

האגודה לזכויות האזרח בישראל
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The Association for Civil Rights in Israel



ADMINISTRATIVE DETENTION IN ISRAEL AND THE OCCUPIED TERRITORIES

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Any discussion of the Israeli experience with counterterrorism measures or preventive detention must first, of course, account for the ongoing, prolonged occupation of the Occupied Territories (OT). On one level, the Israeli experience is that of a democracy, dealing like other Western democracies with the dilemma of balancing human rights with security concerns. On another, it is the experience of a society that has been occupying another people for over forty years – nearly half a century – subjecting them to a military regime that lacks the most basic protections.

While 9/11 has had an undeniable impact on anti-terrorism legislation and practices in Israel – and perhaps more than anything else on a sort of general sense that the limit of what is acceptable has changed - the vast majority of the measures used predate 9/11 by many years - and changes have reflected, more than anything else, ups and downs in the Arab-Israeli conflict, and political changes like the disengagement from the Gaza Strip.

Administrative Detention

Israeli criminal law contains various special provisions governing the detention and interrogation of individuals suspected of security crimes. The most extreme example of the preventive paradigm in Israel, however, is the use of administrative detention, which basically allows individuals to be held for indefinite periods of time, based on secret evidence that points to their dangerousness.

As human rights activists, our opposition to preventive detention is rooted, perhaps more than anything else, in our sense that it treats people as objects, rather than as rights-bearing individuals. It reflects a utilitarian willingness to view people as a "means to an end" rather than an end in and of themselves, and thus to strip them of their right to human dignity. The very notion that we as a society are entitled to try and predict what other people may or may not do in the future undermines their status as free moral agents, who are both responsible for their actions and capable of making choices. When these predictions are based on secret evidence, and we deny a person's right to mount any substantive defense against a potentially arbitrary deprivation of their liberty, this "objectification" is even more profound. In that sense, the long Israeli experience with administrative detention, especially in the OT, can serve as an instructive example of the dangers of the preventive paradigm in two ways. One, in that it shows just how much easier it is for a system to objectify the "other," and to subject "them" to the routine use of administrative detention; and second, in that it serves as a very concrete example of just how slippery the "slippery slope" of objectification is.

Administrative Detention in Israel

Administrative detention has been permissible in Israel since the establishment of the State. It was originally based on Emergency Regulations inherited from the British Mandate, and since 1979 has been codified in the Emergency Powers (Detention) Law, which remains in force as long as there is a declared state of emergency in Israel. The law allows the Defense Minister to order a person to be placed in administrative detention for indefinitely renewable periods of up to six months, if he has "reasonable grounds" to presume that "reasons of state or public security" so require. Once a person has been placed in administrative detention, he must be brought before the President of the District Court within 48 hours, and the court can either uphold, nullify, or shorten the order; it must then review the matter every three months. The court is not bound by the usual rules of evidence, and may rely on secret evidence where it finds that revealing classified information may jeopardize state or public security. The District Court decision may be appealed to the Supreme Court.

Administrative Detention in the West Bank

Not surprisingly, there are glaring differences between Israel and the Occupied Territories, both in terms of the rules of administrative detention themselves, and in the way they are applied. Thus, while there are currently no Israeli administrative detainees – and one can count on one hand, or maybe two, the number of Israelis who have been placed in administrative detention over the past few years, there were, as of January 2008, no less than 814 administrative detainees in the OT, including 18 minors.

In the West Bank, which is subject to a military regime of belligerent occupation, detention is based on a military order, constituting legislation. The substantive test is largely the same as that found in the Israeli law, and like in Israel, the detention is also subject to indefinite renewal for periods of up to six months. However, whereas Israeli law requires a person to be brought before the court within 48 hours, the military order allows a person to be held eight days without any judicial review. And instead of the District Court, the detainee is brought before a military judge and must appeal to the Military Court of Appeals. Interestingly, the Order in the Territories contains a provision not found in the Israeli Law, reflective of the requirements of the fourth Geneva Convention, i.e. that the commander may not use this authority except where "imperative reasons of security" so require.

In practice, however, administrative detention in the OT is treated as a routine measure, and very little care is taken by the system – even within the confines of the preventive paradigm – to prevent mistakes and ensure a minimum of due process. Decisions are based primarily on secret evidence; a person is not informed of the specific allegations against them (they may be told in general terms that they "pose a threat to the security of the area" or that they "are active" in a particular organization and therefore pose a threat); the military judges who review the case rely entirely on written material – i.e., they do not hear witnesses; and the security service personnel in charge of the investigation do not usually show up in court, so that the detainee's attorney is left cross-examining an army prosecutor who is not particularly familiar with the details of the case. And while administrative detainees in the OT who have exhausted their appeals may bring their cases before the Israeli High Court of Justice for administrative review, experience over the years has shown this to be of little practical benefit.

Indeed, while the Court's decisions often demonstrate, on a rhetorical level, an appreciation of the problematic nature of administrative detention, it has rarely intervened in the military courts' decisions, and has failed to provide any binding, concrete guidelines to maximize the few due process guarantees that could be provided, even within the system of secret evidence.

Thus, for example, in 1998 an attempt was made to argue before the Supreme Court that military judges should hear actual witnesses, rather than basing their decisions on just a written file¹. The Court emphasized that "the fundamental right to liberty" must not be an empty slogan, and emphasized the importance of substantive and careful judicial review of administrative detention decisions. It outright rejected the notion that courts should limit their intervention and instead held they must conduct a "multifaceted and comprehensive review" of the military commander's decision, and that they should delve, for example, into issues of informants' reliability. But then, rather than specify a clear process that could potentially achieve that result, it turned around and in the same breath basically said: even if it is possible to hear witnesses in administrative detention proceedings, it certainly is not something that can be done on a regular basis, but rather in extraordinary situations, as per the military judge's discretion. It refrained from intervening in the specific case that had been brought before it, and rejected the petition. I personally know of no case where witnesses – other than the security personnel themselves – have been heard.

In another case, this time from 2003², the Supreme Court was asked to require, at the very least, that a General Security Services (GSS) representative, who is actually familiar with the case and its history, be required to appear in court, so that he could be questioned about the relationship between the informant and the security agency. The lawyer, somewhat at his wit's end, even suggested that if the large case load makes it impossible to do this in every case, it should at least be done once in a while, on a random basis, to have at least some check on the circumstances under which information is gathered. The Supreme Court rejected this petition as well, basically saying that it is up to every military judge to determine, according to their discretion (or in

¹ HCJ 4400/98

²HCJ 5994/03.

the court's words, their "judicial experience and common sense"), whether any additional information or checking is required.

A little bit of history here: Up until the past few years, GSS officials regularly appeared at administrative detention proceedings, and were questioned by defense attorneys. After the outbreak of the second intifada, and operation "Defensive Shield," when the number of detainees skyrocketed, they stopped appearing in court and instead sent army prosecutors with just a summary of the classified information. So the court was not just relying on secret evidence, it was relying on a summary of the secret evidence, prepared by GSS officials who did not even come to court. After a number of cases were discovered where there were mistakes in the summaries and discrepancies between them and the actual evidence, the President of the Military Court of Appeals, who is in charge of the whole system, issued a decision requiring that the entire file be brought before the judge, even if the GSS officials did not appear³. The prosecutors and security people vigorously opposed the decision, claiming logistical difficulties, and arguing among other things that the judges were not equipped to understand the secret files, and would end up requiring the GSS agents to come to court. Despite the decision, the military courts continue to rely in most cases on summaries.

In one case⁴, the court did provide guidelines for how military judges should approach secret evidence (i.e. that they should first hear the open evidence, and then consider whether part of it could be revealed to the detainee without endangering security), However, as David Kretzmer points out in his book *The Occupation of Justice*, in a case shortly thereafter the court said that it would not interfere in a decision of the military judge who had deviated from the guidelines unless the deviation caused "substantial injustice."

So despite the rhetoric – careful judicial scrutiny, broad authority to intervene, the court's obligation not just to review whether the decision was reasonable, but to actually place itself in the shoes of the military commander etc. – the reality is a process in which the detainee's right to mount a defense is little more than an empty formality. That being said, there is no question that the very process of judicial review does have a restraining

³ Miscellaneous Requests, Judea and Samaria District, 88/02

⁴ HCJ 253/88

effect on the security forces, and it even does happen that administrative detention orders are overturned or shortened.

In the few cases involving Israelis, where the Supreme Court, as I have mentioned, sits as an actual court of appeals – greater care is taken both in rhetoric and in practice. The GSS officials tend to be questioned at length, both in the District and Supreme Courts; the secret evidence is often reviewed more thoroughly; alternatives to detention are more seriously considered; and a greater attempt is made to see whether some of the evidence can be revealed to the detainee. But the basic procedure – of detention based on secret, written materials, remains the same.

A Slippery Slope

The slippery slope inherent in this routine use of administrative detention became shockingly apparent in the late nineties, when the Supreme Court published a decision, holding by a 2-1 majority, that a group of Lebanese citizens could be held in administrative detention as "bargaining chips" for Israeli hostages, according to the Israeli law on administrative detention, even though on an individual level they posed no threat to Israeli security. While recognizing that such detention did constitute a severe violation of the right to human dignity, treating the prisoner as a "means to an end" and not an "end in and of himself," the court came to the conclusion that it was, under the circumstances, a necessary evil. Or, in the words of Justice Barak, "I am convinced that this violation – difficult and painful as it may be – is required by the security and political reality, and reflects a proper balance under the circumstances, between individual liberty and the need to protect national security." Ultimately, the court overturned its own ruling – in a courageous majority opinion written by Justice Barak, who acknowledged his own error.

However, a short time after that, the Knesset, the Israeli Parliament, passed the Incarceration of Unlawful Combatants law of 2002, which sought to find a legally more graceful way to continue holding two of the Lebanese detainees, without calling them hostages on the one hand, and without recognizing them as POWs on the other.

The Law defines an "unlawful combatant" as a person who "has taken part in hostile activity against the State of Israel, whether directly or indirectly, or who belongs to a

militia that carries out hostile acts against Israel, but who is not eligible to be recognized as a prisoner of war according to international humanitarian law." The IDF Chief of Staff can detain an Unlawful Combatant if he has "reasonable grounds" to presume his release will harm state security. The detainee must be informed of the order against him "as soon as possible," and be given a hearing before an army officer, who must write down his arguments and bring them before the Chief of Staff. He must be brought before a judge within 14 days, and then again every six months, and he may appeal the decision within 30 days before the Supreme Court. However, and this is the clincher: the law contains a presumption (albeit refutable) that the release of any person taking part in hostile activities, or belonging to such a militia, will endanger the security of the state. The Supreme Court rejected a petition against the Law, after the petitioners were released in a prisoner exchange, and the issue was deemed theoretical.

In his decision overturning the original ruling, Justice Barak argued that the move from the "individual danger" paradigm of administrative detention to the "bargaining chip" paradigm was not just a quantitative one, but a qualitative one. While I do think that is true to a large extent, the utter lack of due process available to the "regular" administrative detainee calls that assumption into question; in both cases, I would argue, the detainee is objectified, and in that sense it is, to a certain extent, part of the same continuum. It is interesting to note in this context that one of the minority justices, who argued for the legality of the bargaining chip paradigm the second time it was brought before the Court, in fact said that the bargaining chip paradigm wasn't that different than the usual case of administrative detention, because in any event an administrative detainee is not jailed for their own wrongdoing, rather in order to prevent a danger to national security.

Administrative Detention as a Means of Punishment

Another indication of the slippery slope inherent in the use of administrative detention – that comes across powerfully in the Israeli experience – is the way in which it is almost impossible to prevent its use as a means of "bypassing" restrictions on the regular criminal process. The Israeli case law constantly emphasizes that administrative detention must always be future-oriented, rather than a means of punishment. And yet, in practice this is a distinction that proves impossible to maintain. Punishment, after all, serves several state interests, including the protection of society from repeat offenders.

When administrative detention is used, for example, to imprison a person against whom there is not enough evidence to conduct a criminal trial, or against whom the evidence is classified, how can you tell whether they are being "punished" for their unproven past acts, or merely "prevented" from committing future acts? Future dangerousness is often learned from the alleged past acts, which, after all, have not been proven. The logic is inevitably circular, and leads to statements like the one a prosecutor made in a pending case before the military court, that if the criminal investigation against the detainee, then held in regular criminal detention, did not come up with enough material to justify an indictment, the file would be transferred to the military commander, who would consider administrative detention. Or to decisions like the *Katamash* case⁵, where the Court held that if a person was indicted, and the Court found insufficient evidence to justify pretrial detention, the authorities could still order administrative detention, if there was supplementary secret evidence indicating dangerousness.

An excellent example of the inevitable blurring of the lines between preventive measures and punishment is the Ajuri case, decided in September 2002⁶. In the midst of a wave of heinous terrorist attacks in Israel, a decision was made to expel three close relatives of terror suspects, from the West Bank to the Gaza Strip, on the basis of a military order granting the area commander the authority to place residents of the OT in "assigned residence". The State argued that the order was based on Article 78 of the Fourth Geneva Convention, which deals with assigned residence and internment – the same article that forms the basis of the occupying power's authority to use administrative detention. The case raised the issue of whether the forcible transfer of the petitioners to Gaza constituted illegal expulsion, an argument which the Court rejected – but for the purposes of our discussion, what is significant is the way the Court dealt with the prevention/punishment paradigm. The Court held, in keeping with the preventive paradigm, that "assigned residence" may not be used as a form of punishment, but rather only where clear and convincing administrative evidence, including secret evidence, not admissible in court raises the "reasonable possibility" that they pose a danger to the security of the area. It went one step further, however, and stated that although the military commander cannot use this authority simply to deter others, once dangerousness has been determined, deterrence can serve as a legitimate

⁵ HCJ 6843/93

⁶ HCJ 7015/02

consideration, in deciding whether to make use of the measure. In the words of the Court: "When, due to a person's dangerousness, assigned residence is justified, and the question is merely whether to make use of this authority, there is no problem with the military commander considering, in addition, general deterrence." And in an even more significant statement for our purposes, after pointing out that "assigned residence" is a less serious preventive measure than internment," the court then noted that deterrence can be a legitimate consideration in choosing between the two.

The way the Court evaluated the facts of the case blurred the lines between prevention and punishment even further: It based its determination that two of the three petitioners in fact constituted a danger to security entirely on the military tribunal's findings regarding their past acts: evidence, including secret evidence, which indicated that they had known of their siblings' terrorist activities and been involved in them in various ways – one was accused of "sewing" explosive belts, another of serving as a lookout. The Court made no reference to evidence - "clear and convincing" or otherwise – dealing directly with future dangerousness.

Use of Administrative Detention as a Means of Political Control

One crucial point that's very important to mention is that administrative detention has been used often in the OT not to counter terrorist attacks, but rather as a means of political control. I'll refer you to the website of the human rights organization B'Tselem (www.btselem.org), which has several reports on the way it was used to round up political activists during the first intifada and to imprison people who incited against the peace process during the Oslo years. More recently, there have been cases where administrative detention was used to imprison organizers of protests against the Separation Wall – and in one case the military court actually ordered the immediate release of an activist who had clearly been detained for nonviolent political activity.