Special Inquiry: Security Practices and Legal Challenges

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Security rationales have gained more force globally, enabling governments to suppress various forms of political participation and opposition, to single out particular groups based on racial, national or ethnic belonging while realizing them as security threats, and to employ a wide range of other repressive measures to expand the reach of the state and the law into new domains previously not governed by security logics.

The first section of *Adalah's Review* presented interdisciplinary discussions of the workings of law and security. This special inquiry section expounds legal challenges to the workings of security logics in Israel vis-à-vis Arab citizens of the state. The first three entries are challenges to three different forms of security legislation, as practiced in the Israeli juridical field. The fourth entry takes place in the field of international human rights law attending to these forms of national security legislation.

The first form of security legislation is an amendment to a basic law, representing a permanent change to a "constitution-like" law. The Basic Law: The Knesset and its recent amendments, which further restrict the right to run for election, exemplifies such a form. The second form is an amendment to a regular statute, passed as a temporary order or a temporally limited security exception to extant law. Here, we highlight a recent amendment to the legislation regulating citizenship, which introduced a new, ethnically defined ban on family unification. The third form is a series of state of emergency laws and regulations, supposed exceptional legalities, which are usually conceived of as distinct from general laws, but which, in the case of Israel, have become fully integrated into the juridical system.

Restrictions on Arab Participation in the General Elections

A policy of incitement targeting Arab members of Knesset (MKs) (and Arabs generally), citing their opposition to the Israeli occupation and their vocal resistance to oppressive state policies against Arab citizens, has been escalating since the late 1990s. This policy trend has reached new levels of hysteria since the beginning of the second Intifada and the October 2000 protest demonstrations in Israel. Examples of recent attacks on the Arab leadership and the Arabs in Israel in general abound. They include directives given by Attorney General Elyakim Rubenstein to open criminal investigations against almost every Arab MK for incitement to violence based on political statements they made; the lifting of an Arab MK's immunity and the filing of a criminal indictment against him for political speeches; physical attacks by police officers against Arab MKs, as well as other demonstrators, during protests against land confiscation, home demolition, and the occupation; the commando-style arrest

of an Arab public representative and his subsequent indictment; and the submission of numerous anti-Arab and racist bills by extreme right-wing parties in the Knesset.

These practices are carried out under the pretext that Arab loyalties and allegiances clash with their citizenship status. Hence, Arab citizens of Israel, according to this logic, represent and embody a "danger" to security; thus, the need to suppress their activities, to monitor them, to criminalize them, and ultimately to de-legitimize Arab representatives and prevent their participation in the political realm.

Reflective of this attempt to undermine the political participation of Arab citizens of Israel are three new amendments to the elections laws, which govern the registration of new political parties and the right to stand for election, passed by the Knesset on 15 May 2002. The most significant of these amendments relates to Section 7A of the Basic Law: The Knesset. Section 7A, as amended, provides that: (a) "Any candidate list or any single candidate running for the Knesset elections will not participate in the election if the direct or indirect goals or actions of the candidate list or of the candidate is one of the following: (1) denial of the existence of the state of Israel as a Jewish and democratic state; (2) incitement to racism; or (3) support of armed struggle of an enemy state or of a terrorist organization against the State of Israel."

While the legislation is troubling in itself for the ideological conditions that it places on political participation, its recent particular application reveals the nature and extent of its political roots and implications. In the run-up to the 2003 Knesset elections, pursuant to these amendments, the Attorney General submitted a motion to the Central Elections Committee (CEC) to ban the National Democratic Assembly (NDA) party list, led by MK Dr. Azmi Bishara, from participating in the elections. Numerous other disqualification motions were filed by right-wing parliamentarians and political parties against Arab MKs Dr. Azmi Bishara, 'Abd al-Malek Dahamshe (United Arab List), and Dr. Ahmad Tibi (Arab Movement for Renewal) (AMR), as individual candidates, and against three political party lists – the NDA, the United Arab List, and the joint Democratic Front for Peace and Equality-AMR list.

The motions to disqualify the Arab MKs and political parties primarily raised two arguments. Based on political speeches and actions, which indicated opposition to the occupation and legitimation for resistance to the occupation in the West Bank and Gaza, the first argument alleged that the named parties and representatives are thus "supporting the armed struggle of terrorist organizations against Israel." The second argument, raised mainly against the NDA and MK Bishara, claimed that advocating for a secular, non-ethnic "state of all its citizens," denies the character of the state as Jewish and democratic.

Adalah represented all of the Arab political leaders and political party lists before the CEC,[1] and, following the CEC decisions, represented the NDA party and MK Bishara as well as MK Tibi before the Supreme Court. The CEC, chaired by Supreme Court Justice Mishael Heshin, was comprised of 41 representatives of all political parties based on their representation in the last Knesset. Contrary to CEC Chairman Justice Heshin, who voted against the disqualifications, the majority of CEC members voted to ban the NDA list and MK Bishara and MK Tibi from participating in the elections. The CEC approved the candidacy of MK 'Abd al-Malek Dahamshe, as well as the participation of the UAL and the Democratic Front for Peace and Equality – AMR list. A Supreme Court panel of 11 justices reviewed the disqualifications of MK Bishara and MK Tibi and heard Adalah's appeal against the decision to ban the NDA. On 9 January 2003, the Supreme Court overturned the decisions of the CEC, allowing them to participate in the elections.[2]

The first document included in the special dossier is one set of legal arguments submitted by Adalah to the CEC and the Supreme Court in these elections disqualification cases, specifically on the issue of "support of armed struggle of an enemy state or of a terrorist organization against the State of Israel." Adalah raised both constitutional challenges to Section 7A(a)(1) and (3) and to the evidence as presented by the applicants. We include the legal arguments challenging the "supporting terror" provision because they scrutinize the executive's power to decide what constitutes "terror" and what counts as "support," and subsequently to limit the right to run in the elections. This section in the arguments advances the demand that the "supporting terror" provision must be voided, or alternatively, strictly construed as it imposes severe restrictions on freedom of expression.

The Supreme Court issued a substantive and lengthy written decision on these cases in May 2003.[3] The Court did not rule on Adalah's arguments relating to the violation of separation of powers or the overbreadth and vagueness of the amendment. Nor did the Court provide any interpretation for the new provision of "supporting terror." Rather, the Court ruled that the disqualification motions presented no factual basis upon which to disqualify the political parties or the candidates.

The "supporting terror" provision thus remains, without a juridical interpretation. Such a lack of definition allows for the executive's use of this provision in wide-ranging and arbitrary situations. The power of the provision remains obscure, and therefore flexible. Simultaneously, the power of the provision is a product of its obscurity and flexibility.

Ban on Family Unification

At the same time as the Knesset amended the elections laws, the Israeli government unanimously passed a decision entitled, "The Treatment of Those Staying Illegally in Israel and the Family Unification Policy Concerning Residents of the Palestinian Authority and Foreigners of Palestinian Descent." The decision effectuated an interim policy whereby the Ministry of Interior's policy regarding the gradual process of the naturalization of spouses of Israeli citizens, in place since 1999, would not apply to spouses who are residents of the Palestinian Authority and/or are of Palestinian descent. According to the terms of this decision, it was passed "in light of the security situation and because of the implications of the processes of immigration and settlement in Israel of foreigners of Palestinian descent, including through family unifications."[4] The general policy for residency and citizenship status for all other non-citizen spouses of Israeli citizens remained unchanged. Adalah and the Association for Civil Rights in Israel (ACRI) each filed petitions to the Supreme Court of Israel challenging the legality of this government decision.[5]

One year later, on 4 June 2003, the formalization of this decision through legislation came when the government introduced a similar bill in the Knesset entitled, "Nationality and Entry into Israel Law (Temporary Order) - 2003." On 31 July 2003, this bill, which amends the Nationality Law - 1952, was enacted into law. This law prohibits Palestinians from the Occupied Territories from obtaining any residency or citizenship status in Israel by marriage to an Israeli citizen. The law almost exclusively affects Arab citizens of Israel, the Israeli citizens married to or wishing to marry Palestinians from the Occupied Territories. The promoters of this law justified the need for it on the grounds of security, claiming that Palestinians from the Occupied Territories, unified with their spouses - citizens of Israel - were increasingly involved in the "course of terror attacks" against the state. "In the name of security," the law intervenes in matters of love and marriage and does so under the guise of both the general law (as an amendment to an existing statute) and as temporary security legislation (the law is stated as a temporary order applicable for one year that can be annually extended for one year increments).

The second document in this special dossier consists of excerpts from a petition submitted by Adalah to the Supreme Court of Israel in August 2003 challenging the constitutionality of this new amendment.[6] Adalah filed the petition in its own name and on behalf of two couples ensnared by the law's retrospective provisions, the High Follow-up Committee for the Arab Citizens in Israel, and eight Arab MKs. Adalah's General Director Attorney Hassan Jabareen and Adalah Attorney Orna Kohn jointly authored the petition.

As Adalah argued in the petition, this is the first law passed, since the enactment of the basic laws, that directly and explicitly denies rights on the basis of national or ethnic identity. Adalah's main argument, as presented in the petition, is that the law must be struck down as it violates the "constitutional rights" of citizens to family life, dignity, equality, liberty, and privacy. As for the security claims put forward by the state, Adalah emphasized that the data provided to support these sweeping measures is insufficient, inconsistent, and even if reliable, completely disproportionate to "form the basis for the suspicion against an entire population because of its ethnic identity." In its initial response, the state claimed that the purpose of the law is to defend the right to life of Israeli citizens and national security. When balanced against other individual rights that may be violated, the state contended, these considerations must prevail.

Before the Supreme Court, the legal representative of the Attorney General's Office argued that in fact, the prohibition against residency and/or citizenship in Israel is against all Palestinians as such because all Palestinians support violent resistance, and thus, every Palestinian is a potential terrorist. Adalah countered that the law and the Attorney General's position was racist and cannot be defended. It is racist because among the three million Palestinian people, women and men, living in the Occupied Territories, there are human rights activists, workers, intellectuals, and academics, people who support civil disobedience, for example, and people who support violence as a means of struggle. Therefore, to assert that all Palestinians are potential terrorists defames and vilifies the whole Palestinian nation. The new law has generated considerable opposition both locally and internationally.

State of Emergency

As the Knesset was considering the new ban on family unification law, the United Nations Human Rights Committee (UN HRC), which monitors the implementation of the International Covenant on Civil and Political Rights (ICCPR) by State parties, was reviewing Israel's compliance with the treaty. In October 2002, the UN HRC had prepared a *List of Issues* or specific questions that Israel was called upon to answer during these hearings in Geneva in July 2003.[7]

One area of particular interest to the UN HRC, as noted in its *List of Issues*, was to what extent Israel was derogating from the provisions of the Covenant, based on the 55-year proclaimed state of emergency. In advance of the session, Adalah prepared and submitted a short report to the UN HRC, included as the third document in this special dossier, that delineates the legal structure

and practices resulting from Israel's "normalized" state of emergency, numerous derogations from the ICCPR employed "in the name of security," and Israel's increasing reliance on emergency powers laws to suppress political dissent by Arab leaders and activists, to limit their freedom of movement, and to restrict their right of association.[8]

The main argument advanced by Adalah in the State of Emergency report is that rather than being of a "temporary and exceptional nature," the tens of emergency laws and regulations in place have become an integral part of the daily functioning of the Israeli legal system. Upholding a continuous state of emergency, while at the same time admitting that Israel's civil and government institutions generally operate in a normal fashion, contradicts the exceptional nature of emergency powers and allows the state to legitimize unjustified and unnecessary derogations from its international human rights obligations, including the ICCPR. The use of emergency laws against those who voice opposition to the government, particularly against the legitimacy of the occupation, constitutes a severe and excessive infringement of protected rights, which cannot be justified under the exigencies of the declared state of emergency.

Representatives of Adalah and numerous other NGOs attended the hearings before the UN HRC. In addition to hearing Israel's response to questions concerning legal practices pursuant to the state of emergency, the UN HRC also inquired into the use of prolonged detention without any access to counsel, the vagueness of definitions in Israeli counter-terrorism legislation, the Israeli army's "targeted killings," home demolitions, the use of Palestinian civilians as "human shields," and instances of "ill-treatment and torture," to name a few issues of concern. During the hearings, the official delegation of the state of Israel justified many of the human rights violations "in the name of security." In its Concluding Observations, issued in August 2003, the UN HRC recognized at the very outset the serious security concerns of Israel.[9] The UN HRC, however, did not reach the conclusion that such violations are therefore tolerable.

Regarding the state of emergency, the UN HRC expressed concern about "the sweeping nature of measures… which appear to derogate from Covenant provisions… these derogations extend beyond what would be permissible under those provisions of the Covenant which allow for the limitation of rights" (para. 12). The Committee also raised concerns about "public pronouncements made by several prominent Israeli personalities in relation to Arabs, which may constitute advocacy of racial and religious hatred that constitutes incitement to discrimination, hostility and violence," and called on Israel "to investigate, prosecute and punish such acts" (para. 20). In addition, the UN HRC spoke

out in its Concluding Observations against the new law banning family unification, calling upon Israel to "revoke" the law, which raises serious issues under several articles of the Covenant (para. 21).

The full text of the Concluding Observations closes this volume of *Adalah's Review*. While a few remarks are not related to violations of human rights carried out "in the name of security," the document is reproduced in its entirety for purposes of coherence. The reader of the Concluding Observations will quickly realize that most of the UN HRC's remarks concern human rights violations that Israel justified through a security lens. The pervasiveness of the security logic in managing the Arab minority in Israel is striking.

What is noteworthy about all of the documents included in this special dossier is the degree to which security constructions are very much integral to the legal regime governing Palestinian citizens of Israel. Security legalities, whether enacted as permanent changes to basic laws, as exceptions in the form of temporary amendments to regular statutes, or as supposed special measures strictly required by the exigencies of a state of emergency situation constitute a major means of governance. Only by understanding them do we begin to adequately address the interaction of the Arab minority with Israeli law.

End Notes

1 See Reply Brief Regarding Disqualification Request 1/16, *Attorney General, et. al. v. National Democratic Assembly and MK Azmi Bishara*; Reply Brief Regarding Disqualification Request 11/16, *Likud v. MK Ahmad Tibi and the Democratic Front for Peace and Equality-Arab Movement for Renewal*; Reply Brief Regarding Disqualification Request 6/16, *MK Avigdor Lieberman, et. al. v. United Arab List and MK 'Abd al-Malek Dahamshe*; and Reply Brief Regarding Disqualification Request 3/16, *Herut, et. al. v. The Democratic Front for Peace and Equality-Arab Movement for Renewal.* Adalah's four reply briefs in Hebrew and a summary of them in English are available on Adalah's website: http://www.adalah.org.

2 See Elections Approval 11280/02, *Central Elections Committee for the Sixteenth Knesset, et. al. v. MK Ahmad Tibi*; Elections Approval 50/03, *Central Elections Committee for the Sixteenth Knesset v. MK Azmi Bishara*; and Elections Appeal 131/03, *National Democratic Assembly v. Central Elections Committee for the Sixteenth Knesset*, 57(4) P.D. 1.

3 Id. The Supreme Court issued one written judgment on all of these cases on 15 May 2003. The judgment can be accessed at: http://www.court.gov.il (Hebrew).

4 Government Decision #1813, "The Treatment of Those Staying Illegally in Israel and the Family Unification Policy Concerning Residents of the Palestinian Authority and Foreigners of Palestinian Descent," 12 May 2002, section B.

5 H.C. 4022/02, *The Association for Civil Rights in Israel, et. al. v. Minister of Interior, et. al.* and H.C. 4608/02, *Awad, et. al. v. The Prime Minister of Israel, et. al.* (cases pending). The Supreme Court has joined these cases for hearings and decision.

6 H.C. 7052/03, *Adalah, et. al. v. Minister of Interior, et. al.* Numerous petitions have been filed against the new law by individual petitioners as well as the Association for Civil Rights in Israel and the Meretz political party. See H.C. 7102/03, *MK Zahava Gal-On, et. al. v. Attorney General, et. al.* and H.C. 8099/03, *The Association for Civil Rights in Israel v. Minister of Interior, et. al.* The Supreme Court has joined all of these cases, which are still pending, for hearings and decision. For the full text of Adalah's petitions in the family unification cases in Hebrew and English, see http://www.adalah.org.

7 *List of Issues: Israel*, Human Rights Committee, UN Doc. CCPR/C/77/L/ISR (27 November 2002). Both Adalah and the Arab Association for Human Rights submitted reports to the UN HRC for consideration in developing its List of Issues. See Adalah, "Recent Developments - The Rights of the Palestinian Minority in Israel," October 2002 available at: http://www.adalah.org and the Arab Association for Human Rights, "Silencing Dissent: A Report on the Violation of Political Rights of the Arab Parties in Israel," October 2002 available at: http://www.arabhra.org.

8 Adalah's report on the State of Emergency was submitted to the UN HRC on 22 July 2003 together with three other information sheets – "The Use of Palestinian Civilians as Human Shields by the Israeli Army"; "Family Unification and Citizenship"; and "Discrimination Against Palestinian Citizens of Israel - No Fair Representation on Governmental Bodies." All of these reports are available on Adalah's website at: http://www.adalah.org.

9 *Concluding Observations: Israel*, Human Rights Committee, UN Doc. CCPR/CO/78/ISR (21 August 2003).

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