

Administrative Detention

A Lawyer's Testimony

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In November 2000, Mr. Ghassan Athamleh, a Palestinian citizen of Israel, was detained by the General Security Service (GSS, also known as Shin Bet), under suspicion of organizing and taking a central part in disturbing the peace, throwing stones at security forces, illegal association and conspiring to perpetrate a crime. Athamleh is a member of the Central Committee of the National Democratic Assembly (NDA), an activist Arab political party that poses serious challenges to the definition of Israel as a Jewish state. Following a ten-day investigation by the GSS, during which Athamleh was held in incommunicado detention, prohibited from meeting with a lawyer, he was placed under administrative detention for six months, imprisoned without any formal charges being brought against him.

According to the Emergency Powers (Detention) Law (1979) ("Detention Law"),¹ once the Minister of Defense signs an administrative detention order against an individual, the individual is brought before the President of a District Court who is authorized to approve the detention order, to cancel it or to shorten the period of detention. Such an order permits detention for an initial period of six months and may be renewed indefinitely. Under the administrative detention procedure, the state is not required to bring charges against the detainee, or to allow him the opportunity to review evidence against him or to cross-examine witnesses. The decisions handed down in such cases are typically short, and do not reveal any background information. Moreover, according to Article 9 of the law, the procedure to approve the administrative detention order is conducted *in*

camera; only the presiding judge is empowered to provide details concerning the proceedings.

Throughout the 1980s and 1990s, the Israeli security forces administratively detained thousands of Palestinians from the Occupied Territories, primarily during the first Intifada,² as well as Palestinian citizens of Israel. Prior to detaining Athamleh, however, the Minister of Defense had not issued an administrative detention order against a Palestinian citizen of Israel for three years.³

The state's approach to the Palestinian minority in Israel changed in late September 2000, following the outbreak of al-Aqsa Intifada in the West Bank and Gaza. These events came after the failure of the Camp David talks and MK Ariel Sharon's (then head of the Israeli opposition) provocative entry to al-Haram al-Sharif. At that time, Palestinian citizens of Israel staged massive solidarity demonstrations with the Palestinians in the Occupied Territories. Clashes between Israeli police and Palestinian citizens at the time of these demonstrations led to the deaths of 13 Palestinian citizens of Israel, the wounding of hundreds more, and the detention of over 1,000 people, many of whom were subsequently indicted. In the context of these events, Athamleh's detention indicated not only that the state is monitoring Palestinian citizen political activists, but that it is also willing to revive draconian measures to suppress their dissent and protest.

Al-Aqsa Intifada reinforced the perception within the Israeli security establishment that Palestinian citizens of the state represent a security threat, and that measures such as administrative detention constitute a legitimate means of



managing this perceived threat. In addition to detaining Athamleh, the state issued numerous orders, after October 2000, restricting the movement of Palestinian citizens of Israel. These restrictions included prohibiting citizens and political activists from traveling to the West Bank, the Gaza Strip, Jordan, and Egypt.

What follows is a personal testimony of my experience as a lawyer and a political activist in representing Athamleh. Lawyers who represent administrative detainees routinely confront the issues that I raise in this account, and even face much harsher conditions particularly in representing Palestinian detainees from the Occupied Territories in the military courts. For them, Athamleh's case is neither exceptional nor unique, but part of their daily routine. This testimony is not only meant to address the particular and the new; it is also meant to note practices that have become typical and conventional. We are often encouraged to stop registering the usual, as the flow of events is so overwhelming and new techniques of monitoring and punishment are continuously being introduced, which themselves demand critical examination. I have chosen, however, to focus on the revived techniques of the past, which continue to be effective in silencing political dissent. It is vital that the practice of administrative detention be exposed and analyzed again and again, in order to resist its normalization, particularly in the wake of the 11 September terror attacks in the United States. The discourse of the "war against terror" is now routinely invoked in an unprecedented manner to justify sweeping human rights violations including the use of secret evidence,

torture and detention without trial in the United States and elsewhere. Similarly, the State of Israel uses this discourse to legitimize human rights violations committed against Palestinians.

Previous Restriction Orders and Administrative Detentions

Athamleh did not appear before the court as a first time "offender." As result of his political activism, he had previously been detained and had his movement restricted on several occasions.

In 1987, at the beginning of the first Intifada, a restriction order was issued against Athamleh under the Emergency Regulations (1945), limiting his movement for six months. At that time, Athamleh was an active member of the political movement Abna' al-Balad (Sons of the Country). It was alleged that he had been in contact with Fatah, the main faction of the Palestine Liberation Organization (PLO) led by Yasser Arafat, classified formally then and now, as a terrorist organization under the Prevention of Terrorism Ordinance. Under the terms of the restriction order, Athamleh was forced to remain in his village, and to report to the local police station on a regular basis. This order was subsequently renewed for an additional six months.

In July 1988, Athamleh was administratively detained for the first time, for allegedly violating the 1987 restriction order against him. The GSS alleged that he had continued to remain in contact with Fatah, and he was detained for six months. Athamleh was administratively detained again in November 1994, for three months, under allegations that he had been in contact with Fatah representatives while abroad.



All of the detention and restriction orders against Athamleh were approved by the Israeli courts, including the Israeli Supreme Court,⁴ based on secret evidence that neither he nor his attorneys were permitted to review. His due process rights were severely violated. To this day, Athamleh has never been indicted, and no charges have been filed against him, with the exception of a 1981 incident in which he was indicted as a minor, while still in high school, for throwing a Molotov cocktail. Because his political activism resulted in the formation of a “past record,” the courts were more inclined to view Athamleh as a potential threat.

Gag Order

On the evening of 20 November 2000, without any prior warning, dozens of police and GSS officers descended on Athamleh’s home, terrifying his family. There was nothing to indicate that such action was required to apprehend him; indeed, the actions of the police and GSS were clearly excessive. It is important to emphasize that the methods used by the police to arrest Athamleh were no different than those used to arrest scores of other Palestinian citizens in Israel. The Israeli army uses even harsher methods to arrest Palestinians in the Occupied Territories.

The Nazareth Magistrate Court, before which Athamleh was initially brought, extended his detention. The Court accepted the request of the GSS to issue an absolute gag order on his case. The gag order prohibited me from discussing even the fact of his arrest and detention in public. The GSS also banned Athamleh from meeting with me, as his attorney, under Article 35 of the Criminal

Procedure (Enforcement Powers - Arrest) Law (1996).⁵ Thus, at this initial court appearance, I represented Athamleh without ever seeing or speaking to him; he appeared before the court alone and I appeared on his behalf in his absence. Further, all court proceedings against Athamleh, up to and including his Supreme Court appeal, were conducted *in camera*. At the beginning of his administrative detention proceedings on 7 December 2000, the President of the Nazareth District Court only allowed the following publication: “The fact that a request to approve an administrative detention order issued by the Minister of Defense for six months against respondent Ghassan Muhammed Hassan Athamleh, who lives in Reineh village, was submitted to the District Court in Nazareth before the President of the District Court.” This ban on communication by the GSS and the Israeli courts and the closed-door proceedings prevented me and other human rights activists from engaging in the vital work of generating awareness of Athamleh’s case in the media and marshalling public pressure as well as advocating against the use of this repressive measure.

On 14 January 2001, Judge Yehuda Abramovich, President of the Nazareth District Court, approved the administrative detention order signed by then Minister of Defense and Prime Minister Ehud Barak. For six months, Athamleh was kept in virtual isolation, forced to remain in his cramped cell for 23 hours a day. The Prisons Authority permitted Athamleh only one hour of visiting time with his family every two weeks, during which he was separated from them by a glass partition. Ostensibly, Athamleh was detained

as a preventive measure, as the state claimed that he constituted a threat to public security. Clearly, however, the conditions of his detention suggested punitive rather than preventive objectives.

In representing Athamleh, I argued, *inter alia*, that his detention was politically motivated. I demanded that if the State had evidence, it should initiate a criminal prosecution and submit an indictment outlining the charges against him. Citing the need to protect “secret sources,” Judge Abramovich rejected my arguments and upheld the administrative detention order.⁶ A subsequent appeal to the Supreme Court was also dismissed on similar grounds by Justice Ya’kov Tirkel.⁷

These events prompted Amnesty International to recognize Athamleh as a possible prisoner of conscience. His long-term detention without trial, based on secret evidence, severely violated his due process rights, and constituted a clear contravention of the International Covenant on Civil and Political Rights (ICCPR), ratified by Israel in 1991.⁸ In Amnesty’s view, Athamleh’s detention constituted “cruel, inhuman and degrading treatment.”

During Athamleh’s detention, a second administrative detainee was placed in his cell. The details surrounding this individual’s case were (and continue to be) subject to an even stricter gag order than the one applied to Athamleh. I became aware of this suppressed information through conversations with Athamleh. Although I was initially concerned that this second detainee was an informant seeking to extract information from Athamleh, it later became clear that he too was in fact under administrative detention. The second detainee was also a Palestinian citizen of Israel,

and was represented by a lawyer; however, I could not even discuss the case with his lawyer because of the sweeping gag order. This detainee was being kept, along with Athamleh, in an extremely cramped and uncomfortable cell, one that could not guarantee their basic right to dignity. Like Athamleh, he was permitted one brief visit with his family every two weeks, and was allowed to leave his cell for only one hour a day. As a result of the strict gag order, however, it was impossible to bring local and international pressure to bear on these serious human rights violations.

Imaginary Judicial Review and Attorney as Co-Suspect

After the Minister of Defense signs an administrative detention order, it is brought before the President of a District Court for judicial review.⁹ As has been illustrated, however, the term judicial review is extremely misleading. The words suggest an independent, impartial and balanced evaluation by a neutral third party. They imply that the arguments of both sides will be duly considered. Moreover, by judicial review, one expects a process that not only results in justice being done, but also in the appearance of justice; that is to say, a process that is fair and transparent.¹⁰

In the case of Athamleh, the judicial review process was neither fair nor transparent, but occurred in an environment of exclusivity and intimacy between the State Prosecutor and the judges. This intimacy is even more objectionable in light of the fact that the proceedings to approve administrative detention orders take place before only one judge in both the District Court and the



Supreme Court. The judicial review process, in Athamleh's case, did not give the appearance of justice, but of two powerful parties, the state and the judiciary, allied against a weak one, the administrative detainee. Throughout the proceedings, the power relations between the four parties - the judges, the representative of the State Prosecutor's office, the GSS officers and myself, as Athamleh's attorney, were made exceedingly clear.

In my representation of Athamleh, there was a sense that I, as his lawyer, was regarded not as an independent professional, but as standing alongside the accused, as a co-suspect. Part of the proceedings in both the District Court and Supreme Court were held without my presence. In these sessions, the judges, the representative of the State Prosecutor's office and the GSS officers discussed so-called "secret evidence." I was refused the right to inspect this "secret evidence" against my client, as well as being denied the opportunity to cross-examine key witnesses, who were available only to the prosecution and the judges. In my view, my role was not to take part in the intimate relationship between the state representatives and the judges, but to ensure transparent, fair and appropriate representation for Athamleh.

The judges chose to use the Detention Law to fully exclude me, both from the presentation of the evidence and from hearing the arguments made by the GSS and the representatives of the State Prosecutor's office in favor of detaining Athamleh. Specifically, Article 6(c) of the law states:

In the procedures of articles 4 and 5 [which deal with the approval of the detention order] the President of

the District Court is allowed to receive evidence, even without the presence of the detainee or his counsel, or without revealing it to them, if after he has reviewed the evidence or heard arguments, even without the presence of the detainee and his counsel, he is convinced that disclosing the evidence to the detainee or to his counsel might endanger state security or public security.

It would have been possible to allow me to review evidence and/or hear arguments without my client being present; however, the judges decided that revealing any of this information to me would somehow "endanger state security or public security."

Not only was I excluded from reviewing evidence and hearing arguments that were presented *ex parte*, but both the District Court and the Supreme Court dismissed my requests to cross-examine the Minister of Defense or the military secretary who presented the secret evidence to him. My cross-examination was meant to verify that the Minister had received all the relevant information, had considered it appropriately, and had allowed sufficient time to make such a significant decision. Without access to the substantive evidence, the arguments that were presented in the *ex parte* hearings and the secret testimonies of GSS witnesses, I was forced to defend Athamleh in a figurative state of darkness.

Unable to Challenge the Constitutionality of the Law

The Detention Law, which was enacted to replace the repressive Emergency Regulations (1948), demands scrutiny. The Detention Law allows



absolute restrictions on the liberty of an individual for six months, which can be indefinitely extended when there is a reasonable basis, based on secret evidence, that state security reasons oblige that an individual must be kept in detention. It suggests a preventive measure rather than a punitive measure. Not only does this law contradict international human rights norms and standards, but it is also *prima facie* unconstitutional according to the Israeli Basic Law: Human Dignity and Liberty (1992).

Article 5 of the Basic Law guarantees the right to liberty as a constitutional right. It stipulates that: "There shall be no deprivation or restriction of the liberty of a person by imprisonment, arrest, extradition or otherwise." It must be read, however, with Article 10 of the Basic Law, the preservation of laws clause, which states: "This Basic Law shall not affect the validity of any law (*din*) in force prior to the commencement of the Basic Law." Case law has established that statutes enacted prior to the passage of the Basic Law, e.g., The Emergency Powers (Detention) Law, cannot be constitutionally challenged pursuant to the Basic Law. Rather, prior statutes should only be interpreted in light of the Basic Law.¹¹

In addition, the Detention Law confers upon the state a range of arbitrary powers to be used only in times of emergency. This may seem reasonable, until one considers that Israel has been in a declared state of emergency since its establishment in 1948. Thus, in fact, the Detention Law is not an emergency law at all, but effectively functions as a regular law. Moreover, it is often argued that the Detention Law offers greater legal protection to administrative detainees than the

Emergency Regulations (1948) mainly because of the drastic change in the judicial review process mandated in this newer law. However, the practice of judicial review, as was described above, suggests that the Detention Law is merely a re-packaging of earlier legislation.

GSS Attempts Search

On Friday, 8 December 2000, at the beginning of the District Court hearings on the administrative detention order against Athamleh, armed GSS and police officers came to Adalah's offices early in the morning to demand the return of "secret documents" relating to his case. The documents in question had been given to Adalah staff lawyers by a representative of the State Prosecutor's office, as part of a collection of largely irrelevant materials that were considered acceptable to be released to Athamleh and his attorneys. The GSS claimed that these documents had been released by mistake.

Although Adalah's offices are normally closed on Fridays, one staff member was present. The officers showed her a handwritten decision issued by Judge Abramovich and demanded to search the premises in order to find the documents. Refusing to accede to their request, she immediately contacted other Adalah staff members to come to the office. Adalah staff did not provide the officers with the requested documents, and they refused to allow them to search the office, arguing that the decision they presented was illegal.

The attempt by the GSS and police to search Adalah's offices was highly irregular. They did not notify the Israeli Bar, nor were they accompanied by a representative of the Bar, as is commonly done when attorneys' offices are searched in order



to guarantee the protection of confidentiality afforded by the attorney-client privilege. In a further example of irregular search procedures, GSS officers went to the home of Judge Abramovich, the President of the Nazareth District Court, to obtain a handwritten decision to search Adalah's offices. Although Judge Abramovich stated that he issued "a warrant," the document itself is entitled a "decision," and states:

I hereby give an order that allows the Israeli police or a representative of the GSS to take out the abovementioned documents from the materials that were handed to the Respondent's lawyers. It is possible to execute this order and to take out the abovementioned documents from their control, from Attorneys Jamil Dakwar and Orna Kohn, or in any prohibited place where the documents may be found.

At the very least, such intimacy between a sitting judge and the GSS is clearly inappropriate. Further, neither the representative of the State Prosecutor nor the GSS requested that the documents in question be returned before going to the judge to get his authorization to search. The judge also did not demand that such a request be made before issuing his decision. On page 4 of his 14 January 2001 decision in the case, Judge Abramovich notes that:

The representative of the state handed to the Respondent's representative all of the materials that the GSS representatives concluded could be presented to the respondent or his lawyers. However, on Thursday 7 December 2000, in the

evening hours, they called me and informed me that by mistake two documents that should be seen as secret materials were inserted [in the documents given to the respondent's lawyers]. Therefore I was asked to decide on this matter. I did not see any need to invite the respondent's lawyer, nor the state's lawyer. Therefore I invited the legal representative of the GSS to [my house on] 8 December 2000 and he presented before me the two documents that were at stake. After an explanation of the matter, I came to the conclusion that these documents are classified. In light of that, [I issued] a warrant that instructs that these two documents be returned to the GSS, and no more, and all of the trouble that the Respondent's attorneys created in this matter in the press is much ado about nothing.¹²

By attempting to search Adalah's office, the GSS sought to send a clear, threatening message to Adalah, which works as the legal representative of the Palestinian minority in Israel. In its work, Adalah seeks to empower Palestinian society, protect the collective and individual rights of Palestinian citizens, and increase the confidence that the society has in itself. By attacking an organization that stands as a symbol of community advocacy and legal representation, the GSS attempted to undermine these confidence-building efforts, and tried to weaken people's trust in Adalah's ability to protect sensitive information. At a time when Adalah was gathering evidence and testimony from Palestinian citizens to be presented before the official Commission of Inquiry into the October 2000 protest demonstrations, as well as coordinating the representation of hundreds of

Palestinian citizens detained during these events, the conduct of the GSS could have been severely damaging to the organization and to the community.

Conclusion

The administrative detention of Ghassan Athamleh points to serious problems in the ways in which the judicial system relates to the Palestinian minority in Israel. The judiciary has a particular responsibility to uphold the rights of the minority to a fair trial and due process, even in times of emergency. Further, it must ensure that justice is not only done, but is also seen to be done, through fair and transparent hearing procedures. The courts must maintain their independence from the state security establishment.

The case also demonstrates that while a law may have the appearance of legitimacy, and may be passed by a majority of the state's elected representatives, its substance may still be unconstitutional and anti-democratic. Such is the case with the Emergency Powers (Detention) Law (1979), used under the terms of Israel's ongoing state of emergency to violate the rights of Palestinian citizens of Israel, in contravention of international human rights norms.

The revival of administrative detention against Palestinians in Israel is a signal to the community that the state can reactivate the severest of measures against political activists, and serves as a warning to curtail political struggle. Indeed, Athamleh's detention appears to have presaged an increasing reliance on state-of-emergency legislation to suppress political dissent by Palestinian citizens.

In November 2001, MK Dr. Azmi Bishara, head of the NDA party, was charged under the Prevention of Terrorism Ordinance (1948) in connection with political speeches he made in Umm al-Fahem, Israel and Kardaha, Syria. The Prevention of Terrorism Ordinance is applicable only under a state of emergency. In an attempt by the state to add legal weight to this unprecedented and politically-motivated indictment, MK Dr. Bishara and two of his parliamentary assistants were also charged under the Emergency Regulations (Foreign Travel) (1948) in relation to visits they assisted in organizing whereby elderly Palestinian citizens of Israel traveled to Syria to meet with refugee relatives they had not seen for fifty years. In February 2002, the state again invoked the Emergency Regulations (Foreign Travel) (1948) to ban the Head of the Islamic Movement in Israel, Sheikh Ra'ed Salah, from traveling anywhere outside the country for six months.¹³ A similar restriction was also recently imposed on the Secretary General of Abna' al-Balad, Mohammad Asa'd Kanaa'nah. Such suppression of internal dissent through the application of colonial-era legislation, in the context of Israel's normalized state of emergency, is a threat not only to the rights of the Palestinian minority, but mainly to the possibility of a democratic regime for all citizens.

End Notes

1. For a detailed analysis of the Emergency Powers (Detention) Law, see Eyal Nun, "Administrative Imprisonment in Israel," 3 *Pilim* 168 (1992) (Hebrew).
2. See Emma Playfair, "Administrative Detention in the Occupied West Bank and Gaza," Occasional Paper, Al-Haq (1985).
3. Authors' Note: This essay was written before the Israeli army's offensive in the Occupied Territories in late March 2002, during which thousands of Palestinians were arrested and detained. According to the state, the total number of Palestinians arrested since the beginning of that operation is about 7,000; the total number released from detention is 5,600; the total number currently detained is 1,500; and the total number currently held in administrative detention is 990. See State's written response, dated 6 May 2002, to H.C. 3239/00, *Iyad Mahmud Ishak Mirab, et. al. v. The Commander of the Israeli Army in the West Bank* (challenging the legality of Military Order 1500, issued on 5 April 2002, which permits the 18-day incommunicado detention of Palestinians; case pending). The number of Palestinian detainees increases each day, as the Israeli army's operations in the Occupied Territories continues.
4. See H.C. 672/87, *Ghassan Athamleh, et. al. v. The Military Commander of the Northern District*, P.D. 42 (4) 708 and A.A.D. 1/95, *Anonymous v. The Minister of Defense*, Takdin Elyon 95 (1), 1522.
5. For more information on denial of the right to legal counsel, see Jamil Dakwar, "Without Counsel: Palestinian Citizens of Israel," in 44 *Criminal Justice Matters* (King's College London) 32 (2001).
6. See A.D. 1/00, *The State of Israel v. Ghassan Athamleh* (Dist. Ct. Nazareth, 14 January 2001).
7. A.A.D. 1232/01, *Ghassan Athamleh v. The Minister of Defense*, unpublished decision delivered 12 March 2001.
8. Article 9(1) of the ICCPR states: "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 ground and in accordance with such procedure as are established by law." Article 9 of the Universal Declaration of Human Rights states: "No one shall be subjected to arbitrary arrest, detention or exile."
9. See Article 4 of the Emergency Powers (Detention) Law (1979). This Article empowers the judge not only to examine the reasonableness of considerations of the Minister of Defense and its proportionality, but also authorizes him to consider the very need for the detention based on the evidentiary material and to use his discretion in lieu of that of the Minister of Defense. See e.g., H.C. 2320/98, *Abd al Fatab Mahmoud Almamlah, et. al. v. The Military Commander of the IDF in Judea and Samaria, et. al.*, P.D. 52(3) 346.
10. John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Cambridge: Harvard University Press, 1980).
11. See H.C. 2316/95, *Ganimat v. The State of Israel*, P.D. 49 (4) 589.
12. See supra note 6, at 4-5.
13. For more information on the cases of MK Dr. Azmi Bishara and Sheikh Ra'ed Salah, see Adalah's website: www.adalah.org/legal_advocacy.shtml

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