "Bloody Sunday" in the city of Derry in Northern Ireland, when British forces shot dead twenty-six demonstrators, including a four-month-old baby.

In the wake of these events the British government adopted a number of legislative measures, followed by the passage of a series of laws in Parliament. In 1972, the Northern Ireland (Temporary Provisions) Act 1972[274] was passed, which revoked the executive powers of the governor of Northern Ireland, transferred them to the Secretary of State, and discontinued the legislative powers of the local parliament. One year later the Northern Ireland (Emergency Provisions) Act 1973[275] was passed, providing a legal anchor for the administrative detention powers that had been exercised by the State since the beginning of the decade. The act established a duty to inform a detainee of the suspicions against him at least seven days before the hearing of his case, and required that the continuation of his detention be reexamined on a six month basis (it bears mention

273 Gross, *supra* note 2, at 315.

274 Northern Ireland (Temporary Provisions) Act 1972, c. 22 (Eng.), appears on site: http://cain.ulst.ac.uk/hmso/tpa1972.htm (accessed on 3.9.2008).

275 Northern Ireland (Emergency Provisions) Act 1973, c.53 (Eng.), at www.legislation.gov.uk/RevisedStatutes/Acts/ukpga/1973/cukpga_19730053_en_1 (accessed 3.9.2008)

that the authority for a reexamination was not provided by law to the court, but rather to the executive authority). By force of this law, almost one thousand people were detained.

The next act was the Prevention of Terrorism (Temporary Provisions) Act 1974,[276] which was hastily enacted after the attacks in Birmingham which led to a huge public outcry (all of the legislative proceedings were completed within a week).[277] The act was initially promulgated as a temporary provision, limited to Northern Ireland, but was extended a number of times until in 1989, it received the status of a general, permanent law. The act conferred upon a policeman the authority of detention for forty-eight hours without a warrant, of a person suspected of participation in terrorist activity. The home secretary was granted the authority to extend the order for a period of no more than five additional days. The grounds of detention were subjective, and the act did not require a "reasonable suspicion" and as such it forestalled any possibility of judicial review.[278] The detainee was not apprised of the reasons for his detention, nor was there insistence on respect for a defendant's fundamental rights during the investigation.[279] During its

276 Prevention of Terrorism (Temporary Provisions) Act 1974; at http://cain.ulst.ac.uk/hmso/pta1974.htm (accessed on 3.9.2008).

277 David R. Lowry, *Draconian Powers: The New British Approach to Pretrial Detention of Suspected Terrorists* 8-9 Colum. Hum. Rts. L. Rev. 185, 186 (1977).

278 *Id.* at 192-193. According to Lowry, it was not by chance that the Parliament chose the phrase "reasonably suspects," instead of the normally used term in English law—"reasonable cause to suspect"—even though the term had not been used since the Prevention of Violence (Temporary Provisions) Act 1936. Its purpose was to prevent the review of these detentions. As such it should be regarded as further evidence of the atmosphere of panic that took hold of the realm in the wake of the two explosions in Birmingham and the fear of Irish terror.

279 *Id.* at 194-197.

first year 1,330 people were detained under this law, of whom only sixty-five were ultimately indicted for the commission of an offense (only thirty-five for offenses related to terrorist acts). Not once did the home office refuse a police request to extend the detention for the full week, which was the result of the absence of any guiding, statutory criteria concerning the considerations for the continuation of the arrest, and the absence of a requirement for evidence attesting to the danger posed by the detainee. From a historical perspective, it appears that these mass arrests not only failed to contribute to the country's security, but they actually triggered increased activity on the part of the Irish organizations and increased sympathy for them on the part of the local population.

The act was last changed in 1989, when it was determined that there was no longer any need for an annual extension of its validity. Since then it has not been applied exclusively to members of the Irish underground and similar organizations, but is now applied to any person who constitutes a danger to public safety and the security of the realm. It should again be noted that the various versions of the Prevention of Terror Acts (PTA) were not intended to enable detention without trial for preventative purposes for an extended period of time (because the order itself was limited to seven days), but rather as tools for a state of emergency meant to enable the adoption of measures against terrorist activists (primarily Irish). Along with the legal authorization for the deportation of aliens (part 2 of the act), the main tool that the act provided the police and the public prosecution was in the form of less demanding rules of evidence for purposes of convicting terrorist activists. The suspect was denied his right to silence and was subjected to exhausting interrogations for a week, without any regard for his rights during that time, and the confessions taken from him in the course of the investigation were sufficient in and of themselves for purposes of conviction, without the need for any

other objective evidence.[280] These leniencies in the rules of evidence often led to wrongful convictions and to miscarriages of justice. In one case, only after the defendants had served part of their sentences was it discovered that the police had in fact forged the interrogation reports that attested to their confessions. The manner in which this act was implemented indicates the need for caution regarding any change in the rules of evidence in the criminal realm, as an alternative solution for dealing with the problems posed by administrative detention.

The fact that none of what goes on in the interrogation rooms during the week of detention is subject to judicial review is inconsistent with the European Convention on Human Rights. In the *Brogan* case, the European Court of Human Rights ruled that the act violates sections 5(3) (the duty to bring the detainee before the court so that it can examine his detention), and 5(5) (the right to an efficient remedy and compensation for the breach of section 5), and as such is inconsistent with Britain's obligations under the Convention.[281]

The rules of evidence were anchored in the Criminal Justice (Terrorism and Conspiracy) Act 1998 (CJTCA).[282] Under section 2 of the act, if a defendant chooses to retain his right to silence, the expert testimony of a policeman who claims that the defendant is a member of a terrorist organization is admissible as evidence. In such a case the policeman is not required to submit the particular information that led him to that conclusion. There were many cases in which defendants were convicted based on such testimony.[283] Exploiting the defendant's

280 Gross, *supra* note 2, at 16-17, and Lowry, *supra* note 277, at 195-200.

281 See Brogan v. United Kingdom, 11 Eur. Hum. Rts. Rev. 117 (1988).

282 Criminal Justice (Terrorism and Conspiracy) Act 1998, c.40 (Eng.). www.opsi.gov.uk/acts/acts1998/ukpga_19980040_en_1 (accessed on 3. 9.2008).

283 Kevin D. Kent, *Basic Rights and Anti-Terrorism Legislation: Can Britain's Criminal Justice (Terrorism and Conspiracy) Act 1998 Be Reconciled with Its Human Rights Act?* 33 V and. J. Transnat'l L. 221 (2000).

silence may constitute a gross violation of article 6 of the European Convention on Human Rights, notwithstanding the various defenses and alternative interpretations that have been proposed for the section.[284] A defendant's silence coupled with the unequivocal expert opinion of a policeman provides sufficient grounds for a conviction, and this would appear to be contrary to Article 5 of the European Convention on Human Rights.

Similar to the arrangement in Israel, the Criminal Justice (Terrorism and Conspiracy) Act 1998 (CJTCA) permitted withholding evidence from the defendant. According to the guidelines of the attorney general, evidence pertaining to matters of national security, as well as evidence that may impede the effectiveness or endanger the life of an intelligence source and the life of his family, is regarded as "sensitive" and its disclosure may have been prevented in the public interest.[285] These guidelines—taken together with the immense weight that attaches to a policeman's testimony and the ability to prevent a meeting between the suspect and his defense counsel for forty-eight hours, and the presumptions to the

284 See more on this subject in Gross, *supra* note 2, at 674-675.

285 Attorney General's Guidelines, 6(v)(a)-(d):

> A statement contains sensitive material if: (a) It deals with matters of national security; or it is by, or discloses the identity of, a member of the Security Services who would be of no further use to those Services once his identity became known. (b) It is by, or discloses the identity of, an informant and there are reasons for fearing that disclosure of his identity would put him or his family in danger. (c) It is by or discloses the identity of, a witness who might be in danger of assault or intimidation if his identity becomes known. (d) It contains details which, if they become known, might facilitate the commission of other offences […] or it discloses some unusual form of surveillance or method of detecting crime.

detriment of a suspect who maintains his right to silence—created a real potential for the miscarriage of justice.

In the year 2000 the PTA (Prevention of Terrorism) laws were cancelled, with the enactment of the Terrorism Act 2000.[286] The new act focuses primarily on the war against global terror, and includes a definition of the term terror (section 1) and an open list of terrorist organizations (including Hamas, Islamic Jihad, and Hezbollah). Section 41 of the act permits a person's arrest without warrant for up to forty-eight hours (as opposed to twenty-four hours for those suspected of other criminal offenses), but revokes the government's authority to extend the detention. An extension in excess thereof requires a judicial order. An arrest warrant is limited to seven days. Following the events of September 11, the authority to extend an arrest by warrant was increased to fourteen days in the framework of the Criminal Justice Act 2003,[287] and thereafter to twenty-eight days in the framework of the Terrorism Act 2006, which was enacted after the attacks in London in July 2005.[288] In 2008, another draft bill was proposed, the provisions of which included the authority to extend a detention for up to forty-two days, in the framework of the Counter-Terrorism Bill 2007-2008.[289] This provision was abandoned following a number of parliamentary debates, and today the maximum statutorily permitted period of detention is twenty-eight days. Again we stress that these detentions are intended, ultimately, to lead to a criminal indictment and are not designed for exclusively preventative detention.

286 Terrorism Act 2000, c.11 (Eng): www.opsi.gov.uk/acts/acts2000/ukpga_20000011_en_1 (accessed 3.9.2008).

287 Criminal Justice Act 2003, c. 44 (Eng). www.opsi.gov.uk/acts/acts2003/ukpga_20030044_en_1 (accessed on 3.9.2008).

288 The Terrorism Act, 2006, c 11 (Eng.) (*id.* at section 23 [7]): www.opsi.gov.uk/acts/acts2006/ukpga_20060011_en_1 (accessed on 3.9.2008).

289 See: Counter Terrorism Bill HL Bill 65 En 2007-2008 42(4)(ii)(b).

The Anti-terrorism, Crime and Security Act 2001 and the *A* Case

The implications of the terrorist attacks at the dawn of the twenty-first century did not end there. After the attacks of September 11, Britain declared a state of emergency. Simultaneously, it enacted the the Anti-Terrorism Crime and Security Act 2001.[290] Section 23 of Part 4 of the act established the authority of the home secretary to order the deportation of an alien suspected of being a terrorist and his detention until the termination of the deportation proceedings. It will be recalled that under International Law, Britain is unable to deport to certain states (for example states that torture suspects), and as a result the law may create situations in which a person remains in detention for an unlimited period of time. There is no guarantee that in these situations an effort will be made to indict the suspect, and he may actually remain in detention. The government is authorized to prevent the disclosure of evidence to the detainee even though the court is duty bound to appoint a special defense counsel charged with examining the secret evidence.

Britain proclaimed a state of emergency in order to avoid the determination that it was in violation of the European Convention on Human Rights, and this measure enabled it to evade certain sections of the Convention. Nevertheless, the act was subjected to scathing criticism, both domestically and internationally. In 2002, the European Commissioner for Human Rights published a report in which he stated that the act was not necessary even if the declaration of a state of emergency was justified. He therefore called upon the

290 The Anti Terrorism Crime and Security Act, 2001, c. 24 (Eng): www.opsi.gov.uk/acts/acts2001/ukpga_20010024_en_4#pt4-pb1-l1g23 (accessed on 3.9.2008).

British Government to repeal the act.[291] In 2004, the matter came before the House of Lords in the case of *A*. This was a case of two detainees who had been detained under the act, and held for about two years. The House of Lords (by a majority of eight to one) ruled that Part 4 of the act conflicted with Britain's obligations under the European Convention on Human Rights, and pursuant to the British Human Rights Act,[292] it recommended that it be repealed.[293]

The Lords' reasoning was based on Article 15 of the European Convention on Human Rights, which stated that in a time of emergency it is permitted to derogate from the obligations of the Convention (parallel to Article 4 of the International Covenant on Civil and Political Rights that was discussed in Chapter Two, above), under certain conditions. The House of Lords interpreted the restriction under Article 15—"strictly required by the exigencies of the situation"—as placing the state exercising the detention authority (or any other authority that derogates from its obligations under the Convention) under a duty to act in accordance with necessity and proportionality. In other words, the derogation of human rights must be necessary for coping with the concrete problem created by a state of emergency, and it must be exercised in a proportionate manner. The House of Lords held that the act does not comply with the requirement of necessity because the requirement gives a broad definition of the term "terrorist" and thus allows the detention of elements that are not connected to Al-Qaeda or to terrorist cells operating in Britain.

291 Comment by the European Commissioner for Human Rights, Opinion 1/2002, 28.08.2002.

292 Human Rights Act 1998, *supra* note 270.

293 See *A* case, *supra* note 247, ¶73 of Lord Bingham's judgment: www.publications.parliament.uk/pa/ld200405/ldjudgmt/jd041216/a&oth-1.htm (accessed on 3.9.2008).

The House of Lords further claimed that the distinction that the act made between a foreign citizen and a British citizen called its very necessity into question. The fact that this group (of British citizens) could be handled without recourse to the act cast doubt upon the necessity of Part 4 in the war against terror. The House of Lords contended that the distinction was also discriminatory, and hence prohibited under section 14 of the Convention. It further ruled that the act was disproportionate, because unlimited detention of a person violates the requirement of proportionality when the authorities are unable to indicate the concrete danger posed by his roaming free. In addition, Lord Bingham accepted the petitioners' claim, that there are more moderate means than detention for restricting suspects awaiting a decision on their deportation, and the choice of detention violates the requirement of proportionality.[294] The House of Lords recognized that

294 Lord Bingham described another case in which a number of alternative measures were used and wondered why they couldn't also be used in the case at hand:

> It was on condition (among other things) that he wear an **electronic monitoring tag** at all times; that **he remain at his premises at all times**; that **he telephone a named security company five times each day** at specified times; that **he permit the company to install monitoring equipment at his premises**; that **he limit entry to his premises** to his family, his solicitor, his medical attendants and other approved persons; that **he make no contact with any other person**; that **he have on his premises no computer equipment**, mobile telephone or other electronic communications device; that **he cancel the existing telephone link to his premises**; and that **he install a dedicated telephone link permitting contact only with the security company**. The appellants suggested that conditions of this kind, strictly enforced, would effectively inhibit terrorist activity. It is hard to see why this would not be so [author's emphasis, E.G.].

Further on I will discuss the use of alternative measures in the Israeli context too. At this stage I will only say that even the limitations described

administrative detention may be legal when the state is in a state of emergency, but it simultaneously accepted the position adopted in the Siracusa Principles[295] that there can be no justification for detention of indefinite duration (regardless of whether or not the detainee is awaiting trial). According to the House of Lords, this approach is consistent with the fundamental principles of the common law and its attitude to the individual's right to freedom, as expressed in the Magna Carta (1215), in the Petition of Right (1628), and in hundreds of years of ensuing English case law. This is also the approach that underlies the European Convention on Human Rights,[296] which binds the English courts by virtue of the British Human Rights Act. In view of all these, the court ruled that Article 5 of the Convention, which protects individual liberty, should be regarded as the keystone for protection of the individual against arbitrary detention by the authorities, and any provision violating it should be interpreted narrowly. Section 23 of the act is not consistent with the status of the individual's right to liberty in English law; it undermines Article 5 of the European Convention, and is not proportional. In the wake of this ruling, the act was repealed at the beginning of 2005.

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here might well be disproportionate due to the extensive numbers and their tremendous influence on the possibility of maintaining a reasonable daily routine.

295 On the Syracusa Principles, see *supra* note 243.

296 This approach is also evidenced in the rulings of the European Court for Human Rights. See e.g., Kurt v. Turkey (1998) 24276/94 (ECHR), where the Court ruled:

> […] The guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities" and to the need to interpret narrowly any exception to a most basic guarantee of individual freedom.

The Prevention of Terrorism Act 2005 and the *MB* Case

The act that was repealed in March 2005 was subsequently replaced by the Prevention of Terrorism Act 2005.[297] The proceedings leading to its hasty enactment (the previous act was designated for repeal on the eve of March 14, 2005) were accompanied by an acute political and constitutional crisis. Following this crisis, various amendments were made (for example, a section was added making it a temporary provision for one year, similar to the provisions of the Prevention of Terrorism Act [PTA]), and it was adopted after a parliamentary debate that lasted about fifty hours. The act did not give the home secretary the authority for administrative detention, but rather equipped him with some less severe measures for handling suspected terrorists. His powers included, inter alia, the authority to issue restriction orders, order house arrest, prevent presence in a particular location at a particular time, order surveillance, prohibit the use of cellular phones or Internet, require that a suspect give notice regarding any person wishing to visit him, and to order electronic handcuffing.[298] Section 1(3) of the act stipulates that the enumerated control orders do not constitute a closed list, and that the secretary of state is permitted to order additional measures that he considers necessary to prevent a suspect's commission of terrorist acts. The duration of the order cannot exceed one year, but in case of measures that deviate from the European Convention (and which therefore require a governmental reservation) the order is limited to six months.[299]

The act places considerable limitations on judicial review of the exercise of authority. Despite its provision that after the issue of

297 Prevention of Terrorism Act 2005, c.2 (Eng). www.statutelaw.gov.uk/content.aspx?activeTextDocId=1414108 (accessed 3.10.2008).

298 See §1(4) of the law.

299 See §6 of the law.

an order (within seven days at the most) the home secretary must submit an affidavit to the court specifying the request, and explaining its reasons, the court has limited discretion in ruling whether the secretary's discretion was "obviously flawed."[300] A major part of the criticism of the act was directed at this limitation of judicial review, and it was claimed that these draconian provisions prevent the court from exercising its habeas corpus authority, for the first time since the Magna Carta.[301]

Section 3 of the act permits the withholding of evidence from the suspect. The exercise of this authority brings section 7 into force, regarding the court appointment of a special defense counsel who can examine the evidence and interrogate witnesses without disclosing the evidence to the suspect. In the *MB* case, the House of Lords had the opportunity to review section 3.[302] The decision concerns *MB* and *AF*, two British citizens against whom control orders were issued, based primarily on secret evidence that they had absolutely no opportunity to examine (in other words, they did not even receive a synopsis of the evidence, or documents that had already been censored or from which identifying details were deleted). In one of the cases, the detainee was also not informed of the substantive details regarding the suspicions leveled against him. The House of Lords ruled that control orders based primarily on secret evidence violate the suspect's right to due process, and are inconsistent with Article 6 of the European Convention on Human Rights, notwithstanding that in the particular

300 See §3(1-3) of the law.

301 See e.g., Jean Claude Paye, *The End of Habeas Corpus in Great Britain*, Monthly Rev. 57 (2005): www.monthlyreview.org/1105paye.htm (accessed on 3.10.2008).

302 See *MB* case, *supra* note 167.

cases special defense counsels had been appointed for the detainees. Article 6 of the European Convention states:

> In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law […]
> Everyone charged with a criminal offence has the following minimum rights:
> to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him.[303]

Accordingly, Baroness Hale handed down the following ruling on the question of whether this compels the annulment of the section:

> If, despite all the efforts of the judge and the special advocates to ensure that there is a fair hearing, the judge determines that the hearing cannot be fair unless more material is disclosed, the convention rights require that he be in a position to quash the order […] However, this will not be so in every case. Indeed, my view is that the procedures can be made to work fairly and compatibly in many cases. It would not, therefore, be appropriate to make a declaration of incompatibility. The matter can be dealt with a different way.[304]

303 Convention for the Protection of Human Rights and Fundamental Freedoms: http://conventions.coe.int/Treaty/Commun/QueVoulezVous.asp?NT=005&CM=8&DF=4/25/2006&CL=ENG (accessed on 3.10.2008).

304 Section 70 of the judgment.

In the case of *MB* and *AF*, the House of Lords ruled that the right to due process had been violated and that the presence of a special counsel had not remedied it. All the same, it rejected the ruling of Justice Sullivan of the High Court that the section should be altogether annulled. The House of Lords drew an analogy to the *Hammond* ruling,[305] which enabled the court to protect the suspects' right to due process without voiding the section. Accordingly, the act was construed as containing an implied condition that authorized the court to protect the detainee's right to due process (in other words to refuse to order the privilege of evidence when such privilege was incompatible with the detainee's right to due process). In such cases, the court would instruct the Secretary to disclose the material or waive it as evidence in its request for a confirmation of a control order.

Lord Bingham addressed the role and the importance of the special defense counsel. In his view, notwithstanding the defense counsel's crucial role in protecting the suspect's right to due process, his effectiveness is limited in certain circumstances, when the suspect has no clue as to the nature of the charges against him. He wrote as follows:

> The use of an SAA is, however, never a panacea for the grave disadvantages of a person affected not being aware of the case against him […] This is a process which it may be impossible to adopt if the controlled person does not know the allegations made against him and cannot therefore give meaningful instructions and the special advocate, once he knows what the allegations

305 R. (Hammond) v. Secretary of State for the Home Department [2005] UKHL 69.

> are, cannot tell the controlled person or seek instructions without permission, which in practice is not given.[306]

The House of Lords further ruled that the right to a hearing is one of the essential components of natural justice, and that one of its essential elements is the suspect's right to know the nature of the charges against him. The House of Lords also ruled, albeit in the context of a situation in which a state of emergency had not been proclaimed, that the right to a hearing is not absolute, and can be restricted for reasons related to state security, but that there is a "core, irreducible, minimum entitlement" in relation to the suspect's right to know what has been imputed to him. In other words, there must be some substantive degree or level of procedural justice, and the substantive core of due process, which includes the detainee's right to be informed of the nature of the suspicions grounding the measures adopted against him, may not be violated.

The implementation of the act must, therefore, be based on strict compliance with the detainee's right to due process. It would seem that in Britain, strict compliance with these rules would result in limiting recourse to the means at the disposal of the Minister by virtue of this act.

D. The United States

In contrast to Israel, and to a great extent, to the United Kingdom, the United States has never been forced to confront ongoing terror over extended periods. However, when terror struck the United States, most of the terrorist acts were of immense dimensions, inflicting a heavy toll in dead and injured. The dates of these events would appear

306 Section 35 of the judgment.

to be inseparable from legislative initiatives in the American war on terror. During the twentieth century, almost all of the legislation or administrative acts introduced by the American government coincided with a large-scale act of terror.

This cycle created a different kind of legislative model, less balanced than those of Israel and the United Kingdom. In the United States, there is no legislative arrangement comparable to the Detention Act, and certainly not one with an important history. Our comments will therefore address various legal arrangements that were intended to confront specific threats, and which, in doing so, adopted balancing formulae that marginalized human rights considerations in favor of security considerations. Apart from the historical review, the central issue from which we may draw an analogy to the Israeli experience is that of the violation of the right to due process. In addition, American discourse has also given considerable weight to a detainee's right to habeas corpus, which is less important for our purposes. We will devote less attention to it because, at least in this regard, Israeli law is several steps ahead of American law.

Legislative History until September 11, 2001

The first formative event with which I will begin is the Second World War. The Japanese attack on Pearl Harbor on December 7, 1941 prompted the Territorial Governor of Hawaii to issue an immediate declaration of a state of martial law over all the islands.[307] Within that framework, the right to habeas corpus was denied, civil courts were closed and military courts were established that did not adhere to the rules of evidence and the rules of due process. The martial law regime

307 Alan Dershowitz, *Preventive Detention of Citizens during a National Emergency: A Comparison between Israel and United States* 1 Israeli Yearbook on Human Rights 295, 304-307 (1979).

continued until 1945, even though the military confrontation itself had already terminated after the Battle of Midway on June 6, 1942.

At the same time an atmosphere of public panic spread throughout the United States in the wake of the attack on Pearl Harbor, especially along the length of the West Coast where there was fear of an additional Japanese attack with the assistance of local Japanese. In response, President Roosevelt issued a Presidential Order (Order 9066) which permitted the detention of Japanese persons in the United States exclusively on the basis of their origin and without any kind of personal examination.[308] Citizens, children, women, and even veteran soldiers were interned in detention camps for the duration of the war. A total of 109,650[309] people were interned, and some were even executed (!) for collaboration with the enemy on the basis of decisions handed down by military courts that did not adhere to the accepted rules of evidence.[310] The Supreme Court addressed the constitutionality of Order 9066 in its famous decision in *Korematsu v. United States*[311] in which a majority of six against three held that the order was constitutional in view of the conditions under which it had been issued.[312]

308 Executive Order 9066 (1942): www.ourdocuments.gov/doc.php?flash=false&doc=74&page=transcript (accessed on3.10.2008). These orders were issued on the basis of the Enemy Alien Act, 1798). www.yale.edu/lawweb/avalon/statutes/alien.htm (accessed on 30.10.2008).

309 See Dershowitz, *supra* note 307, at 308-309.

310 *Id.* at 304.

311 Korematsu v. United States, 323 U.S. 214 (1944).

312 Justice Black wrote as follows:

> Korematsu was not excluded from the military area because of hostility to him or his race. He was excluded because we are at war with the Japanese Empire, because the properly constituted military authorities feared an invasion of our west coast.

For more on this topic, see: Robert F. Cushman, Leading Constitutional Decisions 127-132 (16th ed., 1982).

However, the end of the Second World War did not terminate the arrangements that permitted the state to issue administrative detention orders. In 1950, under shadow of the fear of growing influence of communism in the United States, Congress passed the Emergency Detention Act of 1950. This act conferred upon the federal government authority to detain in its territory people (including citizens) suspected of harboring intentions to commit acts of sabotage or espionage. It further provided that following the detention, an administrative hearing would be conducted for the detainee in the presence of a government clerk, who would decide whether there were reasons that justified his release. The attorney general was authorized to determine the scope of material to be given to the detainee, and he was further authorized to prevent the disclosure of material that could potentially reveal the identity of agents. The condition for the application of the act was that the president of the United States had proclaimed an internal security emergency. Under the act, special camps were established for the detention of suspects, but due to the national scars left by the Second World War, and especially the mass internment of the Japanese, they were not put to use. The act was repealed in 1971, and in its place a special section was inserted into the American Penal Code (18 USC §4001(a)).The amendment prohibited the carrying out of arrests by the executive branch, and prescribed that an American citizen could be arrested only in accordance with Congressional laws.[313]

Other arrangements under which detention without trial was and is still carried out are the American Immigration Laws.[314] Refugees or

313 Further on this topic: Louis Fisher, "Detention of U.S. Citizens" CRS Report for Congress (2005).

314 See e.g., Illegal Immigration Reform and Immigrant Responsibility Act of 1996: http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=104_cong_public_laws&docid=f:publ208.104.pdf (accessed on 3.10.2008).

other illegal immigrants caught near the coasts of the United States are detained and placed in federal detention centers, pending the decision in their matter. This detention is of unlimited duration, and the detainee's rights are not protected. In the beginning, there were a few cases in which the court of appeals ruled that immigrants do not enjoy constitutional rights in the United States, and the court would therefore not interfere in matters concerning them. This approach was criticized, and an attempt was made to distinguish between an immigrant's right to freedom from arbitrary arrest and his lack of a right to be within the borders of the United States.[315] Later judgments held that in order to justify legal detention the state must uphold the rules of evidence, and its proceedings must ensure the detainee's right to due process, including the right to challenge the material against him.

After the September 11 attacks, this means was increasingly used for the detention of illegal residents (most of whom were Muslim). Using this method, 1,200 men were detained, 750 of whom remained in detention for investigatory purposes for a protracted period. This category of detainee was detained for an average period of eighty days, remote from the public eye and his relatives. The detentions were not subject to judicial review, and the detainees were not permitted to meet with an attorney. As it transpired, the vast majority of them were not connected to terror.[316]

On April 19, 1995, a car bomb exploded in Oklahoma City, making the entire city quake. The explosion killed 168 people and injured about one thousand. About one year later, the Antiterrorism and

315 Gross, *supra* note 2, at 324-325.

316 See U.S. Department of Justice, Office of the Inspector General, The September 11 Detainee: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks, April 2003.

Effective Death Penalty Act of 1996 was enacted.[317] That act infringes a number of human rights. It was intended to deter terrorists and to establish the death penalty for acts of terror. It orders the establishment of special courts authorized to adjudicate deportation proceedings of alien suspects. In the proceedings conducted in these institutions, secret evidence may be used, and its submission is not subject to the rules of evidence.[318] The prosecution may even use illegally procured evidence. In addition, the act imposes restrictions on the suspect's right to habeas corpus.[319] It significantly limits additional rights, including the right of association and freedom of expression.

The Antiterrorism and Effective Death Penalty Act of 1996 resulted from the panic and fear that took hold of the American public in the wake of the Oklahoma attack. This phenomenon has repeated itself in American history in the tortuous path of confronting terrorism. Like the British laws discussed above, the American laws were not intended to enable protracted detention without trial for purely preventative purposes, but rather to establish special procedures for the purpose of the indictment or deportation of aliens suspected of terrorist acts.

USA Patriot Act

The events of September 11, 2001 pushed the United States into a corner, and it responded with an uncompromising declaration of war on terror at home and abroad. The U.S. army went to war overseas

317 Antiterrorism and Effective Death Penalty Act of 1996, 110 stat. 1214 (1996): http://thomas.loc.gov/cgi-bin/query/z?c104:S.735.ENR (accessed on 3.10.2008).

318 Section 1534 - 8 U.S.C.

319 On this matter see §101. This arrangement changed a long-standing convention in American Law according to which the right to habeas corpus is unlimited. See United States v. Smith, 331 U.S. 469 (1947).

in Afghanistan and Iraq, and within the United States' borders the Patriot Act was passed,[320] granting the authorities extensive powers for dealing with terror. This act actually led to a greater infringement of suspects' rights than its predecessor.

The Patriot Act granted the authorities extensive powers to carry out detentions, deportations, surveillances, etc., and was the source of legal authority for acts severely infringing freedom of expression, freedom of association, privacy, personal freedom, the right to due process, the right to counsel and other basic rights. It established a clear distinction between aliens and citizens of the United States, so that the rights of foreign residents were grossly trampled underfoot. In 2003, the Department of Homeland Security was established, which, together with the immigration authorities, assumed responsibility for implementation of the new policy. Section 412 of the act permits detention without trial of aliens suspected of involvement in terror:

> CUSTODY: The Attorney General shall take into custody any alien who is certified under paragraph (3).
> […]
> CERTIFICATION: The Attorney General may certify an alien under this paragraph **if the Attorney General has reasonable grounds to believe that the alien**.
> […]
> COMMENCEMENT OF PROCEEDINGS: The Attorney General shall place an alien detained under paragraph (1) in removal proceedings, or shall charge the alien with a criminal offense, **not later than 7 days after the commencement of such detention** […]

320 USA Patriot Act of 2001, 272 Stat. 115 (2001).

> LIMITATION ON INDEFINITE DETENTION: An alien detained solely under paragraph 1 […] **may be detained for additional periods of up to six months only if the release of the alien will threaten the national security of the United States or the safety of the community or any person** [author's emphasis, E.G.].

This is one of the harshest sections of the act. The Attorney General is permitted to order the detention of an alien suspect for seven days, without an arrest warrant from the court. In the course of the first seven days of detention, removal proceedings must commence or the alien must be charged with a criminal offense. If it is impossible to begin removal proceedings or to charge the detainee with a criminal offense, and if the prosecutor is satisfied that the detainee endangers national security, he is authorized to extend the detention for a period of up to six months. Toward the end of the period, the attorney general may review the degree of danger posed by the detainee, and order the continuation of the detention for an additional six months. There is no limit to the number of extensions.[321] In addition to these draconian powers, the act annulled two important defenses that were available to the suspect before its legislation. First, as distinct from accepted practice in American criminal law, the issuance of a detention order does not require a showing of probable cause, but only reasonable grounds that the suspect is involved in terror. Secondly, the detainee's right to habeas corpus is limited to one application to a single United States court of appeals (that of the District of Columbia Circuit).[322]

321 For a detailed comparison of §412 and the Detention Act, see Gross, *supra* note 2, at 693-696.

322 Section 412(3)(b).

Along with the enactment of the Patriot Act, a Presidential Order was issued establishing military courts for trying aliens suspected of terrorism.[323] The order prescribes that the legal proceedings are not to be conducted in accordance with the customary rules of evidence. Inter alia, there is no prohibition upon the use of secret evidence, in contrast to standard practice in criminal law.[324]

Detention of Unlawful Combatants

As is well known, the war on terror extended beyond the borders of the United States, and since the beginning of the campaign in Afghanistan, American security forces have begun arresting suspects of involvement in terror all over the world. Most of the detainees were captured in the wars in Afghanistan and Iraq, but the United States has also detained suspects from African and European states. These detainees are brought to the detention camp in Guantanamo, on the eastern coast of Cuba, and have the status of Enemy Combatants or "Unlawful Combatants."

This definition is an attempt to contend with the accepted definitions of international humanitarian law, which distinguishes between civilians and non-combatants, on the one hand, and combatants, on the other, but as yet does not recognize a third category of "unlawful combatants."[325] The definition is intended to prevent the

323 *Military Order: Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. R. 57, 833 (Nov. 16, 2001): www.whitehouse.gov/news/releases/2001/11/20011113-27.html (accessed on 3.11.2008).

324 See: United States v. Reynolds, 345 U.S. 1 (1952).

325 For an extensive discussion on the question of the distinction accepted in international law and the claims regarding the recognition of a category of "unlawful combatants," see HCJ *Public Committee against Torture, supra* note 192.

application of the accepted conventions of international humanitarian law in the general sense, and specifically, the granting of rights as prisoners of war to all of those detainees who are defined as "unlawful combatants." According to the traditional definitions, citizens are supposed to be protected from acts of war and must not be harmed. On the other hand, combatants too have rights. While their bodies and lives are exposed to the dangers of war, and they may be harmed, they are entitled to humane treatment and are not to be criminally charged for combat acts that they committed.[326] The conditions for meriting combatant status were set forth in Article 1 of the Annex to the Hague Convention (IV) (1907), including the requirement for a commander who is responsible for his subordinates, a fixed distinctive emblem recognizable at a distance, carrying arms openly, and compliance with the laws and customs of war.

Terrorism challenges the traditional distinctions. Terrorists do not always act in the framework of a body in which there are commanders and subordinates; they assimilate into the general population and cannot generally be distinguished from the surrounding civilians, and never act in compliance with the laws of war, inasmuch as the principle objective of terrorism is to sow panic and fear among the population.

Taking this into account, the American administration determined that the treatment of Taliban and Al-Qaeda militants and the like would be carried out with the understanding that they were "enemy combatants."[327] Initially, the army was authorized to determine

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326 See Third Geneva Convention of 1949: www.icrc.org/ihl.nsf/7c4d08d9b287a42141256739003e636b/6fef854a3517b75ac125641e004a9e68 (accessed on 3.11.2008) (for additional detail see Pesso, *supra* note 193).

327 The Israeli government adopted a similar approach in response to an appeal regarding the legality of targeted killings. See HCJ *Public Committee Against Torture, supra* note 192, §§10-11 of Chief Justice Barak's judgment.

whether a person captured and detained was an enemy combatant, and the legal authorities were not involved. In 2002, Yaser Hamdi, an American citizen was captured in Afghanistan. Hamdi was suspected of membership in the militias that were operating with the Taliban forces. Hamdi's father filed for a writ of habeas corpus and the matter reached the Supreme Court. In the decision, delivered in 2004, Justice O'Connor ruled that the administration was obligated to grant every citizen the right to contest his classification as an enemy combatant.

> We hold that although Congress authorized the detention of combatants in the narrow circumstances alleged here, due process demands that a citizen held in the United States as an enemy combatant be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision maker.[328]

In June of that year, committees were established to examine the legal status of combatants (Combatant Status Review Tribunals: CSRT) and enable administrative hearings for each and every detainee. While ordering the establishment of these tribunals, the *Hamdi* decision also legitimized the Administration's creation of the status of enemy combatant, and held that the detention was not illegal.[329] As stated, section 4001(a).s of the United States Penal Code

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328 Hamdi v. Rumsfeld, 542 U.S. 507 (2004).

329 By way of comparison I will mention the definition of an illegal combatant given in the Unlawful Combatants Law, 5762-2002:

> A person who took part in hostilities against the State of Israel, whether directly or indirectly, or who is a member of a force carrying out hostilities against the State of Israel, who does not satisfy the conditions granting a prisoner of war status under international humanitarian law, as set out in article 4 of the Third Geneva Convention of 12 August 1949 relative to the Treatment of Prisoners of War.

provides that no American citizen may be detained by the United States except pursuant to an act of Congress. The petitioners claimed that Hamdi's classification as an enemy combatant, and a fortiori his detention on that basis, contravened the law. A majority of the Court held that the decision authorizing the use of military force (AUMF),[330] namely the Congressional resolution in the wake of the events of September 11, authorizing the President to use necessary force against those responsible for the act, constituted, in effect, Congressional permission to conduct detentions permitted in the framework of military activity, as required by the law.[331]

At the same time, the question was raised whether Guatanamo internees who were not U.S. citizens had a right of habeas corpus in American courts. It must be remembered that detainees held in the Guantanamo internment camp do not usually have information regarding the nature of the suspicions against them; they have no access to counsel, and will not necessarily be brought to trial in the foreseeable future in order to examine the charges against him. In the matter of *Rasul v. Bush* (2004),[332] the Supreme Court ruled against the

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This definition was interpreted in CrimA 6659/06 Anonymous v. State of Israel (not yet reported, 6.11.2008), which examined the constitutionality of the law. Chief Justice Beinisch wrote as follows:

> "Unlawful combatant" under section 2 of the law is a foreign party who belongs to a terrorist organization that operates against the security of the State of Israel. This definition may include residents of a foreign country that is an enemy state, and who belong to a terrorist organization that operates against the security of the state and who satisfy the other conditions of the statutory definition of "unlawful combatant." This definition may also include inhabitants of the Gaza Strip which today is no longer held under belligerent occupation.

330 AUMF, *supra* note 269.

331 See Hamdi, *supra* note 328, ¶2 of Justice O'Connor's judgment.

332 Rasul v. Bush, 542 U.S. 466 (2004).

position presented by the administration, holding that every internee was entitled to petition the federal courts, because the United States had full control over the territory of the camp in Guantanamo Bay. The administration's response was to grant the internees the right to petition the military commissions, where they would be able to present their own accounts and hear at least a partial account of the factual basis for their detention. The commissions did not operate in accordance with the normal rules of evidence law, and the detainees were not permitted to participate in certain parts of the hearings.

The legality of the Commissions was challenged in the case of *Hamdan v. Rumsfeld.*[333] The U.S. army had captured Salim Hamdan in Afghanistan in June 2002, and transferred him to the Guantanamo camp. In July 2004, he was indicted by a military commission on the charge of conspiring to attack citizens and to perpetrate terrorist acts. Inter alia, he was suspected of having been the bodyguard and driver of Osama bin Laden and of conveying arms to Al-Qaeda combatants. He filed a petition for a writ of habeas corpus, and the matter reached the Supreme Court. In a decision handed down in 2006, the Court held that the actions of the military commissions were not legal. The common law recognizes the authority of military commissions in three situations: (a) adjudication in an area under military administration; (b) adjudication in an occupied territory without an autonomous administration; (c) adjudication in regard to the violation of the laws of war (jus in bello), exclusively on the battlefield. Conspiracy to commit terrorist acts is not part of the laws of war and is not within the jurisdiction of the commissions. The Court further held that the evidentiary and procedural rules under which the commissions

333 Hamdan v. Rumsfeld, 126 S.Ct. 2749 (2006). See also Peter J. Spiro, *Hamdan v. Rumsfeld,* 100(4) American Journal of International Law, 888-895 (2006).

operated contravened section 36 of the Uniform Code of Military Justice (because the deviation from the rules of evidence of American law did not satisfy the tests of necessity[334] or the rules of the Geneva Convention).

This decision did not spell the end of the struggle between the administration and the Supreme Court regarding the rights of the Guantanamo internees. In October 2006, the Military Commissions Act was enacted.[335] It explicitly authorized the military commissions to adjudicate matters pertaining to enemy combatants:

> §948b. **Military commissions: general**
> (a) PURPOSE: This chapter establishes procedures governing the use of military commissions to try alien unlawful enemy combatants engaged in hostilities against the United States for violations of the law of war and other offenses triable by military commission.[336]

The act denied the federal courts jurisdiction to hear detainees' writs of habeas corpus, apart from the grant of limited jurisdiction to the United States Court of Appeals for the District of Columbia Circuit. The act provides a legal basis for procedures based on hearsay, prevents the detainees from requesting legal representation, and permits the use of evidence law that infringes the rights of the detainees and their chances of success. The enactment of the act provided the administration with two avenues for holding suspects in detention. The first is the administrative path, in which a suspect is

334 Uniform Code of Military Justice 10 U.S.C., chap. 47 (1951).

335 Military Commissions Act of 2006 10 U.S.C (2006): http://frwebgate.access.gpo.gov/cgi-in/getdoc.cgi?dbname=109_cong_bills&docid=f:s3930enr.txt.pdf (accessed on 3.11.2008).

336 *Id.* §948b.

detained by virtue of his classification as an enemy combatant subject to a hearing before the Status Review Tribunals (CSRT). The second is the criminal avenue, which makes it possible to try the suspect under the Military Commissions Act.

Following the enactment of the act, a number of detainees petitioned the Federal Court of Appeals, claiming that the act was unconstitutional, and did not satisfy the Suspension Clause of the United States Constitution[337] which permits a deviation from the right to habeas corpus only under certain exceptional conditions. The federal court ruled that the act was not constitutionally defective, and the detainees subsequently petitioned the Supreme Court. In June 2007, the Supreme Court gave notice in the matter of *Boumediene v. Bush* that it would hear the case, and it handed down its decision in June 2008.[338] In a majority decision of five against four, the Supreme Court accepted the petition and reversed the decision of the federal court. It ruled that section 7 of the Military Commissions Act, which denied the jurisdiction of the federal courts to adjudicate the cases of enemy combatants, is unconstitutional and that the act does not satisfy the petitioner's right to habeas corpus. Justice Kennedy, writing for the majority, initially reiterated the *Rasul* ruling, holding that the detainees' presence in the Guantanamo camp, or the fact of their being enemy combatants does not negate their right to habeas corpus under the Suspension Clause. It was ruled that the

337 Section 9 of the United States Constitution (U.S. Const. Art 1, §9), limits the power of Congress to violate the right to habeas corpus to situations that necessitate it for purposes of public safety or during a time of rebellion or invasion:

> "The privilege of the writ of Habeas Corpus shall not be suspended, unless when in cases of rebellion or invasion the public safety may require it."

338 See Boumediene*, supra* note 166.

framers of the Constitution sought to confer upon the judiciary a tool to balance the power of the executive and the legislature, and as such determined a limited range of rare and clearly defined circumstances in which a court was denied the power to issue a writ of habeas corpus. Accordingly, if the administration sought to limit the rights of the detainees, it must do so in a law that conforms to the Suspension Clause. At the second stage, the Court examined whether the existing procedure for judicial review of the detainees' status, as set forth in section 1005 of the Detainee Treatment Act 2005, upheld the right to habeas corpus. Justice Kennedy related to the battery of difficulties confronting a detainee in the course of CSRT proceedings, including the fact that even though the state was permitted to rely on circumstantial evidence when it was "relevant and helpful," the detainee had only a very limited range of tools at his disposal:

> The detainee has limited means to find or present evidence to challenge the Government's case against him. He does not have the assistance of counsel and may not be aware of the most critical allegations that the Government relied upon to order his detention (noting that the detainee can access only the "unclassified portion of the Government Information").[339]

From all of the above it emerges that:

> The detainee's opportunity to question witnesses is likely to be **more theoretical than real** [author's emphasis, E.G.].[340]

339 *Id.* at 54-55.
340 *Id.* at 55.

Justice Kennedy further ruled that these proceedings created a real danger of mistaken understanding of the facts of the case that could result in erroneous legal conclusions, and having consideration for their grave implications for the detainee's fate, particular importance attaches to the authority of the federal courts to remedy mistakes, in the framework of a hearing conducted after the issuance of a writ of habeas corpus. As such, the Justice ruled that section 7 of the Military Commissions Act, which denied the jurisdiction of the federal courts to preside over matters concerning enemy combatants, was unconstitutional.

The procedure before the Status Review Tribunals enables the appointment of a personal representative for the suspect, who can examine the secret evidence and assist him in the presentation of his case, but the Court pointed out that the personal representative is not a defense counsel and is thus unable to help the suspect refute the account presented by the army, both by reason of his lack of expertise in the laws of evidence and the rules of procedure, and because the evidence submitted by the army already benefits from a presumption of validity. Justice Scalia argued in his dissent that the appointment of a personal representative actually afforded a detainee substantial help, and thus provided legal legitimacy for the proceeding.

In conclusion, it seems that the contemporary discourse in the United States focuses primarily on the detainee's right to petition the court and appeal the legality of his detention. These issues do not present problems in Israeli law. On the other hand, it must be recalled that one of the principle sources of injustice caused to detainees in the United States stems from the rules of evidence that deny them any possibility of having a proceeding conducted based on due process. This problem exists in Israel too, and is a central element in the tension between the Detention Act and the rule of law.

E. Comparative Survey of Other States

It would appear that historical circumstances placed the United States and Great Britain at the forefront of the global struggle against terror. Today, however, this battle is no longer being waged by a few isolated states. In aftermath of September 11, brutal terrorist attacks have been perpetrated all over the world, inter alia, in Spain, India, Egypt, Indonesia, Turkey, Iraq, and Pakistan, and numerous other states have been the targets of similarly motivated attempts. The various legal systems have formulated laws and regulations to confront the threat, each state adopting its own particular formats and balancing formulae consistent with its own views. In what follows I will review the principal arrangements in a number of states, in order to clarify the goals and the nature of the decisions made by these states in regard to issues that are also addressed by the Detention Act.

Canada

Following the attack on the United States on September 11, legislative proceedings began in Canada to establish arrangements for the war on terror in its various forms, including underground activities for the establishment of terrorist cells and acts intended to aid in the funding of terrorist organizations.

From a constitutional perspective, the implementation and interpretation of these statutory provisions are subject to the Canadian Charter of Rights and Freedoms (hereinafter: the Charter). In this context, sections 10 and 11 of the Charter are of particular importance.

Under section 10(c) of the Charter, every person in detention must be ensured the right to habeas corpus and has the right to be released from detention if the detention is not lawful. Section 11(a) provides that

every defendant has the right to be informed promptly of the reason for his arrest or detention.

The Anti-Terrorism Act (Bill c-36),[341] which is the primary, comprehensive statutory arrangement in Canadian law on the subject of terrorism, was enacted in December 2001. It introduced amendments to the Criminal Code, the Canadian Evidence Act, and additional laws in order to prevent terrorist acts within Canada's borders. It granted a peace officer the authority to detain a person without a detention order if the legally prescribed grounds for detention existed, including (1) the peace officer must have reasonable grounds to believe that the suspect is about to participate in an imminent act of terrorism or is in possession of information pertaining to such activity; (2) the peace officer must have reasonable grounds to believe that the detention is imperative in order to prevent the danger; (3) the urgency of the case renders it impractical to receive the approval of the minister of justice or to apply to a judge in order to request approval for the detention (as required under regular circumstances).

If all of these conditions are met, the peace officer is authorized to arrest a person without the arrest warrant required under the primary arrangement of the Criminal Code. The executing authority is obligated to bring the person before a provincial court judge within twenty-four hours, and if no judge is available, then "as soon as possible." In the hearing before the judge, the peace officer bears the burden of persuasion to show the reasonableness of the detention, and the continuation of the detention is contingent upon judicial approval of the order. At all events, the detention order cannot be extended beyond forty-eight hours. The continued legal proceedings

341 The Anti-Terrorism Act, chap. 41 (2001): www.parl.gc.ca/HousePublications/Publication.aspx?pub=bill&doc=C-36&parl=37&ses=1&language=E&File=130 (accessed on 4.12.2009).

against the detainee are a function of the nature of the suspicions against him and the possibility of his standing trial in accordance with the criminal law and pursuant to the court's decision. The provisions regarding arrest without warrant are subject to an annual report that the minister of public safety and emergency preparedness must submit to Parliament concerning the actual use that was made of these authorities. According to the data at the ministry of public safety, to date, no detentions have been carried out by force of this arrangement.[342]

In the framework of evidence law, section 37.6.1 grants the court the authority to accept any evidence, even where it does not comply with the requirements of the Canadian law, provided that it is reliable and appropriate. This arrangement is substantively similar to the provisions of section 6(a) of the Detention Act. Regarding privilege of evidence, section 37 enables the authority to apply to the court for an order prohibiting the disclosure of information that may harm the public interest. Section 38 enables a request to the attorney general if the information is liable to impair the foreign relations or security interests of the state. Following the filing of the application, the court is required to balance the interest of disclosing the information and the public interest that supports the issuing of a privilege order. Section 37.3 states that in any proceeding under this law it is incumbent on the judge to respect the defendant's right to a fair trial. In other words, if the suppression of evidence violates the defendant's right to a fair trial, the information should be disclosed to him or excluded from use in the proceeding.

342 Updated statistical data appear on the site of the Public Safety and Emergency Management, as part of the reports submitted to the parliament. The data is updated as of March 2007. See further on the Public Safety Canada site: www.publicsafety.gc.ca (accessed on 4.12.2009).

Another legal arrangement enacted in June 2002 was the Immigration and Refugee Protection Act 2002.[343] This act authorizes the immigration authorities to detain foreign nationals and permanent residents. Section 55 invests the Immigration Office with the authority to detain a foreign national, provided that he has reasonable grounds for believing that the foreign national cannot be permitted to enter the state because of the danger he poses to the public, or that he is unlikely to voluntarily attend the proceedings, including proceedings concerning his removal from Canada, or where his identity is in doubt. Within forty-eight hours of the detention, the immigration officer must notify the immigration division so that the latter can decide whether there is justification for his continued detention. In the course of the next seven days, the immigration division must conduct at least one examination concerning the justification for his continued detention, and thereafter at least once every thirty days after the previous examination. The immigration division must order the release of the detainee unless convinced that one of following conditions is fulfilled: (1) the detainee poses a danger to the public; (2) the detainee is reasonably unlikely to appear at the hearing or the proceedings concerning his removal from Canada; (3) the minister is taking the required measures for verifying a reasonable suspicion that the detainee cannot be permitted entry into the state on grounds of security, or for violating civil rights; (4) the minister has a doubt concerning the foreign national's identity, in his view the foreign national is not cooperating regarding the matter, and the minister is adopting reasonable measures to discover his identity.

Section 62 of the act grants the immigration appeal division the authority to hear appeals under the act, but its authorities are limited

343 The Immigration and Refugee Protection Act, 2001.

to hearing appeals on decisions relating to entry visas, removal orders, etc. The division has no authority to hear an appeal against detentions, and an appeal against a detention must therefore be brought before a federal judge, in the framework of his authority under section 72 of the act. There is no formal limitation in the act on the period of time the immigration division is permitted to hold a person in detention, although it would seem that the purpose of the act is to confer authority for detention until a decision is made on the suspect's entry visa or his removal. The act contains provisions enabling the use of secret evidence in the course of proceedings, but in such a case a special counsel must be appointed who is permitted to examine the secret evidence, to appeal the decision to withhold the material, and to appeal the significance of its contents. These powers do not exist in Israeli law.

As for the right to due process, it was held that in the context of detention preceding removal, and to the extent possible, the detainee must receive a summary of the material against him. The confidentiality of the material is preserved as neither the detainee nor his attorney are present in the hearing that relates to the material, and they are replaced by a special defence counsel who cross-examines the witnesses and assists the court in determining the strength of the evidence. A synopsis of this proceeding, with the necessary deletions, is provided for the suspect's examination. A similar procedure was also adopted in the United Kingdom.

Australia

The history of anti-terrorism legislation in Australia is brief. The South Pacific continent has yet to witness terrorist acts within its borders, and it is to be hoped that this situation will continue. Prior to September 11, 2001, Australia had no federal legislation concerning

terrorism, and apart from in the Northern Territory, there was no state legislation. The exceptions to this were the laws that Australia had undertaken to enact in the framework of international conventions to which it is a partner. This changed as a result of the attack on the United States in September 2001, and the terrorist attack in Bali in 2002 that claimed eighty-eight Australian lives and which was perceived by the Australian public as an attack against it. These events necessitated an Australian response, which was forthcoming on a number of levels, inter alia, the legal level. In 2004, an explosion in the Australian embassy in Jakarta, Indonesia gave further impetus to this trend. The past few years have seen the legislation of over forty acts by the Australian parliament relating to the prevention of terror. Dozens of other acts were adopted in the states and territories. The emerging trend discernible in most of these acts, as could be expected from states that have yet to experience terrorist attacks, is that of prevention. It was in this framework that legislative amendments were introduced that allowed administrative detention.

In 2001, the Australian Security Intelligence Organization (ASIO)—which exercises its authority by virtue of the Australian Security Intelligence Organization Act 1979 and the Intelligence Services Act 2001—was granted authority to carry out administrative detentions. ASIO was given the authority to issue three kinds of orders: a surveillance and intelligence gathering order, an investigative order, and a detention order. The issuance of an order was contingent upon submitting an application to the Commonwealth attorney general and obtaining his approval. The attorney general's approval is actually an approval to file an application with a federal judge for the issuance of the order. The order takes legal effect after its approval by the judge. Both the attorney general and the judge will approve the security organization's application if they are satisfied that there are reasonable

grounds for assuming that the order will significantly contribute to collecting intelligence regarding the planning of a terrorist act. An additional condition relates specifically to the approval of a detention order, whereby the judge must be persuaded that the detention is necessary in order to prevent the frustration of an investigation, and that alternative measures will not be effective.

In contrast to the arrangements in other states examined so far, the detainee under Australian law need not be a suspect (!). He can be a friend, relative, attorney, or any other person in direct contact with the suspect, who has information related to the investigation. The order is implemented under the oversight of a retired judge appointed for that purpose by the attorney general.

The duration of the order is seven days, and it cannot be extended. Nevertheless, the act contains no provision that would prevent the issuing of consecutive detention orders. The person under investigation does not have a right of silence, and may be liable for up to five years imprisonment for perjury or refusal to answer questions. Concededly, the detainee cannot be convicted on the basis of information that he provides, but there is no guarantee that evidence gained as a result of his investigation will not be used against him.

Once every few years the act must be reapproved by parliament. Recently, its validity was extended until 2016; however, provisions were added concerning the detainee's rights (inter alia, penalties of up to two years imprisonment for interrogators who violate the provisions concerning the maximum duration of an interrogation session). To date, no detention orders have been issued under this arrangement.[344]

344 See the annual report of the Australian Security Intelligence Organization (ASIO) to the Australian parliament, at 31: www.asio.gov.au/Publications/Content/CurrentAnnualReport/pdf/ASIOAnnualReport0708.pdf (accessed on 4.20.2009).

Another arrangement—The Anti-Terrorism Act (No. 2) 2005—was enacted in 2005. The aim of this act was to grant the federal police the power to carry out administrative detentions for a limited period, for two purposes—the prevention of imminent terrorist actions and the seizing and safekeeping of evidence connected to terrorist acts that have been perpetrated.

The detention proceeding begins with an application filed by the police to a legally constituted judicial body comprising a judge or retired judge. Section 105.4 of the act stipulates two grounds for arrest. The first of these is prevention, and it includes the following conditions: (1) reasonable grounds for assuming that the suspect will participate in a terrorist act intended to be committed within the next fourteen days, or assistance in the planning of such an act or possession of an object designated to serve in such action; (2) reasonable grounds for assuming that the order will provide definite assistance in preventing the expected action; (3) the detention is necessary and reasonable under the circumstances. The second ground is retrospective, and may be exercised on the basis of a terrorist act perpetrated up to twenty-eight days before the detention application. Its conditions are: (1) the detention is necessary for the safekeeping of evidence connected to the terrorist activity; (2) the detention is necessary and reasonable under the circumstances.

An application cannot be filed for consecutive detention orders based on the same grounds and relating to the same act of terrorism. The act also contains provisions that limit the filing of additional applications for a detention order, even when the grounds have changed.[345] The detention order must stipulate the maximum duration of the detention, and in any case, it cannot exceed twenty-four hours.

345 Anti-Terrorism Act (No. 2) 2005 2005 §§105.6-8.

An application for an extension may be filed, but it is limited to a maximum of forty-eight hours.

These legal arrangements were enacted by the federal government, which has since passed into other hands. The arrangements themselves were the source of severe criticism, both locally and abroad, from the UN Human Rights Committee.

The European Court of Human Rights

The European Court of Human Rights ruled that, in the context of criminal trials, there may be justification for not making full disclosure of information to the detainee, but that this cannot justify a substantive derogation of the detainee's right to due process. It further held that reasons of state security or preservation of individual rights or public interest may justify the privilege of evidence. Even so, in *Rowe and Davis v. United Kingdom* it was held that:

> Only such measures restricting the rights of the defense which are strictly necessary are permissible under Article 6(1). Moreover, in order to ensure that the accused receives a fair trial, any difficulties caused to the defence by a limitation on its rights must be sufficiently counterbalanced by the procedures followed by the judicial authorities.[346]

This completes our comparative survey. In the following chapter I will summarize the central issues that encapsulate the problematic nature of the Detention Act, and I will examine the arrangement in its

346 Rowe and Davis v. United Kingdom (2000) 2890/95 ECHR, ¶61of the judgment.

entirety (including the manner by which the act realizes its purpose) and its proportionality relative to the damage that it may cause.

F. Secret Evidence in International Criminal Courts

Before closing, a brief look at the use of secret evidence in the international criminal courts is appropriate. Some of the harshest criticism in this study concerns the use of secret evidence in the framework of administrative detention. Inasmuch as the international criminal courts (The International Criminal Court for Yugoslavia [ICTY] and the International Criminal Court [ICC]) have developed rules of practice that enable the use of secret evidence, even if not for administrative arrest, the matter should be addressed, and its relevance to the use of secret evidence in administrative detention in Israel examined.

The International Criminal Tribunal for Yugoslavia (ICTY)

The rules of procedure in the International Tribunal for the Crimes of Yugoslavia (hereinafter: ICTY) have been changed a number of times. They were established "on the move" and were significantly affected by the demands of the states that influenced the establishment of the ICTY, foremost the United States. In the original draft proposed by the United States for the procedural rules of the ICTY it was suggested that there be a blanket rule of privilege based on a judicial decision that the information concerned "state security," even when the evidence was incriminating and even if it was exculpatory or crucial to the defense.[347]

347 Laura Moranchek, *Protecting National Security Evidence While Prosecuting War Crimes: Problems and Lessons for International Justice from the ICTY*, 31 Yale J. Int'l L. 477, 481 (2006).

However, the original rules adopted in 1994 maintained the disclosure of material: the prosecutor was obliged to grant defense counsel access to all of the evidence at his disposal, brooking almost no exception. Within a short time, however, the rules were revised because the ICTY had difficulty in obtaining classified material from states that claimed that the disclosure of the classified information was liable to endanger national security (the material consisted primarily of satellite photographs and recorded telephone conversations). This resulted in a revision of the rules, which then provided that a state could transfer material to the prosecutor, who was permitted to hold it in secret for use in later investigations. Furthermore, when the material was transferred for use in a trial, the scope of the cross examination and the demand for the disclosure of additional material from that state could be restricted. Originally, the exception to the duty of disclosure did not relate to exculpatory or incriminating evidence, but only to material defined as "relevant." However, in its decisions, the ICTY construed the rules as also including exculpatory or incriminating evidence, as the need for cooperation with states in possession of classified material increased. Ultimately, in 1999, the rules were once again revised to explicitly state that the exception to the prosecutor's duty of disclosure included material of any kind (including exculpatory evidence or evidence that undermined the basis for conviction).[348]

The International Criminal Court (ICC)

Under the Rome Statute of the International Criminal Court (ICC), the prosecutor is obligated to transfer all of the material at its disposal to the defense, and even to attempt to examine additional investigative

348 *Id.* at 487.

avenues that may assist the defense (similar to the prosecutor in the Continental system). All the same, the Rome Statute also includes the possibility of concluding agreements under which certain material will be given to the prosecutor under conditions of confidentiality for purposes of obtaining additional evidence.[349] This section is intended to enable the transfer of information by states and witnesses even when they are unwilling to explain how they obtained the information, primarily for reasons of national security.[350] For purposes of protecting the safety and privacy of witnesses, section 68 of the Statute permits the prosecutor to interrogate witnesses in camera and without disclosing their names in the course of the proceedings.

In the first case that was brought before the criminal court in 2006, against Thomas Lubanga Dylio, some fifty percent of the material given to the prosecution was provided pursuant to a confidentiality agreement, and as such, this part of the evidence was not given to the defense. What was originally intended as an exception thus became the rule,[351] and the prosecution even conceded that it possessed information that could possibly acquit Lubanga or mitigate his guilt,[352] but its position was that it could not even disclose the evidence to the judges, who would be given a summary of the exculpatory evidence. Ultimately, the judge decided to postpone the proceedings against Lubanga, and subsequently released him. The court held that the prosecutor had abused his authority to conclude confidentiality agreements by making the exception into a rule. The prosecution therefore changed its position, and all of the material will be submitted

349 Sabine Swoboda, *The ICC Disclosure Regime: A Defence Perspective,* 19 Criminal Law Forum 450, 461 (2008).

350 *Id.* at 467.

351 *Id. at* 465.

352 *Id. at* 468.

for the judges' examination. The court has yet to decide what to do should it find that the evidence is exculpatory and must be transferred to the defense.[353]

It is difficult to draw any far-reaching conclusions from the experience of the international criminal courts' treatment of secret evidence, inasmuch as it is an entirely different "ball game." As opposed to the situation of national courts, where the state is in possession of secret evidence and in a position to balance its own national security concerns against the need for a conviction, the international courts are absolutely dependent upon the states and the evidence that they possess, and have no choice other than to accept the evidence subject to the conditions that they stipulate, including its non-disclosure to the defendant. It should be noted that the present discussion relates exclusively to the stage of disclosing evidence, and that, in any case, a conviction cannot be based on confidential evidence that was disclosed only to the judge. In this context, too, the Lubanga case demonstrates that the judges of the international criminal court are unwilling to condone this practice as a matter of course, and it remains an exception.

353 *Id.*.at 470.

Chapter Four

Interim Summary

A. The Tension between Administrative Detention and the Rule of Law

My comments so far have related to the exceptional nature of the Detention Act in the overall system of Israeli law. While the authority exercised under the act is for preventative purposes, the concern is that the act may serve as a means of circumventing the criminal law of the state, and for punishing for previous acts. Furthermore, an examination of the act's provisions exposes other dangers that may be attendant to a careless exercise of the authority, primarily by the executive, but also by the judiciary in discharging its role in confirming the detention and in its quarterly reexamination.

The rule of law is a multifaceted, complex concept and the current context is not suited for a comparison and analysis of jurists' views on the scope of its application.[354] In Israel, it is apparently agreed that the rule of law (also) has a substantive aspect.[355] The substantive aspect examines the content of the law in order to prevent it from becoming the "villain" of the judiciary. The internal content of the norm is examined from the perspective of the demand that the act's provisions comply with certain meta-values and principles. Jurists have a variety

354 See Aharon Barak, *The Rule of Law and the Supremacy of the Constitution*, Selected Writings, 319 (Haim Cohn and Itzhak Zamir eds. 2000) (Hebrew).

355 See Barak, *supra* note 20, pp. 116-122; Rubinstein and Medina, *supra* note 14, at 284-311.

of means for defining these principles. Meir Shamgar refers to them as "the imperative of justice,"[356] Haim Cohn, too, has mentioned justice as the realization of the rule of law in the substantive sense.[357] Ronald Dworkin and Albert Dicey stress human rights as the foundation of the rule of law in the substantive sense.[358] Itzhak Zamir claims that an appropriate law that complies with the substantive rule of law must reflect the values of equality and freedom.[359] Aharon Barak opines that the substantive rule of law realizes the values of democracy.[360] The law must uphold the values of the state, and in the particular case of Israel, it must comply with Jewish and democratic values. These values are complex and varied, and inter alia they include the fundamental human rights, the right of the State of Israel to exist as the state of the Jewish people, and the right to life of all the individuals living in its territory. A legal arrangement that is not faithful to these values, i.e., that fails to strike a proper balance between the objectives that it promotes and the objectives that it impedes, is inconsistent with the rule of law in its substantive sense.

In this chapter I will examine whether the Detention Act contradicts the principle of the rule of law. In the previous chapters I dwelt upon the purpose of the act, and in analyzing its sections I also

356 Meir Shamgar: *The Dedication of the New Building of the Supreme Court*, 40 Hapraklit, 369, 370 (1991-1993) (Hebrew).

357 Haim Cohn, The Law 143 (1991) (Hebrew).

358 See: Anthony W. Bradley and Keith D. Ewing, Constitutional and Administrative Law 97 (14th ed. 2007)

359 See Yitzhak Zamir, Administrative Authority, vol. 1, 60-61 (1996) (Hebrew).

360 Barak, *supra* note 20, pp. 120-122. See also HCJ 1993/03 Movement for Quality of Gov't v. Prime Minister, 57(6) P.D. 817, 825, (2003). Also available at: http://elyon1.court.gov.il/files_eng/03/930/019/P26/03019930.p26.pdf.

pointed out its inherent dangers. My purpose now is to consider the act as a whole. I will define and specify those aspects of the rule of law liable to be infringed by the Detention Act, and I will then attempt to clarify, in light of the proportionality tests, whether the act in its present form contributes to the promotion of the rule of law.

Violation of Basic Rights

The implementation of the Detention Act begins with a procedure whereby security agencies present their recommendation to the minister of defense for a certain person's arrest, and continues with periodic judicial examinations of the continued custody of the detainee. During that entire period, and without reference to the statutory goals of the act, it would appear that a number of the detainee's basic rights are not respected.

The detainee can be detained without being apprised of the reasons for his detention, which violates the basic right of any person against whom sanctions are adopted to know about what he is being accused. From the day of his detention, the detainee is unaware of the maximum period of his detention, and the normal rules of evidence do not apply to the proceedings concerning him. Usually, neither he nor his defense counsel have access to the evidence that served as the basis for his detention, thus precluding any possibility of refuting the suspicions that gave rise to his detention. These factors violate the fundamental notions of due process. Furthermore, the detainee's right to freedom is denied, and with it his dignity. It is not the acts that he actually committed that lead to his imprisonment but rather the fear of acts that he may commit.

The unbridled exercise of this authority may even transform administrative detention into an arena in which other basic rights are violated, in contravention of the defenses provided by the criminal law. An example of this is the right to freedom of speech. Freedom

of speech as recognized in Israel also applies to harsh and even racist expression.[361] Nevertheless, in the *Agbaria* case it was held that expression can constitute grounds for administrative detention.[362] This raises a problem and even the fear of incautious exercise of authority. In another case, the Court invalidated a detention order issued on the basis of the suspect's statements,[363] but this case, too, illustrates the concern for the potential harm involved in the exercise of the authority. Justice Dorner addressed this point as follows:

> In any event, the appellant has been teaching his students for a number of years, but no-one claims that he has

361 HCJ 399/85 MK Kahane v. The Board of the Broadcasting Authority, 41(3) P.D. 255, 281 (1987). Justice Barak wrote the following:

> We have seen that according to our prevalent conceptions, the "internal" scope of freedom of speech even includes the freedom to express dangerous, infuriating and deviant views. Does this freedom also extend to views of a racist nature? Couldn't one say that the racist content of an expression excludes it from the domain of freedom of expression? [...] Indeed, racism is fundamentally false, but this truth will only come to light by way of the untrammeled confrontation of ideas and opinions. From out of the confrontation with the falsity of racism in the free arena of views and ideas racism in all its ugliness will be execrated and human equality and dignity will be augmented and fortified. It is not the truth of racism that supports the freedom to express it, but rather the free confrontation of ideas and worldviews that will expose its falsity.

This approach is also accepted in the United States. See R.A.V. v. City of St. Paul, 505 (1992) U.S. 377.

362 ADA Agbaria, *supra* note 44, at 843. Justice Levin gave the following ruling on the matter: "I therefore think that just as not every physical act justifies the issue of a detention order under the law, similarly it cannot be said without qualification that an act involving only words and organizational activity will not justify the adoption of that measure."

363 See ADA Ginsburg, *supra* note 76.

> incited them to the commission of concrete offenses. Nor has it been proved that his words are liable—not to a degree of near certainty, or even to the lesser degree of a concrete probability—to cause his students to harm Arabs.[364]

We think that the judge expressed the proper approach. In general, it is inappropriate to use the exceptional tool of administrative detention for confronting a remote danger that might (or might not) materialize by reason of the suspect's words and their influence on others.

These, in essence, are the fundamental human rights that may be violated in the implementation of the Detention Act. They are accompanied by the reasonable possibility of a violation of the principles of administrative law and the proper division of powers among the branches of government, which we will now address.

Administrative Defects

Every public authority, including the minister of defense, is duty bound to act in accordance with the principle of administrative legality.[365] The meaning of this principle is that a governmental agency can exercise

364 *Id.* at 225.

365 The principle of administrative legality reflects the formal meaning of the rule of law by conditioning any exercise of governmental power on the existence of an authorizing law. It expresses the rule of law as opposed to rule by man. Yitzhak Zamir views it as a democratic principle in its own right, explaining that "Democracy transfers sovereignty to the people. All of the powers vested in the government and any other administrative authority are conferred upon them by the people, by means of laws, and all they have is the powers conferred upon them by the law. The law is thus the source as well as the limit of any role and any power of any authority." See further: Yitzhak Zamir, 1 Administrative Authority 50 (1996) (Hebrew).

authority only within the framework defined by the legislature, and its actions must be consistent with the overall contours of the legislation in its entirety and not just those of a specific legislative act.[366]

The principle of administrative legality establishes the basis for a number of other principles governing the public administrative law, including the grounds of extraneous objectives or extraneous considerations. This particular ground spawned the rule that in exercising its statutory authority an administrative agency may consider only factors that are consistent with the promotion of the goals of the particular law and with the fundamental principles of the system, and must only further goals that are consistent with them. Any other consideration may render the administrative action illegal, in accordance with the principles that have been enunciated by the HCJ over the years. [367]

In this paper it is proposed that the substantive scope of "state security" and "public safety" be restricted in order to ensure definitions that prevent the act being used for alien objectives. The implementation of the act in its current form may permit the detention of suspects in order to realize extraneous objectives, i.e., not for the purpose defined in the act—prevention of a danger to state security and public safety.

366 See e.g., HCJ 1640/95 Ilanot HaKirya v. Mayor of Holon, 49(5) P.D. 582 (1996).

367 Regarding an alien purpose see HCJ 98/54 Lazerovitz v. Food Supervisor, 10 P.D. 40 (1956); HCJ 465/89 Raskin v. Jerusalem Religious Council, 44(2) P.D. 673 (1990); HCJ 5090/96 Horev v. Minister of Transport, 51(4) P.D. 1 (1997). Available at: http://elyon1.court.gov.il/files_eng/96/160/050/A01/96050160.a01.htm
Regarding the considerations for striking down a decision when it involves alien considerations, see HCJ 390/79 Duikat v. Israeli Government, 34(1) P.D. 1 (1979); HCJ 392/72 Berger v. District Planning and Building Committee, 27(2) P.D. 764 (1973).

The most serious concern is that the executive branch might use the Detention Act for the purpose of punishment, by exploiting the fact that the procedure is not subject to the rigorous evidentiary laws governing criminal procedures. Similarly, there is a concern that the Detention Act may be exploited for the purpose of recruiting collaborators and for intimidation and oppression. The ability to rely on administrative evidence, within the meaning indicated above, and the ability to conceal evidence from the detainee may tempt the authorities interested in securing a person's imprisonment with relative facility, without having to confront and overcome the defenses guaranteed to the defendant by the regular criminal procedure.

In the following chapter of conclusions, a practical solution for this concern is presented, the realization of which, presumably, was not included in the intentions of those who drafted the act. The extensive scope of administrative detentions in the Occupied Territories raises the fear that this danger has already materialized there, and that one can no longer rule out the possibility of this undesirable practice spilling over into the State of Israel.

B. Proportionality

Having characterized the dangers that may materialize with the exercise of the Detention Act, I will now examine whether it is proportionate. In that framework I will employ the three proportionality tests applied for the examination of the constitutionality of a normative arrangement in Israeli legislation. The applicability of the proportionality principle extends beyond its formal location in the statute books in the limitation clauses of Basic Law: Human Dignity and Liberty and in Basic Law: Freedom of Occupation. The principle of proportionality is a general legal principle, and part of the conception that characterizes Israeli law's protection of

individual rights; it is also an important component of customary international law.[368] The Supreme Court explicitly stressed that a law allowing administrative detention must comply with the requirement of proportionality:

> Notwithstanding, in view of the extent of the violation of personal liberty and in view of the exceptional nature of the measure of detention that is provided in the law, an interpretive effort should be made in order to minimize the violation of the right to liberty as much as possible, so that it is proportionate to the need to achieve the security purpose and does not go beyond this.[369]

It will be recalled that from a concrete, legal perspective the act is protected by the "stability of laws" provision in Basic Law: Human Dignity and Liberty, and as such cannot be declared unconstitutional. Nonetheless, in a study examining the ideal law, it should be measured against the standard of proportionality so that appropriate conclusions may be drawn.

Before taking that path, two guiding rules bear mention: (a) the implementation of the tests is neither strict nor absolute. The Knesset's stature and constitutional status allow it a measure of discretion that the judicial authority normally respects when subjecting arrangements

368 See HCJ Public Committee against Torture*, supra* note 192, ¶¶41-44 of judgment of Chief Justice Barak.

369 See CrimA Anonymous*, supra* note 329, ¶8 of judgment of Chief Justice Beinisch. The comments were made in criticism of the Internment of Unlawful Combatants Law. However in her decision the chief justice stressed that "The mechanism provided in the law is a mechanism of administrative detention in every respect, which is carried out in accordance with an order of the chief of staff, who is an officer of the highest security authority." See §15 of the judgment.

determined by the Knesset to proportionality tests; (b) it is important to remember that public resources are limited and that the less harmful solution will not necessarily be preferable to other solutions, insofar as other factors must also be considered, among them the availability of resources. However, where a legal arrangement violates fundamental rights, less weight is given to the question of the resources, and the scope of discretion given to the authority in choosing a less than optimal solution is reduced.[370]

It bears note that these guiding principles are of value in examining the constitutionality of the existing act. They do not apply to the formulation of a new arrangement, which is supposed to reflect the ideal law.

Suitability of the Means for the Purpose

The Detention Act is designed to prevent acts that are liable to harm state security or public safety. The question is whether granting the minister of defense powers of detention suits that purpose. We think that the answer is affirmative. Let us consider the following scenario: The state is subjected to an onslaught of grave terrorist acts perpetrated by hostile organizations. Ongoing surveillance of security services indicates that dozens of youths seeking to emulate these actions are currently in the initial stages of planning and establishing contacts necessary for the commission of terrorist acts. The evidence of the security services is based on the hearsay evidence of an individual agent who cannot be exposed. The security services are unable to maintain ongoing surveillance of the suspects because of the other demands made upon them by the battle against terror. Would the

370 For a survey and analysis of the proportionality tests, see HCJ 1715/97 Israel Investment Managers Association v. Minister of Finance, 51(4) P.D. 367, 419-423 (1997).

detention of those suspected of planning terrorist acts under the Detention Act be of assistance in protecting public security? The answer is affirmative. Administrative detention is a suitable means for the goal it is intended to achieve.

The suitability of this means, from among the many other available tools, increases to the extent that the dangers confronting the state increase, to the extent that the threats to security are graver, and to the extent that the burden born by the security forces is greater and more demanding.

The Test of the Least Harmful Means (Review of Alternate Legal Tools)

According to the principles enumerated above, this test too should not be applied with excessive rigor. In other words, only a solution that achieves an identical or almost identical result, and that involves more than a negligible mitigation of the infringement of rights, is to be considered a preferable solution.[371] In what follows I will examine the alternative solutions to administrative detention from among the existing solutions in Israeli legislation, and from among the measures employed in similar arrangements in other parts of the world.

a. Amendments to the Penal Law

If a person is arrested for conducting preparatory acts for terrorist activity, his objective will be thwarted and he is punished in accordance with the criminal law. Punishment of this kind is more consistent with the rule of law and remedies most of the defects discussed above: punishment is judicially determined only after the

371 HCJ 7862/04, Zuhariya Hasan Murshad son of Hussein Abu-Daher v. the IDF commander in Judea and Samaria, 59(4) P.D. 368 (2005).

defendant is allowed a reasonable opportunity for mounting a defense in court against the charges. Furthermore, the punishment for these kinds of acts may contribute to the deterrence of those considering the perpetration of such acts.

As for the significance of adopting this kind of policy, one possibility is the expansion of the scope of punishable acts to include acts of preparation. According to section 25 of the Penal Law, an attempt is an offense that was not completed, but in which the perpetrator's conduct went beyond the stage of mere preparation. Case law and legal literature recognize a number of tests for analyzing the nature of the perpetrator's conduct, the intention being to enable a distinction between an attempt, which is punishable, and a preparatory act, which is not. In criminal law, the general rule is that preparatory acts are only punishable in exceptional cases that require the establishment of a specific prohibition, for example an act of preparation that is dangerous per se, or the preparation of a particularly heinous felony. One might therefore examine whether such cases warrant an expanded definition of preparatory acts that are criminalized, beyond those that are currently prohibited under the penal law, such as certain preparatory acts toward a murder. In my view, punishing these kinds of preparatory acts, even if desirable for various other reasons, would not significantly further the goals that administrative detention aims to achieve, because administrative detention is used primarily in cases in which there is no admissible evidence that could substantiate a criminal conviction.

It bears mention that conceptually, the use of this tool means punishment for acts committed (retrospective: looking to the suspect's past), and as such it differs from the Detention Act (prospective: directed at the future). Nevertheless, on a practical level, the punishment and legal tools employed in the course of the proceedings

(criminal arrest) promote the objective of the act—the prevention of acts that can harm public safety or state security.

It is incontrovertible that assuming the existence of a suitable evidentiary foundation the criminal tool is no less effective than that of administrative detention, and that in terms of its ability to achieve deterrence while safeguarding the detainee's rights, is actually preferable. On the other hand, empirical examination of administrative detentions in Israel indicates that they all share the common element of reliance upon section 6 of the act, which permits reliance on evidence that would be inadmissible under the laws of evidence applicable in a criminal trial, including the use of hearsay and withholding evidence from the detainee. Therefore, before determining that the procedure provides an acceptable alternative, it is necessary to clarify the questions pertaining to the laws of evidence.

(1) **Withholding Evidence –** When the state requests to convict a person of one of the offenses enumerated above, with the aim of frustrating a possible threat to public safety, the assumption is that a certificate of privilege will be issued under section 44 of the Evidence Ordinance. In our discussion above we discerned the problematic nature of implementation of this section and of the test established in the *Livni* decision regarding administrative detention. The evidence will always be of critical importance to the defendant's defense, thus creating a situation in which the state is compelled to choose between revealing the evidence and withdrawing the indictment. This leads to the paradox noted in Chapter Two, whereby to the extent that the evidence is graver and of greater quality, there is a greater probability that the state, in its desire to protect it, will waive the conviction. This waiver frustrates the objective that the law seeks to achieve.

Another possibility is broadening the application of section 128 of the penal law, which allows the court adjudicating the offenses of treason or espionage to deny the defendant or his counsel access

to a certain item of evidence if state security so requires, provided that the defendant is assured a full defense (which is achieved by the presence of the defendant's counsel or of defense counsel appointed by the court). Eyal Nun takes an interesting approach to this subject. His proposal is to broaden section 128 to include other offenses, including preparatory offenses.[372] Nun argues that this would achieve coherency between administrative detention and the criminal law; the result would be an arrangement in the penal law that would enable indictment for acts that currently give rise to administrative detentions. In our view it is doubtful whether such an extension is desirable in terms of Israeli criminal law, because despite what is referred to as "full defense," in practice, the defense is only partial. This may explain the general reticence to resort to this particular provision. Broadening the provision in this way would curtail defendants' ability to defend themselves in a wide range of offences, and could well lead to the conviction of the innocent and thus undermine the integrity of the criminal process and the public trust in that integrity. It is highly doubtful that the benefit of broadening the arrangement would outweigh the damage it would cause.

(2) **Use of Administrative Evidence** – In addition to withholding evidence, there is also the problem of the nature of the evidence that currently serves as the basis of administrative detention. For the penal law to achieve the objectives served by administrative detention to the same degree, the nature of admissible evidence would have to be revised (for example, to enable the admissibility of hearsay evidence), and the evidentiary threshold required for a criminal conviction would have to be lowered to a level lower than persuasion beyond reasonable doubt. The potential harm of such an approach exceeds its

372 See Nun, *supra* note 52, at 194-195.

benefits due to the danger of convicting the innocent, which is more serious than an unjustified administrative detention due to the special stigma attaching to a criminal conviction.

In the review of the comparative law, I pointed to a number of legislative attempts to enable conviction based on evidence that would not be admissible under the accepted standards of criminal law. My view is that these attempts were unsuccessful and were not consistent with the upholding of the defendant's rights. A post-facto examination of the convictions indicates many cases of false convictions and fabrication of evidence. Israeli law would be best advised not to take this path.

In conclusion, when admissible evidence can be adduced and the suspect can be criminally charged, criminal proceedings should be adopted rather than administrative detention. In such cases, resort to administrative detention does not satisfy the proportionality test, because the same objective can be achieved at a lower cost. On the other hand, when resort to the criminal law is not viable without changing its basic principles as they apply to the incidence of offenses and the rules of evidence, the law itself should not be broadened without extreme care. It is preferable to waive recourse to this tool as a means of frustrating the realization of risks to state security.

b. Alternative Measures for Preventing Realization of the Danger

The Defense (Emergency) Regulations, and first and foremost the Prevention of Terrorism Act enacted in the United Kingdom in March 2005, provide a series of more moderate measures for confronting the very dangers that the Detention Act seeks to prevent. The great advantage is that they are less injurious to the suspect's human rights. While the harm they cause is not negligible, it represents a "qualitative step back" in terms of the violation of human liberty. The important question pertaining to the effectiveness of these means is whether

and with what degree of reasonableness they fulfill the basic goal of administrative detention.

(1) **House Arrest, Obligation to Remain Within Defined Area, Exclusion from Certain Areas, and Other Restrictions of Movement** – This group of measures seeks to distance the suspect from locations in which he is liable to carry out a plot to impair state security. Placing a person under house arrest will not prevent him from taking a leading role, contacting his people, and implementing the threat through remote control. Nevertheless, a combination of these measures with the imposition of restrictions on the means of communication at the suspect's disposal could contribute to achieving that purpose. It bears note that some of these means already feature in Israeli legislation, in sections 109-110 of the Defense (Emergency) Regulations 1945. In my conclusions, below, I recommend including them in the framework of the new arrangement, alongside additional measures. The possibility of ordering house arrest instead of a detention order issued by the minister of defense was considered in the *Fahima* case, in which the Supreme Court ruled:

> Despite the existence of a real, direct danger posed by the appellant to the state and public security, which necessitates and justifies her administrative detention, I have examined the possibility of her release to house arrest under conditions which, on the one hand, would ensure the purpose of the detention, and which, on the other hand, would involve a lesser violation of her personal freedom and would facilitate her daily confrontation with the difficulties of having been severed from her regular life routine. Having considered the matter, the security service was prepared to agree to the alternative means of

> house arrest for the appellant, provided that there was assurance of ongoing supervision of her during all hours of the day, by way of security agencies that would be approved by the security service, and provided that the state is not required to bear the financial costs.[373]

Justice Procaccia is to be commended for her awareness of the importance of enabling a less harmful solution when circumstances allow it, and it is regrettable that this solution was not utilized because of the cost involved. Evidently, the issue of the cost of supervision may provide grounds for discriminating between indigent suspects who are compelled to "choose" the detention alternative. It thus seems appropriate that the state be forced to bear the cost. In any case, despite the aforementioned difficulties, the alternative of house arrest should be preferred when possible, given that it represents an appropriate implementation of the principle of proportionality. Regarding the obligation to remain within a defined area, the supervision of a suspect need not necessarily be achieved by obligating him to report at the police. He can also be supervised by way of a conversation from an appliance installed in his home or in another agreed upon location (within the framework of the technological limitations and the ability to identify him with a sufficient level of certainty).

(2) **Human Surveillance, Electronic Surveillance (wiretapping) and Warning the Suspect** – Surveillance measures partially violate a person's right to privacy, but the violation is immeasurably less grave than administrative detention, and even than the other measures mentioned above. This is certainly true for warning the suspect. All the same, these measures are less efficient, and consequently it may be

373 ADA Fahima, *supra* note 54, at 265.

unwise to run the risk involved in their use. Even so, I believe that these more moderate measures should be enacted and be considered prior to the issuing of a detention order, because under certain circumstances they realize the purpose of the act. In such cases, resort to administrative detention would not be proportionate, and would, therefore, be illegal.

(3) **Electronic Tagging** – An electronic handcuff is an electronic transmitter in the form of a bracelet attached to the suspect's body (ankle or wrist). From the moment of attachment, the suspect is under the ongoing surveillance of the location network by means of GPS satellites, and can be pinpointed at any given moment. A member of the security services attaches the bracelet to the suspect and from that moment on the suspect (or any other person not belonging to the security services) cannot remove it. The transmitter transmits frequent periodic signals to a receiver located in the suspect's house and they are sent by telephone to a monitoring center that keeps track of the detainee or the prisoner. If the receiver records a disruption of broadcast or any other kind of signal, by reason of malfunction or a breach of the stipulated supervision conditions, a warning is sent to the monitoring center.

The great advantage of electronic tagging is that it remedies the shortcomings of the other means of surveillance, because it enables locating a person with a high degree of precision. We can assume that its combination with the measure of house arrest or a specific demarcation the area in which he may move freely would provide an almost complete solution for the preventative goal of administrative detention, and even for the problem that arose in the case of Tali Fahima.

Its purpose is to replace the detention of detainees who pose little danger with supervision. An administrative detainee may pose a real danger but, unlike a person who has been convicted, the

detainee's guilt has not been proven, and he may be innocent. Thus, electronic tagging can significantly reduce the need for administrative detention.

These are the principal alternative tools available for use in realizing the preventative goal by means that are less harmful to individual rights. The operative conclusions of this review will be presented in the following chapter.

The Test of Proportionality between Benefit and Harm

The proportionality principle, requiring an appropriate relationship between benefit and harm, weighs the objective realized by the administrative detention against the harm that it is liable to inflict. When the harm outweighs the benefit, the test indicates that the arrangement is not proportionate and is inappropriate.

The proper method for conducting the proportionality test is to examine the marginal gain provided by the arrangement both in terms of benefit and harm. In other words, the institution of administrative detention as currently implemented in Israel should be examined in order to ascertain the degree to which it enhances the ability to prevent dangers to state security or public safety, in contrast to a parallel situation without such an arrangement. The results of this comparison should then be weighed against the degree of harm caused by the operation of the arrangement as opposed to the harm that would be caused were the arrangement unavailable but where alternative measures could be adopted.

Many of the judgments on this topic have repeatedly stressed the importance of the suspect's right to due process, including the right to be apprised of the reasons for his detention, and his right to have the possibility to investigate and raise questions with the purpose of refuting the suspicions.

Notwithstanding attempts at striking a balance within the framework of the Detention Act (intensified judicial review, periodic reevaluation, etc.), the progress made on the protection of the detainee's rights has proven inadequate. Concomitantly, there remains the possibility that the authorized official may exercise the act for alien purposes, primarily as an alternative to the criminal process in cases in which the evidence is weak. Due to the legal arrangements that restrict the suspect's ability to defend himself, the weakness of the evidence will probably go unnoticed. This possibility has not yet materialized, and at least until now, the State of Israel has never carried out mass, indiscriminate detentions, as has been the case in other states during times of emergency. But this does not guarantee the future, and an act that fails to provide appropriate safeguards and defenses to prevent these grave dangers is not proportionate. Furthermore, the act fails to properly define the probability test that permits the withholding of evidence, it does not explicitly limit the duration of the detention, and it fails to provide alternative legal tools for confronting the risks, despite the availability of these tools.

In view of all the above, there is no escaping the conclusion that the State of Emergency (Detention) Act, as currently implemented in Israel, is not proportionate, given that in the balance it strikes between achieving its goal and the attendant harm it causes, the harm significantly outweighs the benefit. When a person is held in detention without being apprised of the reason, a severe and unpardonable blow is inflicted on human dignity; there is a very real fear that people who pose no risk will be detained; and it is almost certain that the detainee will be subjected to a Kafkaesque trial with no real possibility of defending himself.

In order to reconcile the Detention Act with the requirements of the proportionality principle, it must be reformed. The changes proposed in following chapter are an attempt to rectify the defects

by the addition of more moderate measures for the realization of the act's purpose, by way of changes in the nature and scope of judicial review, and by means of changes in the laws of evidence. I believe that these proposals would result in a more proportionate arrangement that would strike an appropriate balance between human rights and the security interest. But before concluding, I will briefly address the inevitable question: Why should the institution of administrative detention not be totally abolished in Israel?

C. Implications of Repeal of the State of Emergency (Detention) Act

In view of the many defects inherent in the provisions of the act, and in view of the fear of its increased use, one might conclude that it should be repealed. The repeal of the act would remedy all of those defects, because it would force the authorities to treat dangerous people in accordance with the requirements of the criminal law (if possible), while ensuring the procedural and substantive guarantees for safeguarding their rights.

Such a conclusion is undesirable. It would swing the pendulum uncomfortably close to the extreme at which there are insufficient guarantees for state security and public safety during a state of emergency.

During a state of emergency, especially in Israel, the existential dangers threatening the state and its citizens are tangible and not the mere invention of politicians seeking to reap political capital from public panic. In an emergency, a "gamble" may mean harm to the lives of many, and even the possible undermining of the foundations of the social order. Accordingly we should cautiously entrust the executive branch with formidable powers that can be implemented swiftly in order to realize security objectives. Indeed, a similar conclusion

has been reached by other western states in their confrontation with terrorist threats resembling those confronted by the State of Israel. The United States has entrusted its authorities with particularly draconian powers, while similar measures in the United Kingdom have only recently been toned down. My view is that in Israel we have the ability to frame an appropriate arrangement that responds to the needs of the state and the security agencies in confronting current and foreseeable security threats.

The alternative measures may provide a better, more proportionate solution, but ultimately they cannot ensure the same degree of protection of the security interest. Under certain circumstances these measures may be preferable because it is sometimes possible to relinquish some marginal part of the security objective in order to significantly enhance other objectives. On the other hand, in an extreme state of emergency the proportionality formula changes, and what was formerly deemed disproportionate may become proportionate. It is possible for the danger to be so grave (and hence the willingness to take or tolerate risks will lessen), and the burden on the security forces so extensive, that it would be impossible to rely on more moderate measures. This kind of situation brooks no alternative to administrative detention. However, by neutralizing and mitigating a significant portion of its defects, it becomes possible to ensure that the act is used exclusively for preventative purposes and only when it is vitally necessary.

Another consideration, the historical significance of which cannot be ignored, must be added to the balance in favor of leaving the Detention Act on our statute books. It may be presumed, with a fair degree of certainty,[374] that in any case in which the State of Israel may

374 For discussion of this subject, see *supra* Chapter Two, part 3.

find itself in a state of emergency (whether in its original sense, such as war, or by reason of natural disaster) a statutory arrangement would be formulated in which administrative detention will be permitted. A further presumption is that any such arrangements enacted at a time of public panic will be disproportionate.

An arrangement intended for a state of emergency is best formulated in peacetime, when the balance struck can be considered carefully, in an atmosphere of open public debate and cool-headed discretion. In such an atmosphere, one can formulate a balanced formula that permits administrative detention during a state of emergency, but only within the framework determined in advance. A step in this direction would promote the rule of law in Israel.

Chapter Five

Conclusions

In this chapter we will present the changes required to make the arrangement proportionate, appropriate and legal. Changes are proposed on a number of levels. The first change is proposed on the external level, not relating directly to the Detention Act, but rather to the approach currently adopted in the Knesset regarding the continuation of the state of emergency. Changes on the second level include reforms in the wording of the Detention Act and a suggestion for legally authorizing the adoption of more moderate means of preventing the realization of security risks. The third level of changes concerns proposals for amendments to the legislative framework and judicial review as they relate to the subject of secret evidence, which is the Achilles heel of the existing arrangement.

A. The State of Emergency Should Not Be Extended Automatically

Our first conclusion, which would significantly limit resort to the Detention Act, is that the manner in which the Knesset exercises its authority to extend the state of emergency should be fundamentally changed. Precise criteria should be established for declaring a state of emergency, which would enable the Knesset to establish the existence of the prerequisite conditions before deciding to extend a declaration of a state of emergency. Implementation of this conclusion would significantly reduce the period of time during which the Detention Act could actually be applied, and, by extension, resort to the

Detention Act would take on more marginal dimensions. This would be the first and perhaps the most important step toward restoring proportionality to the existing arrangement. Indeed, the authors of the arrangement recognized its inherent dangers and determined that as opposed to Regulations 108 and 111, it would only apply during a state of emergency. Restricting the duration of the state of emergency would contribute to a more appropriate realization of the legislative intention and would promote the rule of law in Israel in general, and not only in the realm of the Detention Act.

B. Legislative Establishment of Additional Legal Tools

In my comments above I surveyed a variety of means that would promote the preventative goal of the Detention Act at a lower cost in terms of their violation of individual rights. These means should be incorporated into the legislation and be at the disposal of the administrative authority to prevent the materialization of threats to state security or public safety. The legislative institutionalization of these measures would place them on the same normative footing as the Detention Act and would obligate the authorized official to initially consider sufficing with more moderate measures. A negative decision on that count would be subject to judicial review of the authorized official's decision to prefer administrative detention to more moderate measures in a particular case. Some of these measures already appear in the Defense Regulations, but even without elaborating on the numerous defects of these regulations, our conclusion is that a comprehensive law should be enacted which specifies the various means of implementing them in a balanced manner. This would also be subject to judicial review, because it would not be protected by the stability of law section.

Surveillance, house arrest, partial restriction of freedom of movement, electronic cuffing and other measures that were presented are all, in most cases, appropriate tools for achieving the security goal, and their utilization would further reduce the reliance on administrative detention. Admittedly, application of these tools may mean imposing restrictions of freedom on suspects who pose lower levels of danger and who under the current regime would at most be subject to surveillance. Nonetheless, the choice currently available to the authorized official is not sufficiently refined (detention, surveillance or nothing at all) and does not enable any fine-tuning of measures adapted to specific (varying) levels of danger. The gradation and variation of measures adopted for ensuring prevention of danger to state security and legal authorization for the adoption of more moderate measures will ultimately enable a more appropriate means of addressing those dangers. It would also reduce the use of administrative detention, which severely violates human freedom. Furthermore, adoption of these measures would ensure judicial review of the alternate means, as well as of the detention decision. Administrative detention would only be considered when necessitated by state security or public safety, and only in the absence of other, less grave measures, for attaining the relevant goal.

C. Changes and Additions to the Legal Regime Governing Administrative Detention

Establishment of the Right to Representation by Special Advocate

The arrangement currently prescribed by section 6 of the act gravely infringes the detainee's rights and denies him the possibility of standing trial in a fair proceeding that can assess the legality of his

detention. A central element of the infringement caused by section 6 is the fact that defense counsel, too, is denied access to the evidence. This kind of defense counsel is particularly limited in his ability to assist the detainee to fully realize his rights in the framework of an adversarial proceeding in which the rivalry between the parties is a tool for divulging the truth to the court. The appointment of a special advocate entitled to inspect the secret evidence (and any other exculpatory or relevant classified information regarding the case), would, to a certain extent, remedy the defects that originate in section 6 of the act.

Indeed, as mentioned, this arrangement too suffers from a number of defects insofar as the special defense counsel cannot apprise the detainee of the privileged evidence that he has examined, and is thus unable to obtain his response to the material. Furthermore, there is real concern that a provision of this kind would enable the authorized official to overcome some of its current reservations regarding its use of this measure, and this might well lead to an increase of the number of detentions.

On the other hand we believe that a special defense counsel, especially an experienced one, can bridge the gap between the detainee and the evidence by interrogation and a thorough examination of the material. While it is inherently difficult for a judge, committed to neutrality by definition, to serve as the detainee's spokesperson, the special defense counsel will be concerned exclusively with the detainee's best interests. In addition to his ability to provide the detainee with a more efficient defense, his exposure to the evidence will enable him to be present at the hearing of the State's application requesting the secrecy of the evidence, where it is imperative that the material be examined by one who has the detainee's best interests at heart. As such, a significant, determinative part of the detention proceedings will not be conducted ex parte.

A Statutory Definition of the Goal and Purpose of the Act

The interpretation of the law is specifically the task of the court when hearing the proceedings related to the act, in the framework of which it must determine the act's purpose.[375] In terms of the Detention Act, a provision should be added to it that clarifies its dual purpose, as distinct from the purpose of Regulations 108, and 111, namely, protecting the security of the State and its citizens, while simultaneously guaranteeing the basic rights of the individual in Israel.

Duration of Detention

Section 2, under its current interpretation, precludes the inference of any kind of limitation of the period of detention. This, however, does not mean that a change in that direction would not be desirable—quite the opposite. The current authority to order detention for six months and the possibility of unlimited extension of a detention order (six months each time) represents a disproportionate balance between security interests and individual rights. It also gives rise to the fear that the act might be used for punitive purposes instead of preventative purposes. It should be statutorily determined that in order to prevent the realization of a danger to state security or public safety, it is possible to be satisfied with a far shorter period of detention. An identical conclusion may also be drawn regarding the authority to extend the detention. The determination of any period inevitably carries an element of arbitrariness, but a new balance, dictated by Basic Law: Human Dignity and Liberty, requires a new determination of the length of the detention. My view is that the foundations of

375 See Barak, *supra* note 20.

security would not be undermined if there were a two-month ceiling for the first detention, with no possibility of extending the detention period in excess of one year.

I do not deny that the periods of time that I propose are influenced both by existing practice and from what would seem to be palatable from the perspectives of the security establishment and the political system. The question is whether such a change would impair the ability of the executive to protect state security and public safety? This presents us with the dilemma of the means of treating suspects who pose a permanent, ongoing danger. In other words, is it reasonable to establish a norm that mandates the release of a person who endangers state security if the authorized official is convinced that he continues to pose a danger? The claim is a serious one and raises perturbing concerns regarding the ability of the act to realize its declared goals. As in many of the subjects involving constitutional law, the answer lies in the need to balance the various rights and interests meriting protection. The solution will not always be complete and defect-free, but it may still be preferable to its alternatives. My own answer is divided into three parts:

(1) One option is to leave the administrative authority with the power to order "life detention" based on an assessment of dangerousness that can never be certain. It seems that there is no need to elaborate on the harmful, not to say destructive nature of this alternative in terms of the value of human liberty. A democratic state committed to the human right to liberty cannot live with a norm that approves unlimited detention in its statutes, and all the more so when the detention is imposed on someone who has not been privy to the evidence and whose ability to defend himself is therefore gravely impaired. Similarly perspicacious comments were made by the English House of Lords, regarding the irreversible consequences of a mistake.

Moreover, in the context of "life detention" one can hardly imagine a graver travesty than the denial of freedom to someone who in fact poses no danger at all to the public. It must be remembered that in most cases the suspect is someone whose actions have not crossed the level of criminality, and do not indicate a degree of determination that proves his complete intention to proceed toward the commission of the offense. In fact, we cannot be certain—to the required degree of certainty (i.e., proof beyond all reasonable doubt)—that he indeed has reached the point of no return.

Two conclusions may be drawn from the above; the first is that there is only a minimal degree of certainty that the detention is actually necessary, because it is entirely unclear that the suspect will actually commit the crime that the Authority seeks to prevent, even if he roams free. Secondly, it is quite probable that the detention will lead the detainee to rethink his plans. "Life detention" is based on the assumption that the criminal intention or plot are set in stone, and this assumption conflicts with the perception of man's unique quality as accepted in the liberal-constitutional state, namely—that a person can always alter his intentions and plans.

(2) As mentioned, the decision on administrative detention is the result of a balancing of the individual's right to freedom and the security interest. The longer the detainee is kept in detention the more acute the question of who should bear the security risk. Should the suspect continue to bear the risk and be kept in detention, or perhaps he should be released and the risk imposed on society? Those demanding absolute security will advocate the first solution, but at the same time will run roughshod over the basic right to liberty, which is also a public interest. To the extent that the detention continues, we come close to the point at which, in the words of Chief Justice Barak:

> As the period of detention lengthens, considerations of greater weight are required to justify further extension of the detention. With the passage of time, the means of administrative detention becomes so burdensome as to cease to be proportionate.[376]

The criminal law has given its answer to a similar question, and it may provide a basis for inferring society's position on the question of allocating the risks between the suspect and society. The severity of the sanction of administrative detention and its similarity to the criminal sanction justifies the comparison despite the difference in terms of the special stigma attaching to a criminal conviction.

Criminal procedure permits the denial of a person's freedom for an extended period, and even for a lifetime, but only with respect to specific offences and when the certainty of his guilt is beyond all reasonable doubt. Where there is reasonable doubt, law and society do not agree to the inflicting of such grievous harm to a human being, even if there is a reasonable probability that he committed the offense. In other words, we do not remove people from society regarding whom there is a probability exceeding fifty percent of their having committed grave crimes such as murder and treason, given the existence of reasonable doubt of their guilt, even if the reality of their roaming free poses a serious threat to society. In the criminal law, a person's right to liberty has priority over the interest in public safety. This rationale applies, a fortiori, in the context of administrative detention. Administrative detention is confirmed on the basis of "administrative evidence," which may well be evidence that would be inadmissible in a criminal proceeding. It is a proceeding that does not allow full protection, and the decision is made on the basis of a degree

376 CrimFH Anonymous, *supra* note 5, at 744.

of persuasion that is less than that required in a criminal proceeding. In other words, the case may be one of false imprisonment because a cloud of uncertainty hovers over the suspect who, in reality, may pose no threat to state security or public safety, and the possibility of mistake is immeasurably greater than in the framework of the criminal system. A fortiori, a protracted denial of liberty under this procedure is unacceptable, being antithetical to the fundamental conceptions of society.

(3) Releasing a detainee from custody does not mean discontinuation of activities intended to gather information about his dangerousness or to prevent him from the furtherance of criminal conduct. Where it is feared that he will persist in dangerous activities, other means of surveillance may be adopted in the knowledge that in the event of a resumption of dangerous activities, the sword of a new detention order based on new circumstances hangs over him. Understandably, a new detention order against a person just recently released from administration would be subjected to rigorous judicial review in order to prevent the undermining of the basic goal of the act, which is to limit the resort to detention.

In view of the many shortcomings attendant to detention of indefinite duration, our proposal for limiting the duration is more appropriate. It assists in preventing the immediate danger posed by the detainee. It also allows him a foretaste of the price that he may pay should he attempt to realize his goal of harming state or public security and thus promotes the goal of deterrence. It also conveys to him the message that he is subject to the surveillance of the authorized official. The proposed duration of the detention treats the detainee as a human being in the full sense of the word, in other words, as someone capable of returning from the path of evil that he may have chosen.

D. Changes in the Laws of Evidence: Reinforcing the Right to Due Process

The Purpose of the Change: Buttressing the Status of the Right to (and Public Interest in) Due Process

A conceptual examination of the arrangement governing secret evidence on the one hand, and the right to due process on the other, indicates the inherent difficulty involved in reconciling them. The combination of provisions that allow the use of evidence that is inadmissible in a criminal proceeding (including hearsay evidence) with provisions that severely restrict the suspect's ability to contest the evidence concerning him, creates a constellation that severely impairs his right to due process.

Due process is a fundamental legal right. It is anchored in the constitutions of most of the world's democratic states,[377] and it is an important component of the international conventions that relate to human rights.[378] It has been recognized as a basic right in Israeli law,[379] and recently was recognized as a supra-legal constitutional right that

377 In the American legal system for example, Amendments 5 and 14 of the Constitution establish the right to due process. In South Africa, Article 35(3) of the 1996 constitution establishes the right to a fair trial, and in Canada, Article 11 of the Charter of Rights details a collection of rights that are the components of due process. In the draft proposal for a constitution of the Israel Democracy Institute §26(b) this right appears as part of the section concerning rights in law ("every person has the right to a fair legal proceeding").

378 See Article 6 of the European Covenant on Human Rights, *supra* note 251; Article 14 of the International Covenant on Civil and Political Rights, *supra* note 240; and Article 10 of The Universal Declaration of Human Rights (1948)): www.un.org/en/documents/udhr (accessed on 4.15.2010).

379 See CrimApp 2379/01 Friedman v. Israel Police, TAK-EL 2001(2), 296 (2001).

derives from Basic Law: Human Dignity and Liberty.[380] Its roots in Jewish law already find expression in the Biblical period:

> And I charged your judges at that time, saying: "Hear the causes between your brethren, and judge righteously between a man and his brother, and the stranger that is with him. Ye shall not respect persons in judgment; ye shall hear the small and the great alike; ye shall not be afraid of the face of any man."[381]

The right to due process derives, inter alia, from the right to human dignity,[382] but is in fact the kernel of many legal rights and many of the restrictions imposed on the authorities: The principle of equality before the law, the prohibition on retroactivity,[383] the right to be heard, a person's right to be present in a legal proceeding concerning him, the prohibition on conflict of interests and bias by the holder of a judicial office, and more. In addition to the personal harm caused to the defendant whose rights have been violated, this kind of situation also casts aspersions on the legitimacy of the entire legal proceeding, thereby causing damage to the broad public interest as well.[384]

380 See CrimApp 8823/07 Anonymous v. State of Israel (not yet reported, handed down on 2.11.2010). See especially ¶¶15-22 of the decision of Deputy Chief Justice Rivlin.

381 Deuteronomy 1:15-17.

382 See Ruth Gavison and Hagai Shneidor, 1 Human and Citizens' Rights in Israel: Readings 24-34 (1991) (Hebrew).

383 According to this basic principle of law a legislative act can never have retroactive validity, and can only be valid from the day of its publication. Its central importance lies in its limitation upon the power of the government to enact arbitrary limitation intended to harm the individual.

384 See LCA 1412/94 Hadassah Ein Karem Medical Association v. Ofra Gilad, 49(2) P.D. 516, 521 (1995).

The right to be exposed to the evidence and the accusations leveled against any person lies at the very core of the right to due process. While this right may be anchored in the right of every person to examine all of the evidence that the prosecution has concerning him, it seems that the defendant's right to know the charges against him belongs to the most basic tenet of due process—to hear the other side (*audi alteram partem*). How can a suspect make any claim to prove his innocence without knowing what he is guilty of?

The authority to order administrative detention need not preclude the right to due process. This right is not merely a legal right that functions externally to the administrative detention arrangement as a means of curtailing its scope. Rather, it is one of the goals of the arrangement itself. Public safety is protected when those who threaten it are removed. But at the same time, public safety also means granting every person an opportunity of engaging in legal proceedings based on due process, in other words, the right to be apprised of the suspicions forming the basis of the request for his detention. A proceeding lacking these elements is one that humiliates the individual, and tramples on his dignity and his rights, but no less than this it also harms the public, the fabric of society and the trustworthiness of the governmental authorities.

The need to protect sensitive evidence inevitably involves a certain violation of due process. Nevertheless, the law and the court must ensure that the core of the right be preserved. To that end I recommend changes in the act and in the process of judicial review. The changes proposed are consistent with trends in recent judicial rulings of a number of Western states in the context of the confrontation with international terror.

Changes in the Language of the Act: Apprising the Detainee of the Nature of the Suspicions against Him

In my comments above I elaborated on the need to distinguish between the evidence for which the State requests privilege and the foundation of the suspicion forming the basis of the detention order to be issued. The act should establish the duty of apprising the suspect of the suspicion underlying the detention, at a level of specificity that enables him to efficiently defend himself against the suspicion. Any other approach fails to ensure the basic minimum that is necessary for a fair proceeding and mortally violates human dignity. These principles must guide the authorized official when issuing the detention order and they should be anchored in the wording of the act, as proposed in section 12(c) of the draft bill presented below. Nevertheless, the court plays a special role in the safeguarding of these principles when it considers whether or not to confirm the order.

Changes Regarding Judicial Review

The Detention Act grants special authority to the court in implementing the Administrative Detention Law and special status in maintaining the balances prescribed by the act, according to Hans Klinghoffer's doctrine of a "composite organ." At the same time, in any judicial proceeding, the court has a special role in ensuring the fairness of the proceeding. It does not merely serve in a supervisory role intended to prevent any violation of a right by one of the authorities; it is also required to examine itself and the propriety of the proceedings that it conducts. Today, there is an expectation and even a demand for greater judicial involvement in the supervision of the proceedings for issuing an administrative detention order,

The distinction between secret evidence and concealing the grounds for detention stems from the need to guarantee certain

minimal elements of due process, as dictated by the right to human dignity and the public interest in clarifying the truth and preventing imprisonment under false pretences. The court plays a central role in this process, and before presenting what I view as the ideal position I will expand upon the conceptual foundation that justifies these changes.

In this work I discussed the basic rights that are violated by the administrative detention proceeding and the balances that must be struck between them and the other interests that administrative detention seeks to protect. I applied the proportionality tests, having resort to the constitutional principles that have been accepted by Israeli case law over the years. In view of these, I proposed a variety of means for amending the act in view of the constitutional arrangements. All the same, the implementation of these measures, whether by statute or in case law, does not suffice to protect the basic principles of the Israeli legal system. The problem is the fundamental nature of the statutory arrangement as such, for it denies human freedom without guaranteeing the defendant the basic defenses supplied by the criminal law. As such, it harbors latent potential for the violation of human rights, freedom and due process.

These rights are not just individual rights; our concern is with the very heart of democracy, the basic purpose of which is to serve the individual, and first and foremost, to guarantee his freedom.[385] Recognition of human liberty as the meta-principle of the Israeli legal system rests on the two constitutive foundations of the state—its democratic nature and its Jewish nature. The means of realizing the supremacy of liberty, i.e., ensuring that there can be no absolute denial thereof, requires compliance with the principle of due process.

385 See Zamir, *supra* note 359, at 65.

This is a Gordian knot in which due process is a crucial component of the protection of liberty, and has also been recognized in the case law of the United States Supreme Court.[386]

The *Hamdi* judgment[387] raised questions similar to those regarding the Israeli citizen held in administrative detention. In that case, Justice O'Connor stressed that it is also (and perhaps especially) in the nation's most critical hours, when the security threat is more palpable than ever that the nation is called upon to be true to its core principles by ensuring legal proceedings based on due process:

> It is during our most challenging and uncertain moments that our Nation's commitment to due process is most severely tested; and it is in those times that we must preserve our commitment at home to the principles for which we fight abroad.[388]

These comments merit our endorsement. The Detention Act, and especially its evidentiary arrangements, creates a real danger of unfair proceedings that will ultimately culminate in denying an innocent person's liberty. As mentioned, the balance of interests compels a certain violation of the detainee's procedural rights. Even so, under no circumstances should this balance provide license for the denial of the right to due process that is the first defense of human rights, chief

386 See comments made in Carey v. Piphus, 435 U.S. 247, 259 (1978):

> "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property."

387 For the factual foundation see above Chapter Three, section 4: "Detention of Unlawful Combatants."

388 See Hamdi v. Rumsfeld*, supra* note 328, ¶111 (c)(3) of judgment of Justice O'Connor.

among them the right to liberty and the right to dignity. Due process means that a suspect must be able to state his case and attempt to refute the claims against him. This right can only be realized if the suspect is presented with the grounds for his detention and the factual basis that justifies it**,** even if only partially. [389]

As such, it is incumbent upon the court to ensure strict compliance with these conditions in conducting proceedings for the confirmation of a detention order. This duty may arise at two separate stages of the proceedings, and at each of them the court is required to implement a different balancing formula:

a. **Decision on a Request for the Privilege of Evidence**

The court may only confirm the state's application to prevent the disclosure of evidence when there is a near certainty that its disclosure will substantially endanger state security or public safety, and that the harm to security is graver than the harm to the suspect. The state bears the onus of persuasion regarding the privilege of evidence even if the detainee's defense counsel is permitted to be present at the hearing. The grave consequences of a decision on privilege and the governmental tendency to make exaggerated use of privilege[390] preclude resort to the presumption of the legality or the presumption of regularity in favor of the state. The evidence may be varied and consist of items of evidence collected from a variety of different sources. Each item of evidence should therefore be meticulously examined and the test should be applied to each and every piece of evidence so as to provide the suspect

389 In its decision in that case the Court ruled:

> We therefore hold that a citizen-detainee seeking to challenge his classification as an enemy combatant must receive notice of the factual basis for his classification, and a fair opportunity to rebut the government's factual assertions before a neutral decision maker.

390 ADA Federman*, supra* note 161.

with maximal tools for confronting the suspicions. For example, when the evidence supporting the confirmation of the order is the testimony of an intelligence agent, the court should be authorized to obligate him to testify, while ensuring the secrecy of his identity.

The legislative intention regarding the role of the court in the proceeding is best realized where the court forms its own independent impression of the person upon whose testimony the detention order is largely dependent. Where this proceeding is not possible, or of no benefit, the court should allow a full cross-examination of the agent by the special defense counsel, and the transmission of a censored version (for imperative security reasons) of the interrogation protocol to the detainee and his attorney.

Meeting the near-certainty criterion is not the final step. The judge must also examine whether the decision to conceal evidentiary material from the detainee satisfies the criterion of proportionality, primarily as it relates to the criterion of relativity (in the narrow sense), the essence of which is the relationship between the benefit to state security from the suppression of the evidence and the damage caused to the individual right to due process.

In conducting this test the evidence should not be treated as a single unit; rather each item of evidence should be examined individually. Materials gleaned from different sources may be of varying evidentiary significance and hence give rise to different judicial assessments. A privilege on evidence may be justified when, in terms of its gravity, the security interest that the State seeks to protect clearly outweighs the possible impairment of the suspect's defense and the danger of an unwarranted detention that might result from it.

The decision on whether to enable the suspect and his attorney to examine the evidence is not a binary decision. The court must consider

the possibility of allowing restricted examination of the evidence, i.e., after it has been censored for imperative security reasons, or by furnishing him with a reconstruction or synopsis of the evidence in a manner that enables maximum disclosure of its contents, subject to urgent security needs.

In any event, where the state submits an application for privilege, the court must appoint a special defense counsel for the detainee and extend that appointment for the duration of the proceedings, in the event that the application for the privilege is granted.

b. Apprising the Detainee of the Grounds for Detention and Their Factual Basis

Having decided whether or not to grant the privilege and having determined its scope, the court is required to review the nature of the suspicions to be presented to the detainee. The court cannot confirm a detention order where the grounds specified are "an evaluation that indicates dangerousness."[391] The reason for withholding certain particulars from the detainee must be the near certainty that the disclosure of the details will substantially harm state security or public safety. However the court cannot permit anything that falls short of the basic minimum of details required to enable the detainee to meaningfully address the suspicions against him. The judge cannot rest easy until and unless he is certain that the suspect has been furnished with such information regarding the grounds of detention as to enable him to respond effectively to the suspicions. He cannot rest easy unless he has ascertained that the proceedings before him are based on due process.

The appropriate test for the court's adoption of the decision is whether the factual foundation is sufficient to allow the detainee to

391 HCJ Zaatari*, supra* note 157, ¶2 of judgment of Justice David Cheshin.

argue against it. Can the detainee give an effective response to the suspicions grounding the administrative detention order that the court is asked to confirm? It must be remembered: A factual foundation supplying no information regarding the grounds for detention can never be refuted, not even by a person whose liberty poses no danger at all. Such a situation effectively precludes the right to due process, one of the basic components of which is a person's effective right of response to a suspicion against him. Where there is an insufficient factual foundation regarding the grounds of the detention, there is no provision of the requisite guarantees for the preserving the right to freedom. There can be no legitimacy for this kind of proceeding in a legal system in which the right to due process is a supra-legal constitutional right.

In the framework of confirming an administrative detention order, the requesting authority should be required to explain to the court why it is impossible to suffice with more moderate measures and to refrain from resort to administrative detention under the Detention Act. Such a strict approach in the framework of the judicial review process is liable to reduce the number of administrative detentions and ensure that the use of this tool will be limited only to cases in which there is really no other option.

The measures proposed here are liable to significantly reduce the ability of the authority to justify administrative detention. This is the sacrifice required in order to prevent a threat to state security that is no less grave than that posed by the detainees themselves—the danger posed by the deprivation of the fundamental rights of liberty and due process. The comments made by the United States Supreme Court in the *Robel* case by Chief Justice Warren are particularly apt, even though they were originally made in relation to another basic right (the right to incorporate):

> Implicit in the term "national defense" is the notion of defending those values and ideals which set this Nation apart [...] It would indeed be ironic if, in the name of national defense, we would sanction the subversion of one of those liberties […] which makes the defense of the Nation worthwhile.[392]

392 See United States v. Robel, 389 U.S. 258, 264 (1967).

Epilogue

The confrontation with the scourge of terror at the dawn of the twenty-first century presents liberal democracies the world over with a complex challenge. It presents, in its full regalia, the (renowned) conflict between the public interest in safeguarding the security of the state and society, on the one hand, and the fundamental rights of the individual—the right to liberty, dignity and due process—on the other. Administrative detention attempts to provide the state with a tool to fulfill its duty to the public and to ensure protection of the life and daily routine of every resident and citizen. However, the salient features of administrative detention indicate that it exacts a steep price in terms of violation of individual rights, which are the pillars of every democracy, including Israeli society.

The position I attempted to show in this work is predicated on the understanding that the conflict between public safety and individual rights is limited to the outer surface of the struggle between rights and interests. Deeper analysis reveals that the factors common to the public interest and individual rights exceed those that separate them. The struggle of the democratic state against those who seek to sow terror within its borders is a struggle to protect its character as a free society that respects human rights per se. The State's security is none other than the accumulated rights of all those living in its borders to life, freedom, dignity, and self-realization. However, the moral supremacy of democracy over terror that seeks to overcome it can only be preserved as long as it does not jettison the very values in the name of which it struggles. The existence of legal principles that uphold the fundamental conceptions and values of Israeli society and

the Jewish people, at the center of which are justice and the sanctity of human life—are all critical components of our state security. This point was eloquently stated by Chief Justice Barak in the case of the *Public Committee against Torture in Israel*:

> This is the destiny of a democracy—it does not see all means as acceptable, and the ways of its enemies are not always open before it. A democracy must sometimes fight with one hand tied behind its back. Even so, a democracy has the upper hand. The rule of law and the liberty of an individual constitute important components in its understanding of security. At the end of the day, they strengthen its spirit, and this strength allows it to overcome its difficulties.[393]

The grave difficulty posed by modern terror and its ability to harm the lives of thousands of people in one fell swoop has galvanized many states around the world into actions that violate the traditional balances between human rights and the interest of state security. In doing so there are many who have been branded as terrorists purely by virtue of their ethnic origin or external appearance, and the distinction between a terrorist and a suspect has been almost entirely blurred. Laws that sanction the denial of human freedom based on legal proceedings that have nothing to do with justice spearhead this phenomenon, and they attest to the panic that engulfs certain states during particular periods, and not to the fundamental conceptions to which those states generally subscribe.

393 HCJ 5100/94 Public Committee Against Torture in Israel v. Government of Israel, 53(4) P.D. 818, 845 (1999).

The Detention Act, despite its "vintage," is no exception. A law that permits administrative detention for an unlimited period, in reliance on secret evidence is an anomaly in a democratic state. It gives expression to the exercise of draconian state power against the individual, in a manner that is atypical of the regimes among which the State of Israel seeks to be included.

The principle conclusion of this study is that the balance that has been struck in the State of Israel (as of 2009) does not properly reflect the desired formula, because it violates basic rights of the individual and does not provide sufficient guarantees for the prevention of arbitrariness in exercising the authority for administrative detention by the Executive branch. This situation hinders the promotion of the rule of law in Israel; it is inconsistent with the democratic values of the State of Israel and does not realize the Jewish values of the State, which place human liberty at the forefront, in light of the tradition and the history of the Jewish people during all the years of its existence. This situation must be changed.

It could be argued that the necessary conclusion is that the entire legal arrangement in Israel that allows administrative detention should be abolished. This is not my conclusion. Ultimately, the question at the core of the dispute is this: should the state be furnished with a legal tool that enables it, under defined circumstances, to take preventative measures that include the denial of freedom for a limited period with the aim of preventing the materialization of a danger to state security and public security? My answer is that the granting of such authority cannot be rejected out of hand; not at this time and not in the reality that surrounds us. I think that many of the current defects of the Detention Act can be remedied without altogether uprooting the basic goal that the act seeks to achieve. The arrangement that I propose seeks to establish a different balancing formula—one that is based on the fundamental principles of the

existing regime in the State of Israel and on the basic thrust of the accepted rules of international law.

The principle of proportionality was my touchstone in formulating the proposed statutory arrangement, and in my view, tremendous importance attaches to the more moderate tools proposed thereby for confronting dangers to state security and public safety. Proper use of these tools may render the resort to detention negligible, especially during periods in which the winds of war are not blowing over our heads.

In addition to these tools, I attempted to substantiate the case for a procedure that would safeguard the suspect's right to a procedure based on due process. I was perturbed by the procedures for making evidence privileged, and it was difficult to propose an arrangement that would maintain the right to due process and simultaneously enable concealment of evidence from the suspect, under certain circumstances. The proposed arrangement is not perfect and imposes a heavy burden on the courts and on the suspect's attorneys. Nevertheless, the burden is not unbearable, and the courts and defense counsels will be able to carry it if they remain true to their principles. The adoption of these principles, along with the other proposed changes, may lead to a solution that confers central importance upon the security interests of the State of Israel, while simultaneously endeavoring to safeguard the basic rights of the individual.

As part of my concluding remarks I wish to stress that the privilege proceedings that characterize most of the administrative detentions in Israel made it particularly difficult to draw conclusions that were based on firm factual foundations. Even so, an attempt was made to collect as much information as possible, and it is to be hoped that the gaps in information have not impaired the final result.

Finally, it is my duty to mention that administrative detention is another governmental tool to be used for the protection of the security

and existence of the State. In that sense it may be compared to other weapons entrusted to the minister of defense to be utilized in order to prevent the materialization of possible dangers. Wherever and whenever the State of Israel has resort to arms, there is substantive agreement regarding the obligation to adhere to the purity of arms; this should similarly be the situation when resorting to administrative detention. Not all methods are legitimate, and one cannot justify every action on the basis of the security goal. The struggle against terror is not waged with the same tools brandished by the terrorists themselves, because a Jewish and democratic state must limit the power that it exercises. Otherwise its moral foundations, which are the basis for its existence, will crumble.

This was the point made by Justice Haim Cohn in the famous *Kawasme* case:

> What distinguishes the war of the State from the war of its enemies is that the State fights while upholding the law, whereas its enemies fight while violating the law. The moral strength and objective justness of the government's war depend entirely on upholding the laws of the State. In waiving this strength and this justification for its battle, the authorities serve the goals of the enemy. The moral harm is no less important than the harm wreaked by any other weapon, and perhaps even greater, and no weapon is more moral and effective than the rule of law. Better that all those who must know, be aware, that the rule of law in Israel will never succumb to its enemies.[394]

394 HCJ 320/80 Kawasme v. Minister of Defense, 35(3) P.D. 113, 132 (1980).

Administrative Detention – An Opportunity for Reevaluation

Mordechai Kremnitzer

The subject of administrative detention has engaged the Israel Democracy Institute over an extended period, the length of which reflects the complexity of the subject. The participants in the work were Tamar Sela, Ofer Sitbon, Hili Modrik Even-Chen and Yael Stein, each of whom made a personal contribution to the work. But the main credit and full responsibility for the writing belongs to Elad Gil who wrote the paper under my guidance. At the end of this study I would like to express a few thoughts that point in a more radical direction than the one taken in the document.

In my view, the institution of administrative detention as currently grounded in Israeli law is even more problematic than it is presented here. The substantive justification for this kind of detention relies on the distinction between administrative detention and criminal enforcement. In other words, criminal enforcement is concerned with offenses committed in the past whereas the logic of administrative detention is preventative and prospective; it is intended to prevent offenses that have not yet been committed.

This justification is far from convincing, especially in the context that produced administrative detention—the struggle against terrorist organizations. In almost all of the cases, administrative detention is resorted to at a stage at which its focus is not exclusively upon future offenses. They are all cases in which the line of criminality

has already been crossed because when relating to the criminal acts of terrorist organizations, this line is easily crossed. The scope for incrimination in this context is particularly broad, and it encompasses acts that are remote from causing concrete damage, such as actual membership in a terrorist organization and acts of assistance to a terrorist organization.

Were we to ask, what should be the fate of those convicted of offenses relating to terrorist organizations if instead of being brought to trial they were administratively detained—the answer would be that there would be almost no case which, substantively speaking, is not suited to administrative detention. The reason is simple. The future is almost always inferred from and based upon the past, and the only basis for predicting dangerousness that justifies detention is acts that were actually perpetrated in the past in the framework of terrorist organizations. On the other hand, if we were to ask what would happen to administrative detainees if there were admissible, non-secret evidence for proving the basis for their detention, we would see that in most if not all of the cases it would be possible to bring criminal charges against them. In this context mention should be made of one of the purposes of criminal punishment, namely individual deterrence, in other words, preventing the criminal from repeating his past acts. This claim is buttressed by comments made by Chief Justice Barak in the further hearing in the case of Lebanese detainees:

> […] A similar approach should be adopted regarding administrative detention. Each person will be detained based on his wrongdoing and each will be held in administrative detention based on his offense. One is not to detain in administrative detention any other

> than one who, by his own actions, poses a risk to state security.[395]

The conclusion is that the real distinction between the two procedures is not between past and future, between an act committed and the prevention of an act that may be committed. My claim here is not that there are no grounds for speaking of prevention, but rather that administrative detention is not based on prevention. Rather, administrative detention emerged as an alternative to criminal punishment in cases in which it was not possible to obtain a criminal conviction. In such situations there is no alternative but to utilize a different form of sanction, and in the absence of the criminal option, the administrative characterization emerged. The real distinction is between cases in which the prosecution has admissible evidence that can secure a conviction, and cases in which the prosecution lacks such evidence. This point was articulated by Chief Justice Beinisch with respect to the constitutionality of the Illegal Combatants Law:

> The resort to the exceptional measure of administrative detention is justified in circumstances in which the use of other measures, including criminal indictment, is not possible, due to the absence of sufficient admissible evidence or the impossibility of exposing privileged sources[396]

It can only be one of two things: Either the evidence is hearsay, and, as such, not admissible; or it is privileged for security reasons (the security of those possessing the information or state security in

395 CrimFH Anonymous*, supra* note 5.
396 CrimA 6659/06 Anonymous v. State of Israel (not published, 2008), ¶47.

a broader sense where it relates to privileged methods of attaining information). It must further be added that in most of these trials, the evidence is withheld from the detainee in defiance of the basic requirements of justice and fairness. Even the information given to the detainee as to what is alleged to him can be of a general and vague nature, if the interest of security so requires. The clear impression is that the need for this tool and perhaps even its *raison d'etre* is—for those interested in its continued existence—the denial of due process. There is a disturbing feeling that there is something untrue and misleading in the presentation of the substantive justification of administrative detention as a preventive measure. Even those who believe that there may be cases that justify recourse to administrative detention given the impossibility of utilizing the criminal means of proof cannot ignore the existence of the opposite possibility that there are cases in which administrative detention is unjustified, as, for example, when with a bit of effort it would be possible to collect admissible evidence. The problem is that on a practical level it is impossible to distinguish between the two categories of cases.

A comprehensive view of administrative detention as practiced in Israel shows it to be the gravest possible violation of liberty combined with the gravest possible violation of due process. A person's most valued asset—second only to the value of his life—is denied without due process, in other words by violation of his human dignity. It is not without reason that the case law in democratic states views the vital, hard core of what is absolutely necessary for due process as a definitive threshold which cannot be waived or surrendered.[397] From the governmental perspective, it is undeniably an institution that exemplifies governmental arbitrariness in its harshest, most

397 *MB* case, *supra* note 167.

extreme form (and it is to be hoped that this is not the motivating factor for its continued existence in in Israel). My view is that the import of administrative detention in which the detainee is denied a real opportunity of defending himself, is that the detention is arbitrary and as such proscribed by international law. Not surprisingly, Lord Hoffman referred to administrative detention of unlimited duration in the following words:

> In my opinion, such a power in any form is not compatible with our constitution. The real threat to the life of a nation […] comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve.[398]

I fear that our attitude to this deviation from the laws of evidence and from procedural law, and from the basic requirements of due process is prima facie overly forgiving and overly indulgent, simply because the law itself establishes these deviations and the law influences our normative conceptions and actually tilts our discretion. Were it possible to ignore the existence of the law and to ask a de novo question—is this deviation justified—what would our response be?

In my view we would have a real problem answering in the affirmative. Furthermore, were we to ask the ineluctable question—is this measure "strictly necessary," it would seem that the answer must be negative, similar to the response of the House of Lords in the aforementioned judgment. What is the point of constructing a glorious complex of rules for criminal proceedings, when in almost the same breath, an alternative system is built, one which enables the disregard of those very rules? If the rules are critical to the conduct

398 The *A* case, *supra* note 247, at 56.

of a procedure based on due process, which treats the suspect as a subject (i.e., as dictated by the right to human dignity, and not only as a means for realizing another goal), and to prevent the perversion of justice and harm to whom there is no reason to harm—if these rules are essential, then they ought to apply to all cases in which serious sanctions are liable to be imposed on the suspect, and administrative detention is a classic example of this.

If the inadmissibility of hearsay is intended to enable the person against whom the testimony is directed to cross-examine a person with firsthand knowledge of the event, then the rule should apply to administrative detention just as to a criminal proceeding. If it is inconceivable that in a criminal proceeding in a democratic society a defendant can be unaware of the charge against which he has to defend himself (and if it is conceivable, then the public outcry should rock the heavens), then the same should apply to the proceedings of administrative detention. If this is agreed, then we can also agree that there is no place for administrative detention the sole purpose of which is to accommodate a deviation from those rules and principles. Clearly, in a system such as ours, the stature of these rules and principles is impaired when, on the one hand, their importance is elevated sky-high in criminal procedures, but waived or circumvented in administrative detention proceedings. This matter—particularly where it concerns a person's right to defend himself against harsh sanctions—strikes at the very heart of the rule of the law.

Can it be regarded as a necessary evil? I am hard put to give an affirmative response. The reality is that contemporary comparative law of democratic states knows of no precedent for such an extreme institution or anything resembling it, even in the aftermath of September 11 and the law's attempt to confront the grave threat of international terror. The fact that this measure was adopted in the past does not justify its continued adoption today, having regard for

the tendency of progressive enhancement of the protection of human rights (which concededly is neither continuous nor systematic). For example, there is no real similarity between the adjustments of the English laws of detention for coping with international terror and our own administrative detention. Even the very small number of administrative detentions in Israel, which is to the credit of the defense establishment, raises doubts regarding the actual need for such a measure and the impossibility of confronting the threat of terror with regular tools of law enforcement. Were we to find ourselves behind the veil of ignorance, we would not agree to such a system and arguably its emergence rests on the assumption that it will not be used "against us" but only against "others." While it is clear that the option of administrative detention being used against Jews functions as a deterrent against its excessive use, there is no guarantee that this deterrent will not wane over time.

Chief Justice Barak rightly observed that it is not sufficient that administrative detention is adopted in a state of emergency, for "the detention must be related to the state of emergency and must derive from the special needs created by that particular situation."[399] Administrative detention may be justified if the state of emergency creates a situation that prevents the adoption of the regular measures of law enforcement. As a rule, surveillance is the method used for confronting the danger of an offense being committed according to a criminal plan that has yet to be executed, and which has not yet reached the stage of a criminal conspiracy. Where a state of emergency precludes such surveillance, administrative detention may be justified. However, examining the Israeli reality and the administrative detentions conducted therein one can hardly be persuaded that these

399 ADA Anonymous, *supra* note 24.

measures are only adopted where regular measures are unfeasible. It is similarly clear that the admissible evidence available to the system is not "heaven-sent," but under human control. Had the administrative detention "arrangement" been absent, the system that enlists agents and collaborators would have ensured that its enlistment is of a nature that enables the "burning" of some of its agents, which is accepted practice in the war against organizations involved in drug trafficking. Intelligence information that at a particular stage is inadmissible may become the starting point of an investigation that produces admissible evidence. The very existence of administrative detention creates a negative incentive against processes that might obviate it.

When considering whether administrative detention is substantially preferable to other more moderate forms of restrictions of liberty, such as house arrest accompanied by limitations (which are dictated by the nature of the danger posed by the person upon whom the restrictions are imposed) on inter-personal communication and perhaps also electronic tagging, it is difficult to give an affirmative response. Conceivably, holding suspects in prison offers administrative (not economic) advantages over other alternatives in terms of convenience and efficiency, but considerations of that kind cannot hold sway with regard to a right that is so central and the violation of which is so grave. Even in a real state of emergency, for example an outright war, Israel would presumably be able to maintain efficient supervision over the denial of liberty (in the more moderate categories) of hundreds and perhaps thousands of people. If this estimate is mistaken, then the appropriate solution is an administrative detention arrangement initiated and planned by virtue of a Knesset decision (or one of its committees, all in accordance with the constitutional regime governing a state of emergency). This decision would depend on an extreme state of emergency that prevents the maintenance of a restrictions-of-liberty regime. I do not take these

restrictions lightly, given that they may be particularly oppressive, and given the harm they cause—harm that may approach the level of actual administrative detention. Clearly, this manner of restriction on liberty requires tremendous caution and restraint. It should only be imposed in a manner that enables the restrictee to maintain a law-abiding lifestyle, rather than the contrary. It is clear that to the extent that the infringement on liberty is harmful, it is less harmful than incarceration in prison.

The fundamental principles of the system are trodden underfoot by the existing legal situation. Society's respect for these principles is being eroded. There is also a readiness to live with injustice and a potential for injustice. There can be no doubt that the detention of the Lebanese "bargaining chips" was a grievous legal travesty. It represented an abuse of a measure that lends itself to abuse, primarily by reason of being used against "others," wrapped in the aura of concern for security and secrecy. It is particularly perturbing that even when this legal travesty was judicially redressed it was only by force of a majority opinion, while the minority justices ignored the state's notification that the detainees did not pose a danger to state security. As such, Justice Cheshin's characterization of the detainees as enemy fighters is patently incorrect because the rationale for holding enemy fighters until the end of the hostilities is precisely the danger attendant to their release from the perspective of state security. No less disturbing is the fact that for years the courts continued to confirm the detention of the Lebanese prisoners. It ought to have been clear that there was no point in the continued detention, even if only by reason of the passage of time and the absence of any knowledge that the required information was in Hezbollah hands. I find it similarly worrying that it was proved, and not for the first time, that despite the very positive impression created by balancing probabilistic formulae in terms of their powerful protection of human rights, their concrete

value is extremely limited. Another perturbing question is what fate might have awaited the Lebanese detainees had it not been for the mistaken publication (and perhaps the hand of God was at work) of the first decision in *ADA 10/94 Anonymous v. Minister of Defense* after the many long years in which the legal proceedings took place behind closed doors, as in all administrative detentions.

The institution of administrative detention has a very potent capacity for causing injustice, in view of the detainee's inability to mount an effective defense, which is a sure recipe for injustice, and in view of the task of anticipating future conduct, which is outside the realm of human capability. This is primarily the case when compounded by the difficulty of distinguishing between bragging or idle prattle about future crimes and words that disclose a real and consistent undertaking to perpetrate them. In Israel, this danger is aggravated by the fact that, as opposed to Australia, which enables detention (extremely brief) for the prevention of concrete terrorist activity, detention here enables the prevention of danger of a general and abstract nature. The ability to foresee this kind of danger is particularly limited, and is not within the expertise of legal advisors and judges. A person's detention based on an assessment of that kind of danger hangs on a thread, having consideration for the very limited human capacity (including that of the security services) to predict future conduct. The existing legal position presumes that the person who sinned will continue to sin, and that a person who started to execute a plan will never change his heart or mind. This presumption is incompatible with a human dignity approach according to which man's distinction from beasts lies precisely in his ability to change his ways and abandon the path upon which he began to walk.

The Israeli conception of administrative detention is based on an unwillingness to take any kind of risk in security matters. The problem is that complete and consistent implementation of this approach

leads inexorably to the extinction of basic human rights. That is why democratic states do not adopt it. The principle of requiring proof beyond reasonable doubt for purposes of a criminal conviction indicates that democratic states are prepared to risk acquittal when there may be a high probability that the accused committed an offense (and may repeat it), provided that the probability is not that of near certainty, in which case the defendant will be convicted. Indeed, this is state practice regarding defendants convicted for offenses against state security who are released after serving their term, notwithstanding the continued threat that they may pose to security. This practice should also be adopted in the present context. The concern that the security services will fail to strike an appropriate balance between the security interest and the right to freedom is a palpable one having consideration for the nature of their task.

No less palpable is the concern that judges hearing administrative detention cases will prefer to avoid exposing society (also the judiciary as an institution and themselves) to a risk. On the one hand there is the possibility of a superfluous detention regarding which it is impossible to prove what would have happened had it not been imposed. On the other hand there is the abiding possibility that the person released will go and perpetrate a terrorist act. Given these options for decision, it is easy to guess which will be chosen. This fear is compounded by our judges' general insensitivity to the problematic nature of administrative detention, from the point of view of the detainee's inability to defend himself. This judicial insensitivity is only alleviated by the judges' emphasis of the importance of their judicial role. Indeed, while I regard this emphasis as an expression of good will, it overstates the judge's ability—considering his role and position—to serve as a real advocate for the detainee. This point was perceptively noted by the Canadian Supreme Court:

> The judge is therefore not in a position to compensate for the lack of informed scrutiny, challenge and counter-evidence that a person familiar with the case could bring. Such scrutiny is the whole point of the principle that a person whose liberty is in jeopardy must know the case to meet.[400]

In Israeli case law one cannot find any expressions that parallel the sensitivity to the violation of the right to liberty shown in other states, such as Canada, the United Kingdom, the United States and the European Court on Human Rights even in contexts less extreme than that of administrative detention. Nor does it evidence the creative approach exemplified by the following ideas: allowing the examination of the agent while concealing his identity; apprising the detainee of the evidentiary material against him in a censored or reconstructed manner, in other words in a synoptic format that does not disclose secrets; reliance on a special defense counsel who is trusted by the security services, including the cross-examination of agents and collaborators whose identities are kept under wraps, and bringing the protocol of the hearing to the detainee's knowledge subject to such deletions as dictated by the need for secrecy.

Regarding the privilege of evidence concerning the methods of gathering intelligence, I think that there is an element of exaggeration in the belief that the methods are unknown. Furthermore, in a regular criminal proceeding, too, it is possible to prevent disclosure of particulars pertaining to these methods because for the most part they are irrelevant. At the very most, in this context it is possible to

400 Charkaoui v. Minister of Citizenship and Immigration [2007] 1 SCR, 350, ¶64.

rely on a special defense counsel who is acceptable to the security services.

As to our pronounced confidence in the judges' ability to prevent injustice even when examining privileged material: In my view this confidence is exaggerated and unfounded; it is reminiscent of the detached approach taken by our legal system over the course of many years to a retrial due to difficulty of acknowledging the possibility of a judicial error in the establishment of facts that lead to injustice. The ability to arrive at a reasonable judicial conclusion firmly anchored in factual reality depends more upon the process of factual clarification than upon the qualities of the judge. This is certainly the case with Israeli judges in an adversarial legal system. The judges themselves are completely at a loss when presented with privileged information, even if we ignore entirely the fear of bias as a result of judges being granted entry, as partners to state secrets, into the "Holy of Holies" of security matters.

The decision adopted in the United Kingdom to prefer an administrative decision (for purposes of a relatively brief detention, which in fact was not an administrative detention) over the judicial review of privileged material which the detainee had not been exposed to, was not without logic. Its principal underlying consideration was the limited benefit of judicial review in cases such as these as opposed to the defilement of the legal system involved in such a warped form of review.

Nor can one ignore the exaggerated, unfair advantage that a system with administrative detention confers upon the law enforcement agencies, both at the interrogatory stages and during the trial itself, as a means of forcing a confession and as a means of forcing agreement to a plea bargain in a criminal proceeding (which may very well have occurred in the case of Tali Fahima), and even as a means of attaining a longer period of deprivation of liberty than would have

been achieved as a result of a criminal indictment for membership of an illegal organization. The situation in the Occupied Territories too, where extensive utilization of administrative detentions clearly functions as an alternative to the system of criminal law enforcement, similarly indicates the grave potential inherent in administrative detention.

In my understanding, when weighing the slight advantages of administrative detention, with its numerous violations, against the more moderate alternatives, the scales clearly favor its total abolition. Admittedly, one could argue that an appreciable, if not the lion's share of the problems arising from administrative detention could find an acceptable solution in the proposals for legislative changes appearing in this policy paper. They are indeed of tremendous value, but it should be remembered that even the most stringent probability tests, such as the near certainty test, were powerless to prevent grave distortions of justice when confronted by the security interest. The attitude taken by our legal system to the deportation from territories under military occupation, demolitions of houses, and even to targeted killings, hardly augurs well. Where it concerns our treatment of "the other," I am uncertain as to whether legislative changes will suffice to generate a change in the basic, deeply-rooted respect for the security consideration as one that outweighs any other consideration. I am especially concerned that our judges' unjustified confidence in their ability to arrive at the truth based exclusively on their independent examination of the privileged material, as well as deeply rooted practices that have crystallized over time, will prevent them from treating the changes proposed in the areas of procedure and proof with the appropriate mindset and requisite degree of internalization. Can one expect the legal system to battle for the detainee's right to due process when the judges themselves are convinced that their own examination of the confidential material suffices for the prevention of

injustice? Nor can I avoid expressing my fear that Israel will simply be unable to wean itself from the state of emergency that has been its default mode of existence since its establishment, with all the advantages, both covert and overt, that this situation confers upon the government—any government—of Israel.

Ultimately, I think that the fundamental purpose of administrative detention, at the deepest level of naked truth, is to enable a governmental grave violation of human liberty in a grave and unlimited manner, without minimal due process. The necessary minimum of due process, however, is what separates a state under the rule of law from a state that is not. A state cannot subscribe to the fundamental values of human dignity, the right to due process, human freedom and the avoidance of legal travesties, while simultaneously maintaining the institution of administrative detention. Accordingly, if the State of Israel seeks to be a state of law, it must jettison administrative detention. This proposal may sound radical, perhaps even revolutionary, but in essence it is not. For as mentioned, it should be accompanied by an arrangement that authorizes—under certain conditions—far-reaching restrictions on liberty, but such as are still less drastic than administrative detention. These restrictions—as proposed in this study—would be capable of coping with the dangers to security. They may provide a reasonable solution, provided that their implementation will be maintained under strict oversight.

The question that must be asked is whether the fears expressed regarding due process in administrative detention are not relevant, perhaps even more so, in cases involving lesser restrictions on liberty. I cannot negate the validity of this question. Nevertheless there is a chance that the abolition of the existing regime and the framing of a new system for the protection of state security and public safety will also facilitate a new and different approach to due process.

Appendix
Proposed Emergency Powers
(Protection of State and Public Security) Bill

1. Application

This act shall only apply in a period in which a state of emergency exists in the State by virtue of a declaration under section 38 of Basic Law: The Government.

2. Purpose of the Act

The purpose of this act is to protect state security and public safety while ensuring the protection of human dignity, liberty, and the right to due process

3. **Definitions**

In this act

- "electronic tagging" means attaching an electronic device to a suspect's body. The electronic tag enables the monitoring of the suspect by electromagnetic spotting with the assistance of a transmitter and recorder installed in his place of residence or another place ordered by the court.
- "order prohibiting the leaving of a place of residence" means an order directing a person's confinement to his place of residence during all hours of the day or a part thereof.

- "restriction order" means an order restricting a person to remain in a defined geographic area, or prohibiting his entry into a defined geographic area, or preventing him from contacting or meeting whoever is specified.
- "reporting order" means an order instructing a person to report at defined times and at a defined frequency at a police station.

Chapter One: Measures for Protection of State and Public Security

4. **Administrative Detention**

(a) Where the authorized official has reasonable cause to assume that the protection of state security or public safety, as stemming from the state of emergency, requires that a particular person be detained, he may, by order under his hand, direct that such person be detained for a period stated in the order that shall not exceed sixty days.

(b) Reasonable cause as stated exists when the authorized official has substantial grounds for surmising that upholding a particular person's freedom of movement will, with near certainty, significantly endanger state security or public safety, and that the measures stipulated in sections 4-8 of this act are inadequate for purposes of confronting the said danger.

(c) If the authorized official has reasonable cause to assume, immediately prior to the expiry of the order under subsection (a) (hereinafter: the "original detention order") that the protection of state security or public safety, as stemming from the state of emergency, still requires the detainee's detention, he may, from time to time, by order under his hand, direct that the original detention order be extended for a period that shall not exceed

thirty days, and the extension order shall in all respects be treated like the original detention order.

(d) A detention order shall not be extended for an overall period exceeding a total of one year from the date upon which the first detention order came into force.

(e) An order under this section may be made in the absence of the person to whose detention it relates.

5. **Prohibition on Leaving Place of Residence**

(a) If the authorized official has reasonable cause to assume that the protection of state security or public safety, as stemming from the state of emergency, requires that the freedom of movement of a particular person be restricted, and that the measures stipulated in sections 5-8 of this act are inadequate for purposes of confronting the danger posed by that person, he may, by order under his hand, direct that such person be prohibited from leaving his place of residence during all hours of the day or a part thereof. The duration of the order shall not exceed a period of four months.

(b) If the authorized official has reasonable cause to assume, immediately prior to the expiry of the order under subsection (a) that the protection of state security or public safety, as stemming from the state of emergency, require continued restriction of a particular person's freedom of movement, he may, from time to time, by order under his hand, direct that the original order be extended for a period that shall not exceed two months, and the extension order shall in all respects be treated like the original order.

(c) An order prohibiting leaving a place of residence shall not be extended for an overall period exceeding a total of one year from the date upon which the first order came into force.

(d) An order under this section may be made in the absence of the person to whom it relates.

6. **Restriction Order**

(a) If the authorized official has reasonable cause to assume that the protection of state security or public safety, as stemming from the state of emergency, requires that a particular person be prevented access to certain areas in the State or prevented from contacting certain people, he may, by order under his hand, direct that he be restricted to staying in a geographic area which will be stipulated in the order, and prohibited from contacting persons who are stipulated in the order, for a period that shall not exceed four months.

(b) If the authorized official has reasonable cause to assume, immediately prior to the expiry of the order under subsection (a), that the protection of state security or public safety, as stemming from the state of emergency, requires the continued prevention of a particular person's access to certain areas, or to certain persons, he may, from time to time, by order under his hand, direct that the original order be extended for a period that shall not exceed two months, and the extension order shall in all respects be treated like the original restriction order.

(c) An order under this section may be made in the absence of the person to whom it relates.

7. **Reporting Order**

(a) If the authorized official has reasonable cause to assume that the protection of state security or public safety, as stemming from the state of emergency, requires that the freedom of movement of a particular person be restricted, he may, by order under his hand, direct that such person report at the police station nearest to his place of residence, at the times and frequency dictated by the purpose of the order, as prescribed in the order, for a period that shall not exceed six months.

(b) If the authorized official has reasonable cause to assume, immediately prior to the expiry of the order under subsection (a) that the protection of state security or public security, as stemming from the state of emergency, requires the continued restriction of a particular person's freedom of movement, he may, from time to time, by order under his hand, direct that the original order be extended for a period that shall not exceed three months, and the extension order shall in all respects be treated like the original order.
(c) An order under this section may be made in the absence of the person to whom it relates.

8. **Surveillance Order**

(a) If the authorized official has reasonable cause to assume that the protection of state security or public safety so require, he may, by order under his hand, direct that a particular person be placed under surveillance.
(b) An order under this section may be made in the absence of the person to whom it relates.

9. **Additional Provisions**

In exercising his authorities under sections 5-6, the authorized official or the court may, to the extent that it is necessary, add conditions for a period that it prescribes, including:

(a) Attachment of an electronic cuff to a particular person's body and the installation of an electronic transmitter in his place of residence.
(b) The duty to give notice regarding any change in residential address or place of work.
(c) Prohibition on leaving the country and the deposit of passport.
(d) Prohibition on continued engagement in an occupation related to the suspicion against that person, where there is reasonable cause

to fear that continuation of such occupation constitutes a danger to state security or to public safety, or may facilitate the commission of an act that endangers state security or public safety.

(e) Prohibition on the possession of dangerous materials.

Chapter Two: Execution

10. A**uthority to Order Detention**

(a) The Minister of Defense shall have the authority to order detention under section 4.

(b) If the Chief of the General Staff has reasonable cause to believe that conditions exist permitting the Minister of Defense to order the detention of a person under subsection 4(a), he may, by order under his hand, direct that such person be detained for a period not exceeding forty-eight hours that shall not be liable to extension by order of the Chief of the General Staff.

11. **Authority under Sections 5-8**

The Minister of Defense shall have the authority to prohibit leaving a place of residence, to issue a restriction order, a reporting order, and a surveillance order under sections 5-8.

12. **Powers not Delegable**

The powers of the Minister of Defense and the Chief of the General Staff under this Act are not delegable.

13. **Execution**

(a) An order under this act shall be executed by a police officer or by a soldier within the meaning of section 1 of the Military Justice Act, 5715-1955.

(b) An order as stated shall serve as a warrant for the exercise of the authority in accordance with the conditions prescribed by

the Minister of Justice in regulations, in consultation with the Minister of the Interior and with the approval of a joint committee of the Constitution, Law and Justice Committee and the Foreign Affairs and Security Committee of the Knesset. Regulations as aforesaid may prescribe, inter alia, provisions as to the discipline of detainees in the places of detention.

(c) An order issued under this act shall include as many details as possible relating to the grounds for the exercise of the authority, unless such details are, with near certainty, liable to cause substantial harm to state security or public safety; provided that the order contains details that enable the detainee to address the suspicions imputed to him for purposes of his defense.

Chapter Three: Judicial Review

14. **Judicial Review of a Detention Order**

(a) Where a person is detained by order of the Minister of Defense under this act, he shall, within 48 hours of his detention, or, if immediately before he was under detention by order of the Chief of the General Staff—within 48 hours of his detention under the order of the Chief of the General Staff, be brought before the chief justice of a district court, and the chief justice may confirm or set aside the detention order or shorten the period of detention. If the detainee is not brought before the chief justice and the hearing before him has not begun within 48 hours as aforesaid, the detainee shall be released unless some other grounds for detaining him exists under any law.

(b) Days of rest, within the meaning of the Act and Administration Ordinance, 1948, applying to the chief justice of the district court shall not be included in the count of the 48 hours.

(c) The chief justice of the district court shall set aside the detention order unless it was proved to him that the protection of state security or public safety requires the issuance of the order and that the purpose of the order cannot be achieved by less harmful means.
(d) The chief justice of the district court shall substitute the detention order by an order under sections 5-8 unless it was proved to him that these means are incapable of ensuring the purpose of the order, after he was persuaded of the necessity of the order.
(e) This section shall not derogate from the power of the Minister of Defense to set aside a detention order made under this act either before or after its confirmation under this section.

15. **Judicial Review of the Authority for a Prohibition on Leaving a Place of Residence, Restriction, Reporting, and Surveillance**

(a) Where an order is made against a person under sections 5-8 of this act, the order shall be brought before a judge of a district court within 72 hours of its commencement, and the judge may confirm the order, set it aside, or shorten its duration. If the order is not brought for confirmation as specified in this section, the order shall be set aside.
(b) Where an order is made against a person under section 8 of this act, the court may confirm it in the absence of or without the knowledge of the person against whom it was given, as required under the circumstances.
(c) Days of rest, within the meaning of the Act and Administration Ordinance, 5708-1948, applying to the district court, shall not be included in the count of the 72 hours.
(d) A district court judge shall set aside the order unless it is proved that protection of state security or public safety requires the issuing of the order and that the purpose of the order cannot be achieved by less harmful means.

(e) A district court judge shall substitute the detention order with an order made under sections 5-8, unless it was proved to him that orders under sections 5-8 are incapable of attaining the same purpose, after being persuaded of the necessity of the order.
(f) This section shall not derogate from the power of the authorized official to set aside an order made under this act either before or after its confirmation under this section.

The provisions of section 4(b) shall apply, *mutatis mutandis*, to the exercise of judicial review under sections 14 and 15.

16. **Periodic Review**

Where an order has been confirmed under sections 4-7 of this act, with or without variations, the district court shall review the order no later than two months after confirmation thereof under section 14 or section 15, or after a decision under these sections, or within a shorter period prescribed by the chief justice in his decision. If the hearing before the court has not begun within the said period, the order shall be set aside.

17. **Rules of Evidence**

(a) In proceedings under sections 14-16, deviation from the rules of evidence shall be permitted if the district court is satisfied that this will serve the discovery of the truth and ensure that justice is served.
(b) Whenever it is decided to deviate from the rules of evidence, the reasons grounding the decision shall be recorded.
(c) In proceedings under sections 14-16, the district court may accept evidence in the absence of the suspect or his counsel or without disclosing the evidence to them if, after studying the evidence or hearing submissions, even in their absence, it is persuaded that disclosure of the evidence to the detainee or his counsel will with

near certainty cause substantial harm to state security or public safety, and that the harm liable to be caused to security is graver than the harm liable to be caused to the suspect. This provision shall not derogate from any right to refrain from giving evidence under Chapter Three of the Evidence Ordinance (New Version), 5731-1971.

(d) If possible without harming state or public security, the evidence shall be disclosed in part to the detainee and his counsel, or a summary thereof that is not harmful as stated, shall be given to him.

(e) The court shall ensure compliance with the provisions of section 13(c) of the Act.

(f) The court shall direct that a special defense counsel be appointed for purposes of examining the evidence that remains privileged under subsection (c). Any evidence that is presented to the court shall be accessible to the special defense counsel for purposes of protecting the suspect's right to due process. The special defense counsel is entitled to cross examine any person who submitted material that casts suspicion on the detainee. The examination protocol shall be submitted for the perusal of the detainee and his counsel after the deletion of details that are liable to harm state security or public safety, as stated in subsection (c). Provisions concerning the conditions and guidelines for the special defense counsel shall be published in regulations. The list of special defense counsels shall be determined by the minister of defense and the attorney general.

18. **Appeal**

(a) A decision of the chief justice of the district court to confirm a detention order under section 14, with or without variations, and a decision of the district court to confirm the order under sections 15-16, with or without variations, or to set it aside, may be appealed

before the Supreme Court, which shall hear the appeal before a single judge. The Supreme Court shall have all the powers of the district court under this act.

(b) The appeal shall not stay the implementation of the order unless the chief justice of the district court or the chief justice of the Supreme Court decides otherwise.

Chapter Four: Additional Provisions

19. **Presence of the Suspect and Representation**

(a) Subject to the provisions of section 17(c), and 15(b), a suspect may be present at every hearing under sections 13-15.

(b) The Minister of Justice may, by order, limit the right of representation in proceedings under this act to persons authorized, by unrestricted authorization under section 318(c) of the Military Justice Act, 5715–1955, to act as defense counsel in courts martial.

20. **Hearings In Camera**

(a) A court hearing proceedings under this act may direct that the hearing be held in camera if persuaded that it is required to safeguard state security or public safety.

(b) The court may publish or permit publication of details pertaining to the in camera hearing, provided that nothing in these details is liable to harm state security or public safety.

(c) At intervals of five years from the date of the decision, the court will assess whether details from the hearing can be made public without causing harm to state security or public safety.

21. **Replacing the Chief Justice by a Relieving Chief Justice**

Where, for any reason, the chief justice of a district court is unable to carry out his functions under this act, a relieving chief justice of that district court shall take his place.

22. **Stability of the Act**

This act cannot be varied, temporarily suspended, or made subject to conditions by emergency regulations.

23. **Implementation and Regulations**

The Minister of Justice is charged with the implementation of this act and, with the approval of the Constitution, Law and Justice Committee, may make regulations for its implementation, which prescribe the procedure in proceedings under this act and the time a for the filing of an appeal and the performance of any other act under this act.