



## Adalah's Position Paper

# Israel's Counter-Terrorism Law

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1. In this position paper, Adalah addresses the unconstitutionality of the main sections of the Counter-Terrorism Law, 2016 (hereinafter: "the Counter-Terrorism Law" or "the Law"),<sup>2</sup> which predominantly relate to: (1) the broad and vague definitions of "terrorist acts" and "terrorist organizations", contrary to the principles of criminal law and to freedom of speech; (2) the designation of an organization as a "terrorist organization" and the process of challenging such designation; (3) the disproportionate penalties for security offenses defined under the Law; and (4) the incorporation of legal proceedings that violate the fundamental guarantees of criminal law, and in particular the right to due process.
2. This paper covers key problems of the Law, but it is not an exhaustive account of every issue that the Law presents.

### Broad and vague definitions

3. The definitions set forth in the Counter-Terrorism Law, and particularly the definitions of a "terrorist organization", "member of a terrorist organization", and a "terrorist act", are broad and vague, and liable to have a negative impact on the interpretation of its provisions and the manner in which the Law will be implemented. Given the broadness and vagueness of these definitions, the Law may be enforced against a large number of persons and organizations, many of which are engaged in lawful activities using legal means. Therefore, the Law may gravely breach the basic rights of citizens of Israel in general, and of Palestinian citizens of Israel in particular, as well as the rights of Palestinians living under Israeli Occupation in East Jerusalem (and beyond).

### "Terrorist organization" and "member of a terrorist organization"

4. The definitions of a "terrorist organization" and "member of a terrorist organization" as they appear in section 2(a) of the Counter-Terrorism Law are unconstitutional. The definition of a "terrorist organization" includes both of the following:

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<sup>1</sup> This paper, in Hebrew, was submitted by Adalah in October 2016 with a letter to the Israeli Attorney General to raise fundamental constitutional problems with the Law. Adalah is now issuing this position paper, in English, with an additional section on the designation of an organization as a "terrorist organization" in light of recent developments concerning the designation of six Palestinian human rights and civil society organizations as terrorist organizations by the Israeli Defense Minister on 19 October 2021.

<sup>2</sup> An English translation of the Counter-Terrorism Law is available at:  
<https://www.justice.gov.il/En/Units/IMPA/Legislation/Pages/default.aspx>

(1) A body of persons in an organized and continuous structure that commits terrorist acts or that operates with the intention that terrorist acts will be committed — including an aforementioned body of persons that is engaged in training or instruction for the commission of terrorist acts, or that carries out an act involving weapons or performs a weapons transaction, in order to carry out terrorist acts—whether or not it has been designated as a terrorist organization pursuant to Part B;

(2) A body of persons in an organized and continuous structure that acts, directly or indirectly, to assist an organization mentioned in paragraph (1), or that acts with the intention of promoting the activity of such an organization, including by financing it — all of the foregoing, in a manner capable of making a substantial or ongoing contribution to the organization's activity, or [where such body of persons] has a substantial affiliation to [the organization], provided that the body of persons [defined in this paragraph] has been designated as a terrorist organization pursuant to Part B.

5. Section 2(a)(2) allows that organizations affiliated with designated terrorist organizations to also themselves be designated as terrorist organizations, even when the ongoing activities of these “shell organizations” are not linked in any way to violence-related acts. These alleged shell organizations may, for example, be humanitarian organizations that operate among the civilian population during wartime, and which do not promote violence whatsoever. Yet, according to the definition in the Law, in certain circumstances, these groups could be designated as terrorist organizations. Although section 2(a)(2) requires that there to be “a substantial or ongoing contribution to the [previously declared] organization’s activity” or “a substantial affiliation” to it, this stipulation does not limit the application of the definition only to organizations that engage in actions that contribute to violent acts or terrorist activity.
6. Furthermore, under the Law’s transitional provisions in section 101, organizations designated as unlawful associations under Regulation 84(1)(b) of the Defense (Emergency) Regulations – 1945 (hereinafter: “the Defense Regulations”) shall be viewed as having been designated as terrorist organizations by permanent designation pursuant to section 6 of the Law. In light of the powers they grant, the Defense Regulations are arbitrary, draconian, extreme, and incompatible with the principles of justice and due process, and they do not provide effective protection for the rights of citizens. The Israeli Supreme Court itself has expressed its reservations about these regulations, describing them as colonial measures legislated by an autocratic regime (HCJ 680/88, *Meir Schnitzer v. the Chief Military Censor*, PD 32(4) 617, 626 –627 (1988)). Moreover, the purpose of the designation of an unlawful association is fundamentally different from that of the designation of a terrorist organization. The automatic transformation in designations, from illegal to terrorist, in the absence of due process, raises several problems and does not serve the purpose of the law.
7. For example, the Islamic Movement in Israel, which was designated as an unlawful association in November 2015, is now automatically designated as a terrorist organization under the 2016 Law without any due process whatsoever. The automatic designation happened even though the classified evidence necessary for the designation of an unlawful association may be fundamentally different from that which is required for the designation of a terrorist organization, and despite the fact that the purpose of the pre-existing designation of illegal associations – problematic in and of itself – is fundamentally different from the purpose of the designation of a terrorist organization.
8. While the designation of the Islamic Movement as an unlawful association was based on arbitrary regulations, it also relied on extraneous considerations that are wholly unrelated to the public interest, and is, therefore, an unlawful political decision that violates protected constitutional rights. In the designating order under the Emergency Regulations, there is no mention of any

suspicions of the Islamic Movement's involvement in terrorist activities, financing of terrorist activities, funds received from dubious sources, incitement to terrorism and violence, or incitement to racism. The designation was also made without the Islamic Movement or its representatives being afforded the right to be heard beforehand. The automatic designation of these organizations as terrorist organizations under the Counter-Terrorism Law, without, at the very least, undergoing the (problematic) procedure established in the Law, magnifies the grave rights violations, including the freedoms of association, speech, and political expression, and the right to due process of these organizations and their members. Such automatic designation is therefore unlawful.

#### "A Terrorist Act"

The definition of a "terrorist act" is one of the principal flaws of the Law:

"A Terrorist Act" – an act that constitutes an offense, or a threat to carry out such an act, which meets all of the following:

- (1) It was carried out with a political, religious, nationalistic or ideological motive;
- (2) It was carried out with the intention of provoking fear or panic among the public or with the intention of compelling a government or other governmental authority, including a government or other governmental authority of a foreign country, or a public international organization, to do or to abstain from doing any act;
- (3) The act carried out or threatened to be carried out, involved one of the following, or posed an actual risk of one of the following:
  - (a) Serious harm to a person's body or freedom;
  - (b) Serious harm to public safety or health;
  - (c) Serious harm to property, when in the circumstances in which it was caused there was an actual possibility that it would cause the serious harm mentioned in subparagraphs (a) or (b) and that was carried out with the intention of causing such harm;
  - (d) Serious harm to religious objects; here, "religious objects" means a place of worship or burial and holy objects;
  - (e) Serious harm to infrastructure, systems or essential services, or their severe disruption, or serious harm to the State's economy or the environment;

9. In the first criterion under the definition, that of motive, the Counter-Terrorism Law employs terms that are ambiguous, overly broad and exceedingly unclear – such as an ideological, nationalist, political or religious motive – and which cannot possibly determine a criminal legal norm. These terms do not have a legal definition, either in the present Law or under any other law. It is therefore unclear under which circumstances the State of Israel will consider an act to be an offense committed with one motive or another according to the aforementioned definition. The use of these terms grants the State excessively broad authority to decide in a sweeping and arbitrary manner when a specific criminal offense can be designated as a "terrorist act".
10. Consequently, any legitimate political protest by Palestinian citizens of Israel, such as demonstrations against the Occupation or against a military operation targeting Palestinians in Gaza, or the conditions of their lives in Israel, may be considered a criminal security offense under the Counter-Terrorism Law. For example, in the summer of 2014, demonstrations were held in

Arab towns in Israel against the military assault on the Gaza Strip, the so-called “Operation Protective Edge”. Following the enactment of this Law, it is possible that indictments related to these demonstrations or related acts that took place in their vicinity will render Palestinians liable for a “terrorist act” as opposed to a “regular” criminal offense.

11. Thus, many acts that are currently viewed under the law as criminal in nature will become “terrorist acts” under the Counter-Terrorism Law. These could include, for instance, the outbursts of violence and vandalism associated with the 2011 social protests launched by Jewish citizens of Israel. Some of these acts seemingly satisfy the definition of a “terrorist act” under the Law (i.e., ideologically motivated; accompanied by grave damage to property, infrastructure, or other essential systems and services; and aimed at compelling the government to act). Despite the political-ideological motives behind these acts, they would not generally be conceived of as “terrorist acts”, and yet they fall within the definition set forth in the Counter-Terrorism, Law, alongside other legitimate acts of protest. The fear that arises in this context relates, *inter alia*, to the question of enforcement. Such broad definitions could result in an arbitrary and discriminatory enforcement policy based on unlawful and illegitimate political motives that will serve, much like the entire system of security legislation, as a means of suppressing the rights of Palestinian citizens of Israel to freedom of expression and the rights to protest and demonstrate. Therefore, there are reasonable grounds to fear that criminal acts such as those that took place during the social protests of 2011 will continue to be classified as acts of vandalism and remain as ordinary offenses under pre-existing criminal law, regardless of the underlying political-ideological motives behind them, while similar acts at the margins of protests by Palestinian citizens in Israel, which can be dealt with through the regular mechanisms of criminal law, will instead be classified and prosecuted as terrorist acts.
12. The definition of a “terrorist act” is contrary to the principle of legality in criminal law, specifically *nulla poena sine lege*, which requires legislative warning that a given act constitutes a criminal offense prior to inflicting criminal penalties. One of the prerequisites of the principle of legality in Israel is that the definition of an offense must be explicit. When an offense is not sufficiently explicit, the public cannot know precisely what is prohibited (see: S.Z. Feller, *Basic Concepts of Criminal Law*, Volume 1, 14-19 (1984); CA 53/54, *AS”D, Temporary Transportation Center v. The Attorney General*, PD H 785, 790 – 791 (1954)).
13. Additionally, the vagueness of the definition of “terrorist act” results in a clear breach of the freedoms of speech and protest, including political protest (HCJ 73/53, *Kol Ha’Am v. The Minister of Interior*, PD G 871, 892 – 893 (1953); HCJ 2557/05, *Mate Harov v. The Israel Police* (12 December 2006), paragraph 13, the final section of President Barak’s opinion), and the right to liberty (CA 8823/07, *John Doe v. The State of Israel* (published in *Nevo*, 11 February 2010); HCJ 2605/05, *The Academic Center for Law and Business v. The Minister of Finance* (published in *Nevo*, 19 November 2010)).
14. Moreover, the cumulative effect of the broad definition will result in a greater violation of the basic rights of all citizens of the State, and particularly Palestinian citizens, including the rights to liberty, dignity and freedom of speech. It will also undermine the fundamental principles of criminal law. These defects are of particular relevance and concern to Palestinian residents of East Jerusalem, who are subject to Israeli law but who live under belligerent military Occupation.

#### **Designation of an Organization as a “Terrorist Organization”**

15. The Counter-Terrorism Law allows the Israeli Minister of Defense to designate a “body of persons” as a “terrorist organization” if he believes that the group satisfies the definition provided by the Law. The Law introduces two types of “terrorist organizations”: (1) *type-1 organizations*, which

engage in activities amounting to “terrorist acts”, as defined above; and (2) *type-2 organizations*, which engage in activities, not necessarily constituting “terrorist acts”, but groups that may be seen as contributing to or assisting in the activities of a type-1 organization. Furthermore, according to the Law, an activity of a terrorist organization may include a “legal activity or an activity for legal purposes” (section 2, definition of “activity” of a terrorist organization). Therefore, type-2 organizations may be theoretically designated as terrorist organizations, even if it is established that they only provided lawful assistance to type-1 organizations.

### The Designation Process

16. According to section 3(a) to the Counter-Terrorism Law, the Minister of Defense may designate an organization as a terrorist organization “once he is convinced that paragraph (1) or (2) of the definition ‘terrorist organization’ applies and [he is convinced] that [the organization] has a connection to Israel.”
17. Such designation is declaratory in the case of type-1 organizations and is constitutive in the case of type-2 organizations. In other words, type-1 organizations are considered terrorist organizations whether or not a formal declaration is issued by the Minister of Defense, while type-2 organizations are considered as such only upon the issuance of a formal declaration. Nevertheless, the same procedures apply to process formal designation of both types of organizations. In accordance with section 3(b), the designation by the Minister of Defense shall be based on a request submitted by the Head of Israel’s General Security Service (GSS), also known as the Shin Bet or the Shabak, either on their own initiative or on the initiative of the head of another security agency (i.e., the Secret Intelligence Service (Mossad), the military, or the police), with the consent of the Attorney General (hereinafter: “the Designation Request” or “the Request”). In addition, the Prime Minister or the Government’s Ministerial Committee are authorized to decide to issue a designation decision, per section 3(d) of the Law.
18. In the case of a type-2 organization “that is acting in Israel through a party operating on its behalf,” section 3(c) provides that “the Head of the Security Agency shall only submit a [Designation Request] after a notice has been provided to the organization and it has continued its activity, provided that [the Head of the Security Agency] has determined that such a warning will not thwart the possibility of taking action against the organization.”
19. Upon the submission of a Designation Request, the Minister of Defense may issue a temporary designation order if he believes that the organization in question falls within the definition of a terrorist organization. The temporary designation order will remain in effect until a permanent designation order is issued (subject to an appeal process, discussed below); until its revocation by the Minister of Defense; or - if no permanent designation order is issued, no decision to revoke the temporary designation order is made, and there is no challenge by the affected organization – after seven months from the publication of the latter in the Official Gazette.
20. Once a temporary designation order is published, the head of the affected organization or one of its members, may submit written arguments to the Minister of Defense, via the Advisory Committee, within two months from the order’s publication, per section 5(a). Appointed by the Minister of Justice, under section 14 of the Law, the Advisory Committee is comprised of three members: (1) a former Supreme Court or District Court judge; (2) a jurist qualified to serve as a District Court Judge; and (3) an expert in the field of security and counter-terrorism. The Advisory Committee is charged with the tasks of considering the arguments presented by the designated organization and by the Security Agency that submitted the Designation Request, and of providing the Minister of Defense (or, as the case may be, the Prime Minister or the Ministerial Committee), within four months, with its recommendations vis-à-vis making the designation order permanent

(section 5(e)). Upon receiving the Advisory Committee's recommendations, the Minister of Defense may issue, within a month (which may be extended by one more month), a decision as to whether or not to make the designation a permanent one (section 6(a)). However, if the designated organization fails to submit arguments, the temporary designation order becomes permanent after one month from the end of the two-month period allocated for the submission of arguments (section 6(b)).

21. The Minister of Defense may revoke the permanent designation order: (1) if there were no grounds for its issuance; (2) if two years have passed, the organization has changed its ways in a significant manner, and there exists a high probability that it will not engage in future terrorist activities; or (3) based on a written request submitted after two years by the designated organization to the Minister of Defense, via the Advisory Committee. A decision in the matter shall be subject to the same procedures and timeframe detailed above (section 7).

#### Access to Information

22. Affected individuals who are entitled to submit arguments after a temporary designation order has been issued, or to request the revocation of a permanent designation order, may have access to the Designation Request submitted by the head of the relevant security agency, the Advisory Committee's recommendations, and to the decision of the Minister of Defense. However, they would not be granted access to: (1) any confidential information (i.e. secret evidence); or (2) any other information the Advisory Committee was requested not to consider in formulating its final recommendations (section 8).
23. The Advisory Committee considers confidential information in formulating its recommendations. It is up to the Advisory Committee to conceal this kind of material based on a request by the Head of a Security Agency, if it is convinced that disclosure of the information may harm state security, foreign relations, public safety or security, or such disclosure may reveal classified work methods, "and that the interest in its non-disclosure outweighs the necessity of its disclosure for the purpose of determining the truth and attaining justice." To make such a determination, the Advisory Committee may review the material and request explanations from the Security Agency in an *ex-parte* session (sections 9(a)-(c)). To the extent possible, the Advisory Committee may provide the designated organization with a summary of the information. If, however, the Committee decides not to conceal certain information in accordance with the Security Agency's request, the Security Agency may request that the material not be considered by the Committee for the purposes of formulating its recommendations (section 9(d)).
24. Additionally, the Law elaborates the procedures for designating a foreign terrorist organization or a foreign terrorist operative based on a designation by a foreign competent authority (section 11). Such a designation may be issued by the Minister of Defense or the Government's Ministerial Committee, without the involvement of the Advisory Committee or being subjected to the "due process" requirements applicable to the designation procedures detailed above.

#### Implications: Violation of Due Process

25. Two considerable problems arise in this context. The first is related to the broad scope of activities that may lead to the designation of an organization as a "terrorist organization". The second concerns the grounding of a designation order on classified information, which raises due process issues.
26. For example, an NGO with a mission to provide lawful legal assistance or representation to members of a type-1 organization, may find itself falling within the definition of a "terrorist

organization". The Minister of Defense's choice to designate such NGOs as "terrorist organizations" is not precluded by the Law.

27. Once a decision to designate an organization as a "terrorist organization" is made, the designation procedure must follow. While appearing innocuous at first glance, this procedure is the site of major due process failures.
28. One of the main areas of concern in the process relates to the admissibility of classified materials (i.e., secret evidence), which may form the basis for the Minister of Defense's orders (both temporary and permanent) as well as for the Advisory Committee's recommendations. Contrary to the image of an adversarial process portrayed in the Counter-Terrorism Law, the admissibility of classified evidence - to which the designated organization, its members, and its legal representation are not allowed access - prevents designated organizations and their legal representatives from challenging either the validity of the evidence itself or its interpretation. For this reason alone, the designation process fails to guarantee the minimal requirements of due process. However, the impact on due process rights does not end there, since the designation order may be used as evidence in criminal proceedings against those accused of being associated with the now-terrorist organization, either as members or persons who have contributed to or otherwise supported its objectives.
29. In Chapter 3, the Law enumerates several specific terrorism-related offenses, and for at least a subset of these offenses, the designation order would be a decisive element in whether or not a defendant is found guilty in subsequent criminal proceedings. These include: criminalizing the head of a terrorist organization (section 20); criminalizing the leadership and management in such an organization (section 21); criminalizing different forms of membership within such an organization (section 22); criminalizing the provision of services or resources to such an organization (section 23), and; criminalizing the act of identification with a terrorist organization (section 24). These offenses carry sentences anywhere from three years' to 25 years' imprisonment, or even life imprisonment under certain circumstances.
30. Additionally, the Counter-Terrorism Law bars a party in a legal proceeding, including defendants in criminal proceedings, from raising arguments challenging the legality or validity of a designation order. According to section 19, a court "shall not consider a claim that a body of persons or person designated pursuant to this chapter is not a terrorist organization or terrorist operative, as the case may be, or a claim concerning the invalidity of a terrorist organization or a terrorist operative designation".
31. Thus, a person charged with the offense of membership in a designated terrorist organization, or, with any of the offenses listed above, would not be able to challenge the designation order, both because he/she would not be allowed to review the classified material on the basis of which such a designation order was issued, as well as due to the procedural rule precluding such arguments from being considered by the court deciding the case. This essentially means that a verdict convicting a member of a designated organization would itself rely, at least in part, on classified evidence. In other words, while, in general, classified evidence is inadmissible in domestic legal proceedings in Israel, including criminal proceedings, and cannot form the basis of court rulings, the Counter-Terrorism Law introduces classified evidence into court proceedings through the backdoor. This move insulates the process from judicial review, except by way of a separate administrative petition to the Supreme Court, in which the Court would most likely also consider the classified information in an *ex-parte* hearing.

32. Therefore, the combination of broad and vague definitions and the inherent violation of due process rights, through the use of classified information, raise grave concerns about the injustices authorized by the Counter-Terrorism Law.

### **Chapter 3 of the Law: Penalties**

33. Chapter 3, Article A, of the Counter-Terrorism Law lists criminal offenses which carry penalties that are more severe than those established in the Israeli Penal Code. The problems that arise in this chapter are based on several premises: first, the broad definitions of the terms “terrorist act”, “terrorist organization”, and “member of a terrorist organization”, as explained above, pervade the foundations of offenses anchored in the Law, and therefore the difficulties that arise in light of the expansion of these definitions extend into this section of the Law as well. Second, given the stated purpose of the Law – “to provide the state authorities with suitable means in the realm of criminal and public law for contending with terrorist threats that the State of Israel faces, due to the uniqueness of this criminal phenomenon” (see the explanation of section 1 of the Counter-Terrorism Bill, 2015) – it expands the range of offenses perceived as terrorism, and includes explicit expression-related offenses. This expansion violates the constitutional right to freedom of speech, and incorporates under the umbrella of “terrorism” offenses involving severe and tangible damage along with offenses whose harm to a protected interest is, at best, marginal. The gravity of labeling any kind of criminal offense as terrorist activity is so great that it should only be reserved for the most extreme cases, particularly as the Israeli Penal Code already addresses situations that do not fall within these definitions, as will be detailed below.

### **Offenses of Expression**

34. The Counter-Terrorism Law does not provide an appropriate or proportionate balance between legitimate freedom of speech and the criminal abuse of this right. The problems in the specific context of crimes of expression are best understood in the context of section 24 of the Law, that states the following:

(a) One who commits an act of identification with a terrorist organization, including by publishing words of praise, support or sympathy, waving a flag, displaying or publishing a symbol, or displaying, playing or publishing a slogan or anthem, in one of the following [situations], is liable to three years' imprisonment:

- (1) In public, for the purpose of identifying with the terrorist organization;
- (2) In circumstances where there is an actual possibility that the act will lead to the commission of a terrorist act or an offense according to Sections 22, 23, 25 or 29.

(b) One who does one of the following is liable to five years' imprisonment:

- (1) Publishes a direct call to commit a terrorist act;
- (2) Publishes praise, sympathy, encouragement or support of a terrorist act, or identification with it, where the content of the publication and the circumstances in which it was published, give rise to a substantial possibility that it will bring about the commission of a terrorist act.

(c) One who does one of the following is liable to two years' imprisonment:

(1) Possesses, for the purpose of distribution, a publication mentioned in subsection (a) appearing to express identification with a terrorist organization, or a publication mentioned in subsection (b);

(2) Provides a service for the preparation, creation, or distribution of a publication as mentioned in paragraph (1).

(d) Publishing a correct and fair report on a prohibited publication according to subsections (a) or (b) does not constitute an offense pursuant to this section.

(e) An indictment shall only be filed pursuant to this section with the approval of the Attorney General.

35. One of the key concerns of this section is its use of broad terms such as “praise”, “sympathy”, and “encouragement” – terms which are all encompassing and leave room for arbitrariness and tangible harm to the freedom of speech. Professor Kremnitzer stated the following in this regard:

The difficulty is that the expressions “praise,” “encouragement” and “sympathy” are very broad... Doesn’t the statement, “Were it not for the intifada, the Oslo Agreement would not have been made,” support a violent act? Does the description of the discrimination against the Arab minority and the difficulty or inability to significantly change this situation encourage violence? Does describing the oppressive measures carried out in the Occupied Territories, while sharply criticizing them, constitute such support? Does historical research pointing to the fact that, in certain situations, the attention of the majority to the plight of the minority could not be attained other than by employing violent means, constitute encouraging violence? Does discussing the connection between Israeli actions and terror activities encourage terror? Such statements lie at the core of the area protected by freedom of speech.

M. Kremnitzer, “The Alba Case: Clarifying the Laws of Incitement to Racism”, *Law Review (Mishpatim)* 105, 142 (5759-5760, 1999).

36. The above sections are based on the Law’s definition of the term “terrorist act” (as well as the offense of threat that will be discussed below). The reliance on these definitions taints the offenses noted above with the same flaws that tainted the definitions. Ostensibly, following the entry into force of the Counter-Terrorism Law, the declaration of part of the Islamic Movement in Israel as an unlawful association is considered a permanent designation of the Islamic Movement as a terrorist organization under section 6 of the Law (see section 101(a)). It follows that any protest against the above designation or any other designation may be interpreted as an expression of support or identification with the organization, putting the individual at risk of prosecution for supporting a terrorist organization.
37. Notably, laws that preceded the Counter-Terrorism Law, such as the Prevention of Terrorism Ordinance No. 33, 1948 (hereinafter: “the Ordinance”), included measures regarding the criminalization of expression that are similar to the measures that were adopted in the current Law. However, the Ordinance did not profess to strike a proper balance between security interests and human rights, and was legislated prior to the enactment of the Basic Law: Human Dignity and Liberty in 1992. The Israeli Supreme Court was therefore compelled to restrict the Ordinance’s applicability through judicial interpretation that factored in human rights. For example, section 4(a) of the Ordinance, which once criminalized the “publish[ing], in writing or orally, [of] words of praise, sympathy or encouragement for acts of violence calculated to cause death or injury to a person or for threats of such acts of violence,” was applied to a certain

publication. The Supreme Court however limited the applicability of this section, (CrFH 8613/96, *The State of Israel v. Jabarin*, 54(5) 193 (2000) (hereinafter: the *Jabarin* case), holding that:

[T]o apply section 4(a) of the Ordinance, it is not sufficient that the acts described in the publication are of the type that characterize terrorist activity, but it is necessary that they be the acts of such an organization. Does section 4(a) apply to a publication of the type we are dealing with, a publication which praises and encourages acts of violence undertaken both by individuals and by terrorist organizations, and which in itself contains no indication, explicit or implicit, of activities it wishes to encourage and praise, and when the emphasis in it is on the acts of violence themselves without any connection to the characteristics of those undertaking them?

It is my view that section 4(a) does not apply to said publication. The reason for this is found in the purpose of section 4(a). I clarified above, that its purpose is not to prohibit a publication which encourages, praises or sympathizes with acts of violence of the type which characterize terrorist activity. It is intended, as are the rest of the alternatives of section 4, to prevent support of terrorist organizations, and this as part of an overall system in the Ordinance whose purpose is to eliminate the foundation of such organizations. In order for a publication to be included in the framework of section 4(a), it is necessary, in my opinion, for it to be understood from it that it supports acts of violence of a terrorist organization.

The *Jabarin* case, pp. 209-210.

38. In light of this judgment, the Knesset repealed section 4(a) of the Ordinance, and subsequently added section 144D2 to the Penal Code, which created the criminal offense of incitement to violence or terrorism, and included, *inter alia*, the publication of words of praise or support for acts of violence or terrorism. This law explicitly deviates from the balance established in the *Jabarin* case, and significantly lowers the standard that appeared in section 4(a) of the Ordinance, which prohibited publications which “may cause death or injury to a person or for threats of such acts of violence”. According to the Supreme Court’s interpretation in HCJ 73/53, *Kol Ha’am v. The Minister of Interior*, g(1)871 (1953) (hereinafter: the *Kol Ha’am* case), the probability test, expressed in the term “may”, is a test of near-certainty (the *Kol Ha’am* case, page 887). Article 144D2 adopted the test of “substantial possibility”, which is by all accounts a less demanding test with a lower standard and, therefore, allows for a greater violation of the freedom of speech.
39. The Counter-Terrorism Law continues this trend by adopting the test of “substantial possibility”, in section 24(b)(2), and establishing the publication of “praise, sympathy, encouragement or support of a terrorist act, or identification with it, where the content of the publication and the circumstances in which it was published, give rise to a substantial possibility that it will bring about the commission of a terrorist act” as an offense. Thus, through the Law, the Knesset adopts a probability standard that offers less protection to freedom of speech than the standard under the preceding Ordinance. It further expands the range of incidents to which the offense is applicable, so that it is no longer confined to violent acts by a terrorist organization, as was determined in the *Jabarin* case, but also applies much more broadly.
40. Hence, in fact, the offenses that constitute terrorism under the Law also include expression-related offenses that cause harm of a kind that is not immediate or proximate, and that will likely not materialize.
41. Moreover, the three elements of the constitutional principle of proportionality are not satisfied. There is no rational link between the purpose of security and the violation of the freedom of

speech, because the Law's provisions also apply to expressions that are not stipulated by the occurrence of concrete, immediate, and tangible damage. Additionally, the harm to freedoms is not the least severe of all the possible options with which to fulfil the purpose of preventing terrorism. And above all, the harm to an individual who is convicted of an expression-related offense defined as a terrorism offense and to his/her rights is many times greater than the relative benefit of promoting the purpose of contending with the phenomenon of terrorism and preventing its immediate harms.

42. Similarly, section 27 of the Law provides, "One who threatens to commit an offense that is a terrorist act with the motive and intention mentioned in paragraphs (1) and (2) of the definition of "A Terrorist Act" is liable to seven years' imprisonment". This section also severely limits freedom of speech due in part to the issues inherent in the Law's broad definition of a "terrorist act". Additionally, section 27 of the Law does not provide a formula for assessing the substantial probability of a threat or the scope of the intention of the individual carrying out the threat. Here it differs from the relevant section pertaining to threats in the Israeli Penal Code – which stipulates a punishment of three years' imprisonment, and requires intent to frighten or harass a person – and is also contrary to Israeli Supreme Court rulings which held that in order to establish whether an act constitutes as a threat, it must be determined, based on an examination of the objective purpose of the act, that it constitutes an explicit threat (regarding the tests of the nature of a threat, see: CA 103/88 *Moshe Lichtman v. The State of Israel*, PD 43(3) 373 (1989); and CA 6368/09, *Matan Zaken v. The State of Israel* (published in Nevo, 12 July 2010). Moreover, section 27 of the Law specifies a strict punishment of seven years' imprisonment that can apply, in principle, to idle threats, or to impulsive statements that could be erroneously interpreted as threats.

#### Stricter Penalties

43. The trend throughout the Counter-Terrorism Law to increase the severity of penalties creates absurd situations. In many cases, the Law seeks to increase the severity of the penalty for a preexisting offense in light of the motive behind it. While an attack carried out for reasons of personal animosity and an attack based on a religious, nationalistic or ideological motive – which therefore places the attack within the definition of a "terrorist act" – may result in the infliction of identical damage, the Law differentiates these two acts, with a much higher penalty for the latter attack. The principle of stricter penalty for terrorism-related offense is established in section 37 of the Law, as follows:

(a) One who commits an offense that is a terrorist act, excluding an offense specified below, is liable to double the penalty prescribed for such offense, but not exceeding 25 years:

- (1) An offense pursuant to this Law;
- (2) An offense pursuant to Article B or Article D of Chapter 7 of the Penal Law;
- (3) An offense punishable by mandatory life imprisonment.

(b) Notwithstanding Section 41 of the Penal Law, one who commits an offense that is a terrorist act punishable by life imprisonment, where this penalty has not been designated as mandatory, is liable to 30 years' imprisonment.

(c) Aggravated penalties shall not apply to the minimum punishment prescribed for the offense.

(d) Should the Court hold that a person has committed an offense that is a terrorist act, or convict a person of such an offense, it shall note this in its judgment.

44. Moreover, section 26 of the Law stipulates that anyone who, *inter alia*, does not act reasonably to prevent an offense constituting an act of terrorism is liable to three years' imprisonment, compared to the regular offense of failure to prevent a crime established in section 262 of the Penal Code, which is punishable by only two years' imprisonment. The purpose of criminalizing the failure to prevent a crime is usually aimed at preventing the damage that may result from the execution of the offense. As is evident from the different penalties set forth in these two sections, according to the Law, a defendant's failure to prevent a crime in one particular case is graver than in the other, even though the only distinction between the two cases is the assailant's motive and not the resulting harm. Therefore, there is no legitimate justification for the distinction.
45. The increased severity of penalties is unconstitutional given its sweeping nature. Under the Counter-Terrorism Law, a criminal offense that causes marginal damage will carry a stricter penalty – due to the underlying ideological motives – than a criminal offense that results in serious damage but was committed based on motives other than those listed in the Law's definition of a "terrorist act". The comprehensive nature of this trend demonstrates that this infringement of defendants' rights, and particularly the right to equality in legal proceedings, is excessive.

#### **Chapter 4 of the Law: Grave Security Offense Detainees – Special Provisions**

46. The Counter-Terrorism Law establishes a series of unique procedures for detainees suspected of committing grave security offenses. Prior to the Law's enactment, some of these procedures appeared in temporary measures; now they are enshrined in permanent legislation. These procedures defy basic principles of criminal law and violate the rights of detained persons as established in Supreme Court case law – particularly following the enactment of the Basic Law: Human Dignity and Liberty in 1992 – including the rights to due process, liberty, and equality, and the rights to access the courts, to consult with an attorney, and to be present during the detention proceedings (see: CA 8823/07, *John Doe v. The State of Israel*, PD 63(3) 500, 529 (2010) (hereinafter: "the *John Doe* case")). The right to due process encompasses a wide range of rights, including the "right of a defendant to know why he was detained and what the charges against him are, the right to be represented by an attorney, the right to be present at his trial, the right to a public trial by an independent and impartial court, and the right to defend himself at the trial and to present the relevant evidence. The above right also includes the presumption of innocence and the principle of legality [...]" (CA 5121/98, *Yissacharov v. Chief Military Prosecutor*, PD 61(1) 461, para. 66 of Justice Beinisch's ruling (published in *Nevo*, 4 May 2006) (hereinafter: "the *Yissacharov* case")). The procedures for detainees suspected of grave security offenses also deviate from some of the safeguards provided in the Criminal Procedures (Enforcement Powers – Arrest) Law, 1996 (hereinafter: "the Arrests Law"), although many of these procedures themselves are problematic.
47. Thus, *inter alia*, the Counter-Terrorism Law makes it possible: to delay bringing a detainee before a judge for up to 96 hours; to hold detention hearings, reviews, and appeal proceedings in the absence of the detainee; and to refrain from informing the detainee of decisions made in his/her case. The Law also permits the extension of suspects' detention for longer periods of time than those that are stipulated in regular detention laws. Holding interrogations and detention hearings in accordance with the Law provides wide scope for illegal conduct during interrogations, conduct which could result in the extraction of false confessions from suspects while they are held in

prolonged isolation, under pressure, and far from the surveillance of the court. The following section details and analyzes the principal provisions of the Law regarding detention and interrogation procedures.

#### Delay in Bringing a Suspect before a Judge

48. The Arrests Law mandates that a detained person must be brought before a judge within 24 hours of their arrest (and in exceptional cases within 48 hours). The Counter-Terrorism Law, however, provides an exemption from this requirement by allowing a commanding officer to delay bringing a detainee suspected of a grave security offense before a judge for up to 96 hours.
49. Under section 46 of the Counter-Terrorism Law, the commanding officer may delay bringing a detainee before a judge for a period of 48 hours “if he is convinced that interrupting the investigation to bring the detainee [suspected of a grave security offense] before a judge is liable to materially harm the investigation” (section 46(a)(1)). The authority for an additional delay of 24 hours, is granted to the commanding officer subject to the approval of the director of the GSS Investigations Department, if the officer is convinced that “interrupting the investigation... is liable to materially harm the investigation in a manner that may thwart the prevention of harm to human life” (section 46(a)(2)). The Law further provides the court with the authority to order an additional 24-hour delay, following a request by the head of the GSS with the consent of the Attorney General, should it be found that bringing the detainee “before a judge is liable to materially harm the investigation in a manner that may thwart the prevention of harm to human life” (section 46(a)(3)). In such instances, the court hearing would be held in the detainee’s absence, in accordance with the Law.
50. In contrast, section 30 of the Arrests Law allows a postponement of 48 hours in bringing a detainee before a judge only for the sake of a necessary, urgent investigation or action that cannot be postponed until after the detainee is brought before a judge. Thus, the threshold required under section 46 of the Counter-Terrorism Law for a 48-hour delay in bringing a detainee suspected of a grave security offense before a judge is significantly lower than the threshold required in regular criminal proceedings. Under the Law, all that is required for such delay is that it will significantly hinder the investigation, as there is no stipulation that the postponement is required in order to conduct an urgent investigation that cannot be delayed. Hence, it appears that the very existence of the judicial process is perceived as interference with the interrogation. Although subsections (2) and (3) of section 46(a) include the additional factor of thwarting efforts to prevent harm to human life, the presumption of hindrance to the interrogation in these subsections similarly stems from the very existence of the judicial process.
51. The procedure established in section 46(a) is, in and of itself, an infringement of a person’s constitutional rights to liberty and due process (see HCJ 6055/95, *Tzemach v. The Minister of Defense*, PD 53 (5) 241, page 262 (1999) [hereinafter: “the *Tzemach* case”]; HCJ 3239/02, *Marab v. The Commander of the IDF Forces in Judea and Samaria*, PD 54(2) 349, para. 32 of President Barak’s ruling (2003)). The delay undermines one of the most important foundations of detention procedures – judicial review – which serves as a safeguard against arbitrary detention and unjustified breaches of the right to liberty (CA 2060/97, *Vilenchik v. The District Psychiatrist – Tel Aviv*, PD 52(1) 697; HCJ 3239/02, *Marab v. The Commander of the IDF Forces in Judea and Samaria*, PD 54(2) 349, 368 (2003); HCJ 2320/98, *El-Amla v. The Commander of the IDF Forces in Judea and Samaria*, PD 52(3) 346, 350 (1998)).
52. In the *Tzemach* case, the Israeli Supreme Court invalidated a directive which allowed the detention of soldiers for 96 hours without judicial review, and held that “[d]etention by an administrative agent, such as a police officer, is the most serious infringement on personal liberty.

In contrast to imprisonment, such detention is not imposed by a court as the result of a judicial proceeding, as punishment for a crime. It is imposed by an administrative agency, based on suspicion alone, on a person who still enjoys the presumption of innocence” (HCJ 6055/95, *Tzemach v. The Minister of Defense*, PD 53(5) 241, 262 (1999)).

53. As noted above, even the purpose of section 46(a) is improper. Allowing for the continuous, prolonged interrogation of detainees while they are held in total isolation from the outside world, and preventing judicial review of their detention and of the manner in which their interrogation is being conducted, constitutes a grave violation of the detainees’ basic constitutional rights, and the section ignores and disregards the rights of detainees altogether (CA 6821/93, *United Mizrahi Bank Ltd. v. Migdal Cooperative Village*, PD 49(4) 221, 342 (1995). See also: HCJ 4769/95, *Menahem v. The Minister of Transport*, PD 57(1) 235, 264 (2002); HCJ 466/07, *MK Zehava Galon, Meretz-Yahad v. The Attorney General*, PD 65(2) 44, 75-78 (2012)).
54. Moreover, the aforementioned violation does not satisfy the test of proportionality, since the judicial review of detention procedures is not an obstacle to the conduct of an investigation. The above process is an exceedingly sweeping means whose benefit, if indeed there is such a benefit, cannot justify such an absolute breach of the rights of detainees.

#### Extension of the Maximum Periods of Detention

55. Section 17(a) of the Arrests Law determines that, prior to filing an indictment, a judge may order the detention of a suspect in his/her presence for a period of up to 15 days, which may be extended for an additional 15 days. Section 47 of the Counter-Terrorism Law increases the period of time to an initial 20 days, and thereafter by a total of 15 additional days. Thus, under the Law, a detainee suspected of a grave security offense can be held for a maximum of 35 days prior to the submission of an indictment, which is 5 days more than the number of days allowed in cases relating to offenses to which the Arrests Law applies.
56. This section extends the period during which a detained suspect may be held and thus interrogated without judicial review. Frequent judicial review is important in order to maintain strict oversight over an interrogation, and consequently to protect a person’s liberty, dignity and physical integrity. The purpose of this procedure is highly problematic, not only because of its total disregard of the rights of the detainee, but also because it seeks to keep the suspect out of court, based on the perception of judicial review as an obstacle to the interrogation. Similarly, the extension under the Counter-Terrorism Law of the maximum period during which a detainee can be held prior to the filing of an indictment is disproportionate. The violation of a suspect’s rights, particularly his/her right to liberty, is excessive and therefore does not pass the test of proportionality.

#### Conducting Detention Hearings in the Detainee’s Absence

57. The Counter-Terrorism Law allows the court to hold a hearing on the extension of a detainee’s detention (section 48), a preliminary hearing regarding the grounds for a review of a decision concerning pre-indictment detention (section 49(b)), and a hearing on an appeal of a decision to extend a suspect’s detention (section 50(b)), in the detainee’s absence, if the court is convinced that there is a near-certain possibility that halting the investigation and bringing the detainee to a hearing at court will thwart efforts to prevent harm to human life. Additionally, section 51(d) of the Law empowers the court to order that a decision made at a hearing in the detainee’s absence not be brought to his/her attention, including a decision to extend the detention, if it is convinced this may thwart the prevention of harm to human life.

58. It is clear that these provisions gravely violate the fundamental constitutional right of the detainee to be present at detention proceedings, as established in Israeli Supreme Court case law, and in particular in the *John Doe* case, in which the Supreme Court ruled in 2010 on the unconstitutionality of Article 5 of the Criminal Procedures (Detainee Suspected of Security Offenses) (Temporary Order) Law – 2006 (hereinafter: the Temporary Order) (See Crim. Appeal 8823/07, *John Doe v. The State of Israel* (decision delivered 11 February 2010). Although the Temporary Order was amended following the *John Doe* case, it continues to contravene this ruling. In the *John Doe* case, the Israeli Supreme Court held that holding detention hearings in the detainee's absence is unconstitutional. It therefore ordered the repeal of the relevant section (then-section 5) of the Temporary Order. While in her judgment, Justice Miriam Naor stated her opinion that conducting detention proceedings in the detainee's absence was justified in cases where the detainee's presence at the hearing may, to a degree of near-certainty, thwart the prevention of harm to human life (para. 4 of her opinion), this view was not backed by the majority of the justices on the panel, who decided that even under such circumstances, then-section 5 of the Temporary Order did not pass the test of proportionality.
59. Notably, limiting the permissible grounds and time periods involved in this matter would not sufficiently rectify the legal and ethical problems associated with holding detention hearings in the absence of the detainee. In the *John Doe* case, the Supreme Court held that, "the right of a defendant to be present at his trial is a core element of the right to due process, and it is therefore a protected constitutional right under the Basic Law" (The *John Doe* case, para. 17 of Deputy President Rivlin's opinion).
60. The detainee's presence in court is all the more necessary given the complex of provisions under the Law relating to the initial stage of interrogations of persons suspected of grave security offenses. In this context, preventing a detainee from attending court, in addition to preventing him/her from meeting with legal counsel, eliminates any possibility of an individual's right to a fair trial and right to a defense (the *John Doe* case, para. 31 of Justice Rivlin's opinion; see also the opinion of Justices Procaccia, Rubinstein, Arbel, and Joubran).
61. Notably, while the specific provision that was invalidated by the Israeli Supreme Court in the *John Doe* case was later enshrined in temporary legislation that has been repeatedly extended with minor amendments based on comments in the individual opinion of Justice Naor, the Counter-Terrorism Law incorporates this provision into permanent legislation, despite its blatant unconstitutionality.
62. The foregoing remarks also pertain to the principle of equality before the law. Hence, a provision in criminal law that is bound by constitutional principles, such as the fairness of criminal procedures, and which applies to offenses such as murder, must also apply to other offenses even if they are categorized as security offenses. This principle gives rise to the policy of uniformity of punishment in criminal law. It is possible to draw conclusions in this regard from the *Contractors Center* case, in which then-Justice Barak held that, "the administrative act is one, and administrative law is one, and [in all] ... it must act in accordance with the duties that stem from the fundamental premise that the state acts as a public trustee." H CJ 840/79, *The Center of Contractors and Builders in Israel v. The Government of Israel*, PD 34(3) 725, 747 (1980). Similar comments were made in relation to tort law by former President Barak (H CJ 8276/05, *Adalah v. The Minister of Defense* (published in Nevo (2006))).

#### Secret Evidence and the Violation of the Right to Access the Courts

63. The Counter-Terrorism Law allows the widespread use of secret evidence and information, in stark contravention of fundamental constitutional principles. In regular criminal proceedings,

secret evidence is inadmissible in court, and therefore cannot form the sole basis of a decision (see sections 44 and 45 of the Evidence Ordinance (New Version), 1971), including a decision concerning a criminal conviction. This rule is due to the fact that the defendant has no real ability to examine or challenge the secret evidence in his/her defense. However, the Counter-Terrorism Law allows for the admission of secret evidence at various junctures and proceedings, which is not disclosed to the interested party or his/her lawyers. At best, and as far as is feasible, the Law provides the interested party with a paraphrased version of the classified material. Thus, for instance, the court may, under section 65 of the Law, derogate from the laws of evidence and rely on secret evidence in a judicial proceeding concerning a decision by the Minister of Defense regarding an administrative seizure or forfeiture order of certain assets and property, pursuant to the legal authority conferred on the Minister under the Law.

64. Another example appears in Chapter 2 of the Law, which establishes the procedure for designating a terrorist organization and a terrorist operative. As noted above, section 9, in practice, allows the Advisory Committee – a quasi-judicial committee with a range of independent powers and the authority to provide consultation to other decision-makers regarding the designation of groups as terrorist organizations – to determine that information presented before it is confidential (i.e. secret evidence), if its disclosure may harm interests that the state seeks to protect. However, unlike other confidentiality provisions in other Israeli laws, this Law allows the Advisory Committee to rely on secret evidence and to make operational decisions based on it, decisions which directly impact on the status of individuals and organizations.
65. The Advisory Committee's decisions, including its recommendations to officials, are not merely administrative, but also extend to subsequent criminal proceedings against individuals who are allegedly affiliated with a designated terrorist organization. As stated above, the Law considers heading, managing, and being a member of a terrorist organization as criminal offenses, and the Advisory Committee is involved in the process of challenges to the designations and the transformation of a temporary designation into a permanent one. Reliance on secret evidence by the Advisory Committee, or any other decision-maker for that matter, for the purpose of designating a terrorist organization or a terrorist operative impedes the ability of accused individuals to defend themselves in subsequent criminal proceedings, or against any administrative measures that may be taken against them and their property.
66. Moreover, as noted above, section 19 of the Law violates the right of individuals and organizations designated as terrorist organizations or terrorist operatives to challenge these designations before a court of law, either directly or indirectly as part of their defense in criminal proceedings. This section provides that, "In any legal proceeding, including a legal proceeding pursuant to this Law, the Court shall not consider a claim that a body of persons or person designated pursuant to this chapter is not a terrorist organization or terrorist operative, as the case may be, or a claim concerning the invalidity of a terrorist organization or a terrorist operative designation". Section 19 thus violates the right to due process, by considerably limiting the ability of individuals and organizations that may have suffered an injustice to challenge the designations as part of their legal defense before a court within the framework of a criminal proceeding. Furthermore, the Law constitutes a regression from the preexisting situation, in which defendants were entitled, under the Emergency Regulations, to defend themselves in a criminal proceeding by means of an indirect attack on the designations.
67. The main issue lies in the very establishment of proceedings that lack the minimum components of due process. The Counter-Terrorism Law blatantly contravenes the fundamental principles of criminal law, according to which no person may be convicted on the basis of information they have not examined, the right to due process, and the right of a person to defend himself/herself.

This situation, which includes a large number of sections under the Law, ultimately leads to a total reliance on the classification of individuals and organizations as terrorist operatives or organizations, respectively, by an administrative body, which then has direct implications for subsequent criminal proceedings based on that very classification. Thus, for example, the limits placed on the ability of an individual accused of membership in a terrorist organization to defend himself/herself are highly restrictive. From the outset, the designation by a competent administrative authority relies on confidential material and, naturally, the possibility of challenging it hardly exists. Moreover, it is possible to detain and prosecute individuals on the basis of such designation, without giving them the opportunity of arguing before a court that the designation itself is erroneous. Thus, the court remains bound to the designation and all it represents, including its repercussions on the criminal indictment of a person affiliated with the organization. The Law introduces the practice of using secret evidence through the backdoor of the courtroom.

68. Section 9, which allows judicial decisions to be taken on the basis of classified information, violates the fundamental principles of criminal law and, in effect, exempts the State (the prosecutor) from proving the factual basis of the alleged criminal offense (see: S.Z. Feller, *Basic Concepts of Criminal Law* (Vol. 1) (1984) p. 371, on the factual basis of an offense).
69. Section 9 also violates the right to due process as a result of the classification of an entity or individual as a terrorist organization or of terror activity, respectively. In the *Yissacharov* case, former Israeli Supreme Court President Beinisch elaborated on the content of the right to due process, which includes “the right of the accused to know why he was arrested and what are the charges against him, the right to be represented by a lawyer, the right to be present at the trial, the right to an open trial by an unbiased and neutral tribunal and *the right to defend himself at the trial and to present relevant evidence*”. (CA 5121/98, *Yissacharov v. The Chief Military Prosecutor*, PD 61(1) 461, 541 (2006) [emphasis added]). The violations of these rights are not for any proper purpose whatsoever; their sole objective is to conceal information from the defendant that is vital to their defense. Additionally, the sweeping nature of these provisions and the harm inherent in them, both to individual rights and to general public interests, lead to the conclusion that section 9 of the Law is disproportionate. Similarly, section 19, by preventing defendants from raising objections against the designations in subsequent court proceedings precludes an important defense argument, and strips from the court a principal power, the importance of which cannot be overestimated. In the words of former Supreme Court President Barak:

“Judicial intervention stands before arbitrariness; it is essential to the principle of rule of law. See *Brogan v. United Kingdom* (1988) EHRR 117, 134 EHRR 11. It guarantees the preservation of the delicate balance between individual liberty and public safety, a balance which lies at the base of the laws of detention.”

HCJ 3239/02, *Marab v. The Commander of the IDF Forces in Judea and Samaria*, PD 54(2) 349, 568 (2003).

70. The elimination of judicial intervention is not for a proper and legitimate purpose, as it is intended to hinder defendants and limit their rights without any justification. This sweeping directive is disproportionate by causing harm to defendants that outweighs any benefit arising from it, if indeed there is any.
71. Finally, a detainee suspected of security offenses is entitled to all of the same constitutional protections that apply to other suspects. The judicial procedure is criminal in essence and the rights and protections granted to a person suspected of criminal offenses also apply to a person

suspected of security offenses. The nature or type of offenses attributed to a detainee is not relevant with regards to their rights (see para. 256 of the judgment in the *John Doe* case).

72. As noted above, there are other procedures which apply to security suspects that heighten the risk of the potential violations of their rights to due process, and aggravate the harm to the public's interest in ensuring that the investigative authorities act with restraint and not unlawfully close case files. For example, section 35 of the Arrests Law creates an exception to the right to counsel of detainees suspected of security offenses, and allows their meeting with an attorney to be delayed for a cumulative period of up to 21 days. According to section 35(a), the commanding officer may delay such a meeting if the officer believes that "the meeting is liable to impede the arrest of other suspects"; "the meeting is liable to impede the uncovering or seizure of evidence, or disrupt the investigation in another way"; or "the prevention of the meeting is necessary to thwart an offense or to protect human life". Section 35(c) of the Arrests Law limits the period of the delay ordered by an officer to a maximum of 10 days. An extension beyond 10 days can be ordered by the president of the District Court on the basis of a request approved by the Attorney General, provided that the total period of time does not exceed 21 days. The hearing of an appeal against the officer's decision held before the president of the District Court, and the hearing on the request to extend the detention held before the president or vice-president of the District Court, are conducted, according to Article 35 (d) and (e), in the detainee's absence. Section 52 of the Counter-Terrorism Law amends section 35 of the Arrests Law; it further limits the representation of security detainees by authorizing the head of the GSS Investigations Department, or a police officer with the rank of Deputy Commissioner or higher, to prevent a meeting of a given attorney with a number of detainees being investigated with regards to the same investigation, if they are convinced that such meetings with that particular attorney may materially harm the investigation. For all defendants, the importance of the right to consult with an attorney is paramount. The court has remarked on the multiple purposes that the act of consulting with an attorney serves, since other rights granted to detainees under interrogation are realized through it, and the presence of an attorney at these stages provides additional oversight of the entire process, alongside the court's supervision (regarding the right to consult with an attorney see: CA 1301/06, *The Estate of the Late Yoni Elzam v. The State of Israel* (published in *Nevo*, 22 June 2009)).
73. In addition, the Amendment No. 8 to the Criminal Procedures (Interrogation Suspects) Law (Temporary Order), 2016 exempts the investigating authorities from making audio or visual recordings of their interrogations of security suspects. Adalah, together with six other human rights organizations, filed a petition to the Israeli Supreme Court against the constitutionality of this temporary provision. The Court ruled that the petition was premature, noting that the required implementing procedures were yet to be formulated, and dismissed the petition without prejudice. (HCJ 5014/15 *Adalah v. The Minister of Public Security* (decision delivered 15 January 2017)).
74. The Supreme Court has given its opinion about the cumulative effect of the violations created by the implementation of these provisions when it examined the constitutionality of section 5 of the Criminal Procedures Law (Detainee Suspected of Security Offense) (Temporary Order) – 2006. The Temporary Order, which was challenged in court, established procedures similar to those that have been incorporated into the Counter-Terrorism, as discussed above. However, the difference between the two provisions is that the Temporary Order, as its name indicates and despite its multiple extensions, is temporary in nature, while the provisions enshrined in the Counter-Terrorism Law are permanent. Furthermore, the Temporary Order, as it was deliberated in court, did not include the requirement of near certainty, which was added via the amendment that followed the Court's revocation of section 5 (Crim. Appeal 8823/07, *John Doe v. The State of Israel*, PD 63(3) 500, 540 (2010)).