

## **Ideological Legislation in the Name of "Security"**

**By Abeer Baker<sup>1</sup>**

During the past three years, the Knesset has passed draconian laws that fundamentally violate constitutional rights. Some of this legislation even seeks to circumvent rulings by the Supreme Court. A salient characteristic of this legislation is the expansion of the concept of "state security," even when the purpose of the legislation has no connection to the security of the state. It is no coincidence that officials of the General Security Services (GSS or Shin Bet) have played a central role in the Knesset Committee discussions on this legislation. In this type of legislation, examples of which will be presented below, the executive turns to the legislature and seeks to ground its illegal, ideology-driven policy in primary legislation. By approaching the legislature, the executive branch avoids a double critique: firstly, it can no longer be claimed that the executive branch is acting without authorization and on its own accord. The opposite is true: its activity is anchored in legislation passed in the Knesset, ostensibly in accordance with the law. Secondly, even if the law initiated by the executive authority arouses strong opposition, the judicial process involved in abrogating the law – if the Court is indeed persuaded to do so – is long and tortuous. Thus, the executive is ensured at least a few quiet years while the case is pending during which it can comfortably do as it pleases, under the cover and protection of the law. Thus, the legislature, which is glad to rescue the executive branch from its distress, becomes a tool in its hands. The legislature promises the executive authority significant immunity from abrogation of its illegal policy or at least from the subjection of its actions to imminent judicial review.

This paper will not include all of the examples of recently approved legislation, which include directives that violate human rights. Neither will it describe the way in which these laws are legislated. Instead, it intends to explain how, via the executive branch, the authorities use the legislature to sanitize their illegal and unconstitutional actions. By "illegal," I am referring to actions that the courts have already ruled to be illegal, *inter alia*, due to the absence of any law authorizing the executive to carry them out. "Unconstitutional" actions are those that harm the constitutional rights of a person or citizen to an unreasonable extent or in an extreme way.

To remove any doubt, I must note that the involvement of the executive authority in the legislative process is not inherently improper, as long as it is careful not to betray its governmental role and as long as it acts fairly, in good faith and according to the rules of natural justice. To act fairly means that when the executive is asked to present data to the legislature pertaining to its field of activity, it must do so in an open and fair manner, presenting the full array of facts, in a neutral and not a one-sided way. When the executive turns to the legislature with an emotional plea to establish the law in an area relevant to its activity, this must come from legitimate motives, with the aim of promoting rights and preserving constitutional principles, and not for the purpose of providing a stamp of approval and constitutional mantle for its nationalist ideology.

For example, when the GSS found itself collapsing under the burden of the occupation, it turned to the legislature and asked it to anchor in law the policy of prohibiting the unification of Palestinian families. The executive branch unhesitatingly collaborated with the GSS. The executive's efforts to wrap its ideological motives in a security package did not succeed. The demographic motive lurking behind this law quickly became an open secret, which became increasingly difficult to disguise with security justifications. The security argument served the executive as a tool for blinding the eyes of the legislature and public opinion in order to prevent them from discerning the underlying ideological motive until the legislation was passed. The

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executive's fixed worldview, focused on preventing the growth of the Arab population in Israel as a way to preserve the state's Jewishness, is the guiding principle upon which the law is based.<sup>2</sup>

The GSS, with the backing of the government, sought via this legislation to save itself from being subjected to judicial review each time it recommends to the Ministry of the Interior that it deny entry permits to Israel to Palestinian residents of the Occupied Palestinian Territories (OPTs) and prevent family unification with their spouses who are citizens of Israel. Following closed-door meetings with Ministers and Members of Knesset, during which the GSS presented its arguments in a biased way and laid out the factual information it possessed, the proposed legislation was sent to the relevant Knesset committees for discussion and then brought to a vote in the Knesset plenum. The law was passed despite all of its defects and flaws in terms of values and constitutionality (The Nationality and Entry into Israel Law (Temporary Order) – 2003). Seven petitions to the Supreme Court seeking to overturn this law, including all of its revisions, have been awaiting ruling for over two years; to date, the Court has not made a single ruling.<sup>3</sup>

In its demand to anchor its racist policy in law, the GSS realized that the cancellation of this law would not be an easy legal task. In the meantime, and until the Supreme Court rules on this matter, thousands of couples will continue to lament their love or marriage, which some have been forced to end for lack of any alternative. With the generous assistance of the legislature, GSS officials sleep well at night after creating thousands of sleepless women and children who were forced to separate from their husbands and fathers, condemning them to a life of insecurity, fear and dread.

Here is another infuriating example: the Ministerial Committee on Legislation recently approved a draconian bill, also initiated by the GSS, which provides further illustration of how the organization uses the legislature's authority as a tool to promote its ideological stance. I am referring to the Criminal Law Procedures Bill (Powers of Implementation – Special Directives for Investigating Security Violations Perpetrated by Non-Citizens), Temporary Order – 2005. This bill would pave the way for extremely harsh conditions of interrogation and incarceration for Palestinians suspected of committing security offenses. It could even legitimize the use of prohibited interrogation methods by the GSS as part of an effort to inject into Israeli law the same harsh military regulations that are applied in the OPTs. With the end of the military regime in the Gaza Strip, the military regulations issued by the commander of the armed forces in the area expired. These same regulations granted the security authorities, and the GSS in particular, draconian enforcement and interrogation powers much broader than the enforcement powers afforded under the Criminal Procedure (Enforcement Powers: Detentions) Law – 1996 (hereafter: the Detentions Law). This law does not apply to Palestinians living under occupation and a military regime.

With the end of the military regime in the Gaza Strip, the GSS could only apply the relatively moderate Israeli Detentions Law when it sought to enforce the law (through detentions, arrests and indictments) vis-à-vis residents of the Gaza Strip. The GSS did not like this legal situation and was not at all willing to accept it.

The bill initiated by the GSS replaces the term "Palestinians" with the expression "foreigners who are not residents." The explanation included in the bill's synopsis, which was disseminated by the Ministry of Justice, does not disguise this fact. This synopsis includes internal contradictions. On one hand, it states, among other things, that the demand to adopt harsher measures towards the "foreigners" derives from the fact that, since they are foreign and are not

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<sup>2</sup> For the demographic justification for the Nationality and Entry into Israel Law, see, Ruth Gavison, "Family Unification in Two States," *Yediot Ahronot*, 24 Hours, 5 August 2003.

<sup>3</sup> H.C. 7052/03, *Adalah – The Legal Center for Arab Minority Rights In Israel, et. al. v. The Minister of the Interior, et. al.* (case pending).

citizens or residents of Israel, it is more difficult for the security apparatus to access sources of intelligence information or potential witnesses who will agree to collaborate with them. On the other hand, however, the synopsis also suggests that the tougher law enforcement conditions designated for Palestinians who reside in the Gaza Strip do not derive from the fact that the Palestinians under investigation are "foreigners." Instead, the demand for these tougher measures is attributed to the particular characteristics of investigating security offenses, the anticipated dangers and the need to conduct uninterrupted investigations without delay.

Resting on these arguments, as well as other arguments that will never be revealed to the public, the Israeli legislature, the Knesset, is now being asked to anchor a new directive in law – an even more discriminatory and unreasonable directive than the harsh provisions which already exist in Israeli law.<sup>4</sup> According to the proposed directive, the investigative authorities and GSS will be given, *inter alia*, the authority to order a prolonged interrogation of a non-resident suspected of committing security offenses. It would be permissible to interrogate such a suspect for 96 hours before bringing him or her before a judge. (Under the Detentions Law, the maximum time for which a suspect can be questioned before being brought before a judge is 48 hours.) The judge authorized to extend the remand of a non-resident suspected of committing security offenses is a District Court Judge. (The suspect thus loses a potential venue of appeal under the proposed directive, since the Detentions Law authorizes a Magistrate Court Judge to extend a suspect's remand.) The suspect's remand to custody can be extended for a maximum period of 20 days each time the court is requested to do so. (This compares to 15-day maximum period under the Detentions Law.) A suspect's remand can be extended without his presence in court. (According to the Detentions Law, a detained suspect must be present in court for his remand hearing.) A Supreme Court Justice is authorized to deny a suspect the right to meet with an attorney for up to 50 days, following a request from the Attorney General. (This compares to the Detentions Law's authorization of a District Court president to deny a suspect from meeting with an attorney for up to 21 days, again upon the request of the Attorney General.)

Therefore, the following question arises: What reason does the GSS have for seeking new legislation to regulate matters pertaining to the investigation of those suspected of committing security offenses when such a law, albeit less draconian, already exists and is designed to accommodate any investigation into security offenses, regardless of the suspect's national origin? What considerations stood before the Ministerial Committee when it unanimously approved this bill?

The fact that the bill targets Palestinians seems in itself to be enough to help the GSS divert the discussion away from the question of blanket violations of basic human rights to the focus on security issues. In this way, the GSS achieves two important goals: it facilitates the legislative work and, at the same time, reinforces the worldview of the GSS and the government, which regard the very existence of the Palestinian population as a problem that has no solution other than incarcerating them behind fences, walls or in detention cells, all in the name of security.<sup>5</sup>

Thus, when the GSS found itself perturbed by the application of a regular law to Palestinian detainees, it rushed to the legislature to amend the situation in which Palestinian detainees

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<sup>4</sup> For example, under Paragraph 35 (D) of the Detentions Law, it is possible to prevent a detainee suspected of security offenses from meeting with an attorney for up to 21 days. This is a very severe directive that violates the constitutional right of a detainee to meet with his attorney, especially during the initial days of his interrogation. In my opinion, this severe directive should not be made even harsher.

<sup>5</sup> The writer Yitzhak Laor aptly described this view, saying that, "Terror is not the problem according to this conception, nor is it the borders, but rather the very existence of this people, who have no other solution and should be placed between fences, walls, detention cells – all in the name of security, since there is no other solution." See Yitzhak Laor, "Let them starve to death," *Ha'aretz*, page B1 (page 5 in English edition), 18 August 2004.

might, heaven forbid, enjoy the provisions of regular Israeli law, just like any other citizen of the state suspected of committing identical offenses. The approval of the draconian bill by the Ministerial Committee on Legislation (on 9 October 2005) will help a pleased GSS move onto the Knesset until it satisfies its desires. Only the cancellation of this racist bill can save the legislature from an additional mark of shame in Israel's book of laws. Any amendment to the language of the proposed legislation would only be a cosmetic revision aimed at blurring the moral ugliness at the roots of this bill.

The Israeli legislature plays into the hands of the state's authorities, especially its security branches, not only by expanding their authority and giving expression to their ideology, but also by sometimes granting full immunity to court challenges against their illegal activities. A prominent example of this is the Civil Wrongs (Liability of the State) Law (Amendment 7) – 2005. This law simply denies residents of the OPTs – and residents of any area the Minister of Defense declares a "Conflict Zone" – the right to sue for compensation for damages caused by the security forces, even if this does not occur in the framework of a military operation. A petition against the constitutionality of the law was submitted on 31 August 2005 by Palestinian and Israeli human rights organizations,<sup>6</sup> demanding the cancellation of the law. The Supreme Court has meanwhile rejected their request for a temporary injunction to prevent this law (the gravity of which cannot be overstated) from taking effect. In response to the petitioners' request to schedule an urgent hearing on the petition, the Supreme Court instructed the Court's secretariat to schedule the session for the beginning of March 2006, more than six months after the submission of the petition.

Like the Supreme Court's foot-dragging in ruling on a petition submitted by Palestinian and Israeli human rights organizations to cancel the Nationality and Entry into Law, the petition to overturn the law exempting the state and its agents from responsibility for damages suffered by Palestinian residents of the OPTs is also expected to encounter lengthy procrastination. They will thus join the ranks of other petitioners who have been waiting for years for a ruling on the cancellation of a law. In one such case, the petitioners asked to overturn the "Tal Law", which anchors the arrangement granting an exemption from military service to students of yeshivas (Jewish religious schools).<sup>7</sup> It is important to note that this arrangement was also rejected by the Supreme Court in the past.<sup>8</sup> However, as in many other cases, its rejection by the Supreme Court did not prevent it from being re-anchored via primary legislation; the Court has yet to rule on the validity of this new legislation.<sup>9</sup>

The recent amendment to the Prisons Ordinance (Amendment 30) – 2005 is a good example of the way in which the executive authorities use the legislature to circumvent Supreme Court rulings. The innovation in this amendment is in its establishment of the authority of the Prison Service Commissioner and prison wardens to prevent a meeting between a prisoner<sup>10</sup> and his attorney if they have a genuine suspicion that this meeting would enable a crime to be committed which would endanger a person's security, public safety or state security, or if the meeting<sup>11</sup> would enable a prison violation to be perpetrated that would cause real harm to discipline in the prison.<sup>12</sup>

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<sup>6</sup> H.C. 8276/05, *Adalah, et. al. v. The Minister of Defense, et. al.* (case pending).

<sup>7</sup> H.C. 24/01, *Yehuda Ressler, et. al. v. The Israeli Knesset, et. al.* (case pending).

<sup>8</sup> H.C. 3267/97, *Amnon Rubinstein, et. al. v. The Minister of Defense*, PD 52(5) 481.

<sup>9</sup> The Law Deferring Security Service for Full-Time Yeshiva Students (Temporary Order) – 2001.

<sup>10</sup> A prisoner serving a sentence or being held until the completion of court proceedings. It should be noted that until this amendment it was only possible to limit a meeting with an attorney under the Criminal Law Procedures Law (Enforcement Powers – Detentions) – 1996, which only applies to prisoners suspected of committing security offenses and against whom no indictments have yet been filed. The maximum period of limitation according to law is 21 days, with the approval of the president of the district court and consent of the attorney general.

<sup>11</sup> A prisoner's right to meet with his attorney is stipulated in paragraph 45 of the Prisons Ordinance – 1971: "A prisoner awaiting trial will be offered every reasonable opportunity of communicating with his friends and legal advisor." The right of a prisoner whose case is still *sub judice* to meet with his attorney is

A quick look into the history behind this amendment reveals that this bill would never have been initiated if the Supreme Court had not rejected the Israel Prison Service's (IPS) illegal policy of limiting the rights of prisoners. Two separate petitions were submitted to the Supreme Court, both challenging the legality of the policy adopted by the IPS in restricting the rights of prisoners to meet with their attorneys. In both petitions, the Court ruled that the restrictions imposed by the IPS were illegal and must be canceled.

In the first case, three human rights organizations and the Israel Bar Association petitioned against the Minister of Public Security, who had instituted a regulation authorizing a prison warden to prevent a detainee from meeting with his attorney.<sup>13</sup> In its detailed ruling, issued in February 2004, the Supreme Court struck down this regulation and determined that violating a prisoner's constitutional right to meet with his attorney is unconstitutional when done via a regulation promulgated by the Minister. In the second case, a group of attorneys petitioned, via Adalah and the Association for Civil Rights in Israel (ACRI), against the IPS's decision to prohibit attorneys from meeting with Palestinian prisoners who were participating in a hunger strike, as a punishment for the strike.<sup>14</sup> In this case, the IPS admitted that it had made a mistake and acted illegally, and it declared before the court that *the fact that a detainee or prisoner is on a hunger strike does not provide legal justification for preventing him and his attorney from meeting together*. This declaration was incorporated in the Supreme Court's ruling, which stated that the petitioners' demands have been fulfilled when the IPS admitted its illegal error.

It is important to emphasize that until these two petitions were submitted, it was the IPS's practice to limit meetings between prisoners and their attorneys without any legal authority. The IPS never asked to establish this authority in law and continued to limit the meetings, while fully aware that it had no authority to do so. Many attorneys have complained to the author of this piece that in every mass hunger strike undertaken by prisoners classified as security prisoners, the IPS has prevented the entry of attorneys seeking to visit prisoners. This policy was aimed at suppressing legitimate actions of protest on the part of prisoners against the disgraceful conditions of their incarceration. The IPS admitted this mistake for the first time only after a petition on this matter was submitted.

However, in retrospect, it is clear that the IPS was very far from surrender. It seems that its admission before the Supreme Court that it had made an error and acted illegally was for the sake of appearances only. The IPS preferred to wait until it had succeeded in achieving its goal through methods less exposed to judicial review. The IPS insisted on violating the rights of prisoners to meet with their attorneys, whether they are on hunger strike or not. When it realized that the Court had prohibited this practice, it turned to the legislature and asked Members of

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stipulated in paragraph 34 of the Criminal Law Procedures Law (Enforcement Powers – Detentions) – 1996. According to this paragraph, a detainee has the right to meet with his attorney and consult with him. The person in charge of the investigation must enable him to do so without delay. The Supreme Court has interpreted this right to be a constitutional right. See, e.g., H.C. 3412/91, *Sufian v. IDF Regional Commander, et. al.*, PD 47(2), 843, 847; H.C. 1437/02, *The Association for Civil Rights in Israel, et. al. v. Minister of Public Security, et. al.*, paragraph 2 of Justice Rivlin's ruling; H.C. 6302/92, *Rumhiya v. The Israel Police*, PD 47(1), 209, 212. This right is also anchored in international human rights law. See, e.g., Paragraph 14 of the International Covenant on Civil and Political Rights (ICCPR); and paragraph 18:02 of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment. The unhindered exercise of this right ensures the detainee's right to appeal. On the connection between the right to consult with an attorney and the right to submit appeals, see, *Bounds v. Smith*, 430 U.S. 817 (1977).

<sup>12</sup> Paragraph 45A (b) of the revised Prisons Ordinance (Amendment 30) – 2005. Israel's law book 2014, July 18, 2005.

<sup>13</sup> H.C. 1437/02, *The Association for Civil Rights in Israel, et. al. v. The Minister of Public Security et. al.*, PD 58 (2), 746.

<sup>14</sup> H.C. 7867/04, *Fida Ka'awar, Attorney, et. al. v. The Israel Prison Service* (unpublished), issued on 1 September 2005.

Knesset to help solve its problem by initiating legislation that would anchor within the IPS the authority to restrict the rights of prisoners and attorneys at any time, including during hunger strikes, because hunger strikes are defined under the Prisons Ordinance<sup>15</sup> as a disciplinary infraction (prison violation). As noted above, the new amendment to the Prisons Ordinance states that the Prison Commissioner and prison wardens have the authority to restrict meetings between prisoners and attorneys if such meetings would allow a *prison violation* to be committed that would cause real damage to the discipline of the prison.

It is very easy to assume that the IPS will make use of this paragraph in the future whenever prisoners initiate a hunger strike and thus collectively prevent the entry of attorneys to visit striking prisoners. The IPS's illegal behavior is nothing new. However, unlike in the past, the IPS is now equipped with what it considers to be a strong argument: it is acting within the framework of its legal authority.

It is important to emphasize that the aforementioned law appears to be designed to limit the rights of all prisoners as such, regardless of their status in prison or their classification. Yet, anyone who examines the IPS's documents placed before the Knesset's Constitution, Law and Justice Committee prior to the law's approval, will undoubtedly understand that the law's harmful directives are intended to limit only the rights of those classified as security prisoners, most of whom, of course, are Palestinians. In addition to the argument that there have been attempts to smuggle cell phones to these prisoners (an argument that applies to all of prisoners, not only to security prisoners), the IPS explained that the attorneys of security prisoners serve as "a mouthpiece for propaganda purposes and for an intentionally negative depiction of their situation in the prisons and of the ostensibly criminal policy of the prison management toward them." The attorneys of these prisoners are described by the IPS as those who are "identified with the security prisoners and financed by Palestinian non-governmental organizations, the sole aim of which is to look after the welfare of the prisoner ... and to take care of all of their [the prisoners] needs and to serve as their mouthpiece on the outside."<sup>16</sup>

It is also clear in this case, therefore, that concerns about state security are not the driving force behind the IPS's request for this legislation. The same worldview described above, which seeks to make the Palestinians invisible and to silence them, because they are Palestinians, is what impelled the IPS to turn to the legislature with a request to tighten control over them in the name of security.

The legal option available to any injured person or any interested party complaining about the unconstitutionality of a law is to petition the Supreme Court to overturn it. However, experience has shown that the cancellation of a law by the Court is no simple matter, and that a petition to strike down an unconstitutional law will be subjected to protracted foot-dragging. It is difficult to avoid the impression that the Supreme Court's procrastination in ruling on petitions demanding the cancellation of pieces of primary legislation, especially those dealing with sensitive matters (intervention in the authorities of the security branches under the shadow of occupation, relations between state and religion, and so forth), serves as a catalyst for the continued use of the legislature as a tool for violating human rights.<sup>17</sup> By refraining from granting an immediate injunction against the law's implementation until the matter is adjudicated on, the Supreme Court legitimizes the law's implementation for many years. Thus, human rights will be blatantly trampled on, by power of law and with the consent of the Court.

The fact that the Supreme Court rarely agrees to intervene and overturn an unconstitutional law also plays into the hands of the security authorities and any other authority wishing to exploit the

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<sup>15</sup> Paragraph 56(8) of the Prisons Ordinance (new version), 1971.

<sup>16</sup> *Ibid.*

<sup>17</sup> With regard to the Supreme Court's foot-dragging in making rulings, see, Yuval Yoaz, "The High Court's Wheels of Justice Turn Slowly, if at all," *Haaretz Magazine*, 13 October 2005 (Hebrew).

legislature's disgraceful generosity and unrestrained surrender to the demands of these authorities.<sup>18</sup> A first-year law student seeking to understand why the Supreme Court is so wary of canceling laws is told that, in general, this derives, *inter alia*, from the principle of separation of powers and from the Court's desire to avoid intervening in the authorities of the Knesset as the legislative branch. This reticence is attributed, among other reasons, to an aspiration to honor the will of the legislature, its intentions and its authority to legislate judicial norms, even if it is sometimes difficult to accept these norms from an ethical and value-oriented perspective.

By shrouding legislation behind a veil of security with the support of the GSS, and by expanding the concept of "security reasons," the executive succeeds in promoting its policy and circumventing the Supreme Court's rulings. It also succeeds in doing so in cases where the aim of the legislation it proposes has little to no relation to state security. This is particularly salient in the amendment of the Nationality and Entry into Israel Law, the clear aim of which is ideological: blocking the demographic threat posed by the Arabs. The security arguments seek to serve two goals: firstly, to speak to the hearts of Members of Knesset in order to win their support; and secondly, to send a message with advance warning to the Supreme Court that the issue is purely a security matter, which should be left to the consideration of security professionals rather than judges. Thus, security problems are distinguished from civil matters, in which intervention is not inherently wrong.

As we know, the Supreme Court does not rush to intervene in the state's security considerations, especially when this involves "security" legislation. It is no wonder that army commanders have severely criticized the Supreme Court for daring to intervene in their "professional" matters. From the perspective of these commanders, the Court's intervention in their authority to use Palestinians as "human shields" constitutes a violation of a years-old tradition in which the Court has refrained from interfering in security affairs.<sup>19</sup> The army's demand to hold an additional hearing on this issue is an indication of its unshaken conception that intervention in its work and considerations is not only an extremely unusual step, but also an intolerable one.

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<sup>18</sup> See, H.C. 1715/97, *The Association of Investment Managers in Israel v. The Minister of Finance*, PD 51(4) 367 (declaring the cancellation of an ordinance harming the freedom of occupation); H.C. 6055/95, *Tzemah v. The Minister of Defense*, PD 53(5) 241 (canceling a law depriving the liberty of a person by arrest in the framework of the Military Justice Law); H.C. 1030/99, *Oron v. The Government of Israel*, PD 56(3) 640 (cancellation of a law that granted broadcast licenses without a tender to radio stations operating for over five years, in light of the violation of competitors' freedom of occupation); H.C. 1661/05, *The Gaza Coast Regional Council, et. al. v. The Israeli Knesset, et. al.* (unpublished) (canceling several provisions of the Disengagement Law, such as those which denied the evacuees the right to sue under general law or limited the minimum age for receiving grants to 21).

<sup>19</sup> See, H.C. 3799/02, *Adalah, et. al. v. Yizhak Eitan, Commander of the Israeli Army in the West Bank, et. al.*