The Criminal Procedure Law and the Absent 'Security Suspect': More Time to Interrogate and Torture

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The Criminal Procedures (Detainees Suspected of Security Offenses) Law, a temporary order, which will now be in place for nine years (2006-2015), regulates the detention by Israel of individuals suspected of committing 'security offenses'. The overwhelming majority of individuals subjected to the law are Palestinian citizens of Israel and Palestinian residents of Gaza. Corresponding military orders apply to Palestinians in the West Bank.

The law was first enacted in 2006 as a 'temporary order', but was amended and extended again in April 2013, and is now valid until December 2015, making it look much more like a 'permanent law'. The purpose of the law is to give the Israeli law enforcement authorities more time to interrogate individuals without the burden of intervening courts, lawyers and family members. The law imposes harsh procedures that allow law enforcement authorities to deny a detainee access to a judge for up to 96 hours after his/her arrest (Article 3), to extend his/her detention for up to 20 days at a time (Article 4), and to hold extension of detention hearings in the detainee's absence (Article 5).

The law severely violates individuals' constitutional rights, especially their rights to due process because it permits the denial of a person's liberty without judicial review for a long period of time, and, later, it permits the extension of detention for a longer period of time ***even without his/her presence before a court***, thereby depriving the person of the right to a defense. This ***absence of the detained person*** gives the General Security Service (GSS) (also known as the Shin Bet or the Shabak) myriad opportunities to employ illegal interrogation methods amounting to torture and/or cruel, inhuman and degrading treatment to extract false confessions from detainees. Furthermore, the law operates in tandem with other severe restrictions on 'security' detainees, such as prohibition on access to lawyers for certain periods of time and 'gag orders' that prevent even the publication of the detention, which combine to leave them in almost complete isolation from the outside world for extended periods of time. This law is unconstitutional and should be revoked without delay.[1]

[1] The UN Committee Against Torture (CAT) in its 2009 concluding observations on Israel (para. 15) expressed concern regarding this law, emphasizing that it did not ensure sufficient legal safeguards for 'security detainees' or against torture/ill-treatment. See: http://www2.ohchr.org/english/bodies/cat/docs/cobs/CAT.C.ISR.CO.4.pdf
The UN Human Rights Committee (HRC) also expressed serious concern about the law in its 2010 concluding observations on Israel (para. 13), as well as its consolidation into the newly proposed "Anti-Terror" law. See: http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/448/06/PDF/G1044806.pdf?OpenElement

A. The History of the Law

The Knesset originally enacted the law in 2006 as a temporary order valid for 18 months. It was then extended in 2007 for another three years,[2] and again in 2010 for an additional two years in a further amendment (hereinafter: "amendment no. 2"),[3] which made further changes to the law, as detailed below. In April 2013, the Knesset extended the law yet again until 21 December 2015 in another amendment (hereinafter: "amendment no. 3")[4] on the ground that during this intervening period deliberations would be concluded concerning the pending "Anti-Terror Bill",[5] comprehensive legislation that would incorporate and consolidate the contents of this law and many other security-based temporary orders, emergency laws, etc.

In 2007, the Israeli Public Defender's Office submitted an appeal[6] to the Supreme Court on behalf of an unnamed detainee ("John Doe") following a lower court decision to extend his detention in his absence, in accordance with Article 5 of the law. The court scheduled a hearing on the case in mid-2008. Prior to this date, three human rights organizations – Adalah, the Association for Civil Rights in Israel (ACRI) and the Public Committee Against Torture in Israel (PCATI) – submitted a petition demanding that the entire law be struck down as unconstitutional.[7]

The Supreme Court decided to join the deliberation of the two cases and expand the judicial panel hearing the case from three to nine justices. At a hearing in March 2009, the Supreme Court decided, by a majority opinion, to hear secret evidence that the state wished to present *ex parte*. Adalah, ACRI and PCATI withdrew the petition in protest, arguing that the court's decision had no legal basis and set a dangerous precedent according to which it would decide on the constitutionality of the law on the basis of secret evidence. The appeal submitted by the Public Defender's Office remained pending for further deliberation. On 11 February 2010, the court accepted the appeal and struck down Article 5 of the law on ground that it was disproportionate. The court did not rule on the other unconstitutional provisions of the law, which the human rights organizations petitioned against including the extension of a detainee's detention for a long period of time without judicial review and the extension of pre-trial detention for up to 20 days at a time.

[2] Amendment No. 1 to the Criminal Procedures (Detainees Suspected of Security Offences) (Temporary Order) Law – 2007.

[3] Amendment No. 2 to the Criminal Procedures (Detainees Suspected of Security Offences) (Temporary Order) Law – 2010.

[4] Amendment No. 3 to the Criminal Procedures (Detainees Suspected of Security Offences) (Temporary Order) Law – 2013.

[5] The Anti-Terror Bill – 2011. The Ministerial Committee on Legislation unanimously approved the bill on 9 June 2013. Much of the bill consists of draconian emergency laws governing issues such as the definition of a 'terror organization' and of a 'member of a terror organization', the confiscation and forfeiture of property belonging to persons involved in offenses that are classified as 'terror offenses', and the detention of individuals suspected of 'security offenses'. The proposed bill, if enacted into law, would make it highly difficult to defend human rights, including the rights to freedom of expression, freedom of association, property, liberty and due process.

[6] Criminal Appeal *8823/07, John Doe v. The State of Israe*l (unpublished, decision delivered 11 February 2010).

[7] HCJ 2028/08, *The Public Committee Against Torture in Israel et al. v. The Minister of Justice*.

B. The Principal Provisions of the Law

Article 3: Delay in bringing a 'security' detainee before a judge

Article 3a(1) of the law determines that the officer in charge may delay bringing a detainee suspected of a security offense before a judge for a period not exceeding 48 hours from the start of the detention, if the officer deems it necessary for the investigation. The officer may then extend the delay for an additional 24 hours if the officer and the GSS determine that the interruption of the investigation may lead to a concrete harm in the interrogation whose purpose is to prevent harm to human life (Article 3a(2)). The court is authorized to delay the bringing of a suspect before a judge for an additional 24 hours on the basis of this justification (Article 3a(3)), and the court hearing will accordingly be held in the detainee's absence.

Article 4: Extension of a detainee's detention

Article 17(a) of the Detention Law authorizes a judge to order the detention of a suspect who is present in court for a period of up to 15 days. The judge may then extend the detention for up to 15 additional days, to a total maximum of 30 days. Article 17(b) of the Detention Law determines that the period of pre-indictment detention shall not exceed 30 days (unless a request approved by the Attorney General was submitted for extending the detention).

The Criminal Procedures (Detainees Suspected of Security Offences) Law changes these procedures. It determines that in cases involving security offenses, a judge may order the detention of a suspect for a period of up to 20 days if he/she is convinced that if the detainee is not held for further interrogation, it is likely to hinder the possibility of preventing harm to human life (Article 4(a)). Further, it extends the period of pre-indictment detention to 35 days (Article 4(b)).

Section 5: Holding a hearing on the extension of a detainee's detention in his/her absence

Following the Supreme Court's annulment of Article 5 in the *John Doe* case in February 2010, the Knesset enacted amendment no. 2 to the law, bypassing the ruling. <u>According to amendment no. 2:</u>

1. The Supreme Court is authorized to order the extension of a suspect's detention in his/her absence;
2. The Court may do so following a request by the Head of the GSS Investigations Division, approved by the Attorney General;
3. Additional extensions of detention shall be for periods that do not exceed 72 hours each, provided that the sum of the detention periods determined without the detainee being present shall not exceed 144 hours, or the balance of the time remaining until the end of 20 days from the date of the hearing in which the detainee was present, whichever time period is shorter;

4. The Court may so order if it is convinced that a halt to the investigation is liable to hinder the prevention of a security offense or the prevention of harm to human life.

C. The Harm to Basic Rights – A Permanent/Temporary Order

The fact that the Supreme Court only annulled Article 5 of the law does not validate its other unconstitutional provisions or the court's agreement to discuss the constitutionality of the law in the dark realm of secret evidence.

Further, the Knesset immediately bypassed the Supreme Court's decision by enacting amendment no. 2 to the law. Some 'positive' changes were made in amendment no. 2, including the identity of the authorized court (e.g., the Supreme Court may extend the detention), the position of the person/s submitting the request (e.g., the Head of the GSS Investigations Division), the permissible grounds for preventing a detainee's presence at a hearing, the holding of a preliminary hearing prior to the hearing to reconsider the prevention (Article 5(b)), and the grounds for not informing the suspect of the prevention of his/her presence (Article 5(c)(b)(1)). Yet, it is inherently wrong not to bring an individual to a hearing on the extension of his/her detention, and the disproportionate infringement of constitutional rights remains unchanged. Its significance is amplified by Article 35 of the Detention Law, which prevents an individual suspected of security offenses from meeting an attorney for a period of up to 21 days. As a result, many attorneys represent detainees whom they have never been allowed to meet, whether in the detention facility or in court. They are also frequently compelled to contend with 'classified materials' or 'secret evidence', which they cannot view, brought before the judge by the state.

In the explanatory notes to amendment no. 3 to the law,[8] enacted in April 2013, the Minister of Justice claimed that over the years the security forces have rarely used the special powers afforded to them, and then only in cases of 'real necessity'. The claim of limited use is invalid, however, and cannot serve as a justification for the adoption of a procedure which violates basic constitutional rights, or for putting it in the hands of the investigative authority, the GSS.

A law that was originally legislated as a temporary order valid for just 18 month has thus been extended for nine years (from 2006 and until its planned expiration in 2015). The harmful and dangerous norms set forth in the law for the detention of individuals suspected of security offenses were, and will remain, a stain that cannot be expunged, whether as a temporary order that is renewed time after time, or through future permanent provisions of the Anti-Terror Bill that is currently being drafted. The law must be revoked.

[8] The bill and accompanying explanatory notes were published in the Government Bills Registry 750, 22 April 2013, p. 272.