Exceptional Measures in the Struggle against Terrorism

Administrative Detention, Home Demolitions, Deportation and "Assigned Residence"

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המכון הישראלי לדמוקרטיה
THE ISRAEL DEMOCRACY INSTITUTE

Language Editors (Hebrew): Keren Gliklich, Daphna Schweppe, Anat Bernstein
Typesetting: Nadav Shtechman
Printed by Art Plus, Jerusalem

ISBN 978-965-519-072-4

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Abstracts

A Reexamination of Administrative Detention in a Jewish and Democratic State

Elad Gil
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The Emergency Powers (Detention) Act – 1979 (hereafter: 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.

Despite its worthwhile objective, the 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 – indeed – 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 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* (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 the Mandatory regime in the Land of Israel. The Detention Act was submitted to the Knesset

∗ Translated by Karen Gold.

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.

In the opening chapters of this work, I chose to analyze the key provisions of the 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.

These chapters also include a discussion devoted to the normative framework of the Detention Act – namely, the state of emergency in Israel as declared by the Knesset – which has negligible significance in the present reality since the declaration is automatically extended every year.

It is important to state at the outset that the number of administrative detentions under the Act has been extremely small. However, in recent years, the proposal has been raised in Israeli public discourse to apply the Detention Act to at least two additional cases, which would greatly expand its use. In the first case, just prior to the implementation of the Disengagement Plan, 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, is a loophole begging to be 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.

The third chapter 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 9.11 attacks, democratic states adopted ill-advised laws and practices that clearly reflected the panic that gripped them. 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.

I have reached the conclusion that thirty years after the Detention Act was enacted, 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 Israeli society as a whole toward the basic rights of the individual, as well as the fundamental principles that have guided the State of Israel 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.

I wish to propose the passage of a new act – the **Emergency Powers (Protection of State Security and Public Safety) Act** (as formulated in the Appendix) – in lieu of the Detention Act currently in effect. 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, I propose changes intended to eliminate the basic injustice inherent in the current detention proceedings. I believe 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:

1. 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 alone will not suffice.
2. 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 "heaviest weapon" 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.
3. In order to lessen the likelihood of perverting justice by not allowing suspects to defend themselves against evidence that cannot be disclosed to them, we 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.
4. It is further proposed that the duration of administrative detention be limited to two months (instead of the current six months), 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.

5. 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.

Home Demolitions: A Legitimate Counter-Terrorism Measure or Collective Punishment?

Yogev Tuval
Edited by Ido Rosenzweig and supervised by Yuval Shany

From 1967 until the outbreak of the second intifada in 2000 – when Israel began to engage in preventive assassinations (otherwise known as "targeted killings") – the demolition of the homes of terrorists and their families was the harshest measure employed by Israel to counter Palestinian terrorism. This method was employed until 2005, when Israel ceased utilizing it in light of the conclusions reached by a professional military committee: that the legality of this policy was questionable and that its liabilities outweighed its benefits. In the wake of terrorist attacks carried out by East Jerusalem residents, the defense establishment recently decided that there is a need to change this policy and resume home demolitions as a means of deterrence.

This work examines whether Israel is allowed to resume home demolitions from a legal perspective. The legality of this method will be conducted with accordance to both national and international law. It is important to emphasize that this paper deals with the legality of house demolitions which are being conducted for the purpose of punishment or deterrence (i.e. house demolitions which took place by the State as a response of terror attacks or other security violations). These demolitions are meant to deterrent future potential terror attacks and not operational house demolitions taking place during combat or administrative demolitions of houses built without appropriate permissions.

The first part of this work analyzes the Israeli house demolition policy. This analyze includes a discussion over the sources, purposes, rationalizes and problems of this policy. Furthermore, this part will also elaborate on the legal grounds for the use of the house demolition policy, which is mainly based on the defence regulations, Israel›s position on the legality of this policy and the main judicial decisions of the Supreme Court on that issue.

The second part of this work presents a critical discussion over the Israeli house demolition policy. This discussion includes, inter alia, the examination of the policy in accordance to: the relevant provisions of the international humanitarian law (laws of armed conflict) and especially in accordance to the prohibition on collective punishment and the obligation to preserve the right of due process; the relevant provisions of the international human rights law, which prohibits on arbitrary, cruel, inhuman and degrading treatment or punishment; the Israeli national law which according to the Israeli legislation, applies over house demolitions in east Jerusalem.

As discussed at length in this work, from 1967 to 2009, Israel destroyed more than 1,000 houses of Palestinians in accordance with its policy of home demolitions. This policy caused severe damage, both emotional and material, to the Palestinian population residing in the territories and in East Jerusalem and, moreover, it was implemented in violation of the provisions of international and Israeli law, as we explain. Furthermore, the State of Israel has continued to execute home demolitions despite doubts that this measure achieved the goal it had set for itself–deterring Palestinians from carrying out acts of terrorism against Israel.

For these reasons, the Supreme Court should at least demand a level of proof as to the effectiveness of home demolitions from the defense establishment, which would be suitable to the graveness and the controversiality of this measure. Furthermore, it would be prudent for the Knesset to totally revoke Regulation 119 of the (Emergency) Defense Regulations, which underlies the authority to carry out home demolitions in order to ensure that Israel will not resume resorting to this illegal and ill-advised method.

Deportation and "Assigned Residence"

Inbar Levy
Supervised by Mordechai Kremnitzer

As part of its war on terror, Israel employs various measures against Palestinians suspected of terrorist activity. This work examines the legality and effectiveness of two of these – deportation from the state and "assigned residence" (that is, the relocation of an individual from his natural place of residence to a different area, which in the cases examined here refers to relocation from Judea and Samaria to the Gaza Strip). The conclusion that emerges from the legal analysis presented in this article concerning deportation, a measure that Israel engaged in until 1992, indicates an insuperable problem of illegality. As for assigned residence, which Israel employed until the implementation of the Disengagement Plan, its legal status is more complex; here too, however, there are aspects that tip the scales toward illegality.

The principal difficulty in employing the measure of assigned residence stems from the original intent of the Geneva Convention, which was to accord preference to house arrest over relocating a person from his natural place of residence. Moreover, an analysis of the cases in which Israel applied this measure indicates that the rationale for its use is often punitive rather than preventive, which also contravenes the Geneva Convention. Furthermore, from the standpoint of effectiveness (and not only illegality), it is hard to justify the use of an assigned residence order based on relocation from Judea and Samaria to the Gaza Strip, because this measure does not neutralize the danger posed by the individuals against whom these orders are issued, and may even make it more difficult to monitor them. In addition, it allows terrorists from both areas to be in direct contact with one another. Assigned residence can also trigger opposition among the Palestinian population and incite terrorist activity. This problem is exacerbated by the difficulty of ensuring the deportee decent living conditions in the area to which he is relocated. And finally, given the current impossibility of assigning residence in the area of the Gaza

Strip, where Israel no longer exercises effective control, the deterrence potential of such a measure has been diminished.

This study concludes with a recommendation that the State of Israel desist from resorting to deportation and assigned residence. Instead of these policies, Israel should employ other measures, such as criminal penalties, which are not only legal and more protective of human rights, but are also liable to be more effective in the struggle against terrorism.