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### ***Israel's Counter-Terrorism Bill: Central Themes & Challenges***

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# ***Israel's Counter-Terrorism Bill: Central Themes & Challenges<sup>1</sup>***

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Over the past few years, an Israeli inter-governmental team was involved in drawing up a comprehensive Counter-Terrorism Bill which is currently before Israel's Knesset. The enactment of the Counter-Terrorism Bill will constitute an important milestone in the development of Israeli law on issues related to the legal framework for counter-terrorism. This paper highlights some of our thoughts and ideas regarding the legal challenges facing Israel's legal efforts to combat terrorism. It begins with an explanation of some of the reasons that brought us to initiate this Bill, and then summarizes the main areas sought to be regulated by it.

The need for new legislation in Israel arose from the existing legal situation, in which issues related to terrorism are regulated by a number of different legal instruments (among them, the Defense Regulations, Prevention of Terrorism Ordinance, Prohibition on Terrorist Financing Law and the Penal Code). The problem with some of the old legislation is that it does not in all cases reflect an appropriate balance between security considerations and constitutional rights. Additionally, there is an overlap between the some of the statutes, which leads to legal inconsistency.

## 1. The Rationale and Need for the Bill

Terrorism is a dynamic phenomenon, requiring the law to identify and address a variety of constantly changing challenges. Hence, the purpose of the Bill is to provide the security authorities in Israel with appropriate criminal and public law tools in dealing with terrorist threats, taking into consideration the unique aspects of this phenomenon, including its enormous impact on people's lives and national security, and the challenge of ensuring respect for basic human and due process rights of suspects and defendants in such circumstances.

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<sup>1</sup> The article is based on a lecture I gave at a conference entitled '*Law & Security: Perspectives from the Field and Beyond*', which took place in the Inter Disciplinary Center in Herzelia from June 30<sup>th</sup> to July 2<sup>nd</sup> 2013. I would like to thank Adv. Michal Amram, Adv. Naama Feuchtwanger and Adv. Daniel Geron for their assistance in preparing both the lecture and this article.

The difficulty in combating terrorism is in large part attributable to the multifaceted nature of the enemy, which involves a variety of actors, operating through a variety of methods and against different targets. Thus, for example, a terrorist may act independently or may belong to a terrorist organization; a terrorist operation may be carried out using conventional or non-conventional weapons, or by any other means; and attacks may be directed against people or property, and both predefined as well as arbitrary targets, etc.

As opposed to more common types of criminal activity, terrorism involves ideologically-motivated law-breaking, and is thus much harder to deter by means of regular legal means. Unlike other criminals, terrorists often receive moral and material support from certain sections of their community (and even foreign states) and are frequently rewarded – both in economic ways and through popular glorification. Additionally, terrorists who are members of terrorist organizations are often trained for their encounters with law enforcement authorities. Hence, regular law enforcement tools may not be sufficient in such cases.

Regulating the legal framework for counter-terrorism is a complex project, which demands careful consideration of every detail in order to ensure that the rules adopted express a proper balance between security needs and civil liberties. As Chief Justice Barak has put it in one of his books:

*"Any point of balance reached between security and freedom will impose limits of one kind or another on both of them. The appropriate balance cannot be achieved if human rights are to be fully protected, as if there was no terrorism, or if national security is fully protected as if there were no human rights. The balance and compromise are the price of democracy. Only a vibrant, secure and stable democracy can protect human rights and only a democracy built on foundations of human rights can exist in security... The appropriate balance between security and freedom is the product of an unequivocal stance which recognizes the need for both security and human rights."*<sup>2</sup>

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<sup>2</sup> Aharon Barak "Judgment, democracy and terrorism", **STUDIES IN LAW IN MEMORY OF MENASHE SHAVA**, (2006) 43, pp. 48-51.

In the process of drafting the current draft legislation, we reexamined the current rules applied in Israel in the field of counter-terrorism – both under criminal law and administrative law – in light of the changing needs of counter-terrorism, and compared them with different legal alternatives. One of the purposes of the project was to replace the old provisions related to counter-terrorism which are spread over numerous legal instruments (some of them remnants from the British Mandate legislation) into one coherent modern law. Issues that were only partly regulated or that were regulated in a manner that overly impinges on civil liberties, are addressed in the Bill with structured and balanced legal provisions.

We also took into account the experience that the law enforcement authorities have gained over the years and their "lessons learned" from operating under the existing laws. In addition, we turned to the State and Military Attorneys involved in security cases and asked them to identify the legal tools that are missing for their everyday work on terrorism cases. After responses were received in this context, we examined whether these (requested) legal tools were in fact required and whether such tools would not unduly infringe human rights. Those tools that seemed to us reasonable and necessary were incorporated into the Bill. The inter-governmental team that formulated the Bill included representatives of the Ministry of Justice, the criminal and civil departments in the State Attorney's Office; Ministry of Defense; Israel Defense Force; Israel Security Agency; Israel Money Laundering and Terror Financing Prohibition Authority; National Security Council; and the Ministry of Foreign Affairs. The team also met with non-governmental representatives, including participating in a "round table" discussion at the Israel Democracy Institute.

The Bill seeks to provide the legal authorities with a variety of legal tools in the fields of criminal justice, administrative and civil law, aimed to suppress terrorist activity and undermine the organizational and financial infrastructure that supports them.

Another important purpose of the Bill is to send a clear message to the civilian population that they should stay well clear of terrorist organizations - by avoiding any direct or indirect support in all of their activities, by way of funding, assistance, or joining any activity. That is, the Bill seeks to impose an increased "duty of care" upon the public in relation to terrorist organizations, in order to clarify that any relationship with the various circles of support for terrorist organizations and their activities, is also considered a crime.

Key issues addressed by the Bill include: the mechanism for designating terrorist organizations; the establishment of "terrorist offenses" relating to conspiracy and assistance to terrorist organizations; provisions relating to arrest of suspects in security offenses; forfeiture and seizure of property connected with terrorism; police powers to prevent terrorism and to close down structures used for terrorism; the Minister of Defense's authority to issue "limiting orders" for security reasons; etc.

The Bill passed its first reading in the Knesset and is currently at the stage of deliberations before the Knesset's Constitution Committee. The Committee's deliberations on the Counter-Terrorism Bill are due to begin in the very near future.

## 2. Definitions of Basic Legal Concepts

The Bill redefines central concepts in the field of counter-terrorism. In the course of preparing the legislation, much attention was devoted to the question of the definition of "terrorism", and what constitutes "a terrorist organization". In this context, we formed the opinion that "second-circle organizations" – i.e. those organizations providing financial support to terrorist organizations, and which create economic and social infrastructure that allows for the existence and functioning of terror organizations – should also be considered as terrorist organizations, since any attempt to effectively combat terrorism entails measures against those who providing economic support to such organizations.

It should be emphasized that an important part of the activities of the "second-circle organizations" involves ideological brainwashing of youth in order for them to grow up to be supporters of and participants in terrorism. This is done through schools, summer camps and community activities that are aimed at recruiting young boys and girls, who will identify in the following years with an organization's goals and join its ranks.

Hence, "**terrorist organization**" is defined in the Bill as:

**(1) A group of people performing an act of terrorism or serious crime of terrorism ... Or acting to allow or promote an act of terrorism or a crime as aforesaid; ('a primary organization')**

**(2) A group of people promoting or enabling the activities of a terrorist organization as described in paragraph 1. ("second-circle organization")**

Some provisions of the Bill differentiate between primary and second-circle organizations. For example, the primary organization is considered a "terrorist organization" by its very nature, even without a declaration by the Minister of Defense. However, a second-circle organization is considered a "terrorist organization" only after declared as such by the Minister of Defense (in order to protect innocent people that believe the organization to be a humanitarian one, and are not aware of its role in supporting terrorism).

Additionally, prior to designation of a second-circle organization, the Defense Minister is required to consider, inter alia, the nature of the organization's link with the primary organization, and the nature of its support to the primary organization (for example, whether such support is systematic and ongoing). Only after the Minister is satisfied that there exists an actual and significant link between the primary organization and the second-circle organization, will the secondary-circle organization be designated as such.

Another central provision relates to the definition of the "**act of terrorism**", which is based on similar models found in other countries. The definition chosen states that:

**An offense or a threat of an offence, [is] characterized by three attributes:**

- (1) Motive - the act was done with a political, ideological, religious or racist motive;**
- (2) Purpose - the act was done to instill fear or panic among the public, or to influence a government authority to do or refrain from an act;**
- (3) The nature of the act (partial list) - an act that causes: substantial physical injury, placing a person in grave danger, serious harm to national security, serious damage to property, serious injury to essential services infrastructure.**

**"A Member of a Terrorist Organization" is defined as:**

**A person belonging to a terrorist organization, including:**

**(1) A person who actively participates in a terrorist organization's activity;**

**(2) A person who gave his consent to join a terrorist organization, before another member of the organization or a messenger of the organization.**

In light of the informal ways in which activists are recruited by terrorist organizations, and in accordance with the experience gained by the law enforcement authorities as to the nature of the membership of these organizations, the Bill includes a few legal presumptions regarding membership of terrorist organizations. For example, a person who introduces himself as a member of a terrorist organization is presumed to be a member of the organization; and a person who was a member of a terrorist organization in the past, is considered to be a member, unless such he/she proves their membership has ceased. These presumptions are refutable, in accordance with relevant conditions set out in the Bill.

The Bill incorporates, with certain changes, several crimes that are currently enshrined in the Prohibition on Financing Terrorism Act - including the prohibition of using property for terrorist purposes, offenses relating to the property of a designated terrorist organization, and regulation of the reporting duties in relation to property of terrorist organization.

### 3. Designations

The Bill also provides a legal framework for administrative designations by the Minister of Defense of organizations operating in Israel (that are currently subject to designations in accordance with the Defence Regulations or through the Prevention of Terrorism Ordinance), and organizations and individuals that were declared as terrorists or terrorist organizations by other countries (whose designations in Israel are currently regulated under the Terrorism Financing Prohibition Law).

Up until now, the identity of the designating authority was determined by the law that the specific designation was based on. Designation under the Defense Regulations was made by the Minister of Defense, and a declaration under The Prevention of Terrorism Ordinance was made by the Government. This differentiation is abolished in the Bill.

Alongside the designation mechanism, the Bill details related issues, such as the appointment of an Advisory Committee on Designations, hearings procedures, cancellation of designations, and other related matters.

#### 4. Criminal Law

The Bill regulates the penal framework for the prosecution of terrorists, by defining the main offenses and offenders to which it applies.

It defines the basic criminal concept of an "act of terrorism":

**"An offense of terrorism" is defined as – an offense under the Counter-Terrorism Law and any crime that constitutes an "act of terrorism".**

Accordingly, any offense stipulated in the Israeli Penal Law will be examined within these parameters. If it fulfills the conditions set out in the Counter-Terrorism Bill – the act will also constitute "a terrorism offense". Additionally, the definition of "terrorist offense" includes all offenses enshrined in the Bill. Within this group of "terrorism offenses" the Bill creates a special sub-category of the more severe offenses of terrorism.

Most offenses set out in the Bill exist in other laws and were revised according to accumulated experience (e.g. incitement, support, membership, training, weapons, etc.). The Bill also provides for some new offenses that criminalize terrorist activities that were not previously defined as offenses.

The Bill establishes a hierarchy of punishments for different types of offenses. The punishment for an offense which constitutes an act of terror is twice the regular punishment prescribed for that offense, up to a maximum of 30 years imprisonment.

A person who "assists or conspires to commit" an offense which constitutes an act of terrorism shall be punishable to the same extent as the primary perpetrator of the offense (instead of the modified punishment prescribed in the Penal Code).

In addition, the Bill provides that an act of terrorism that caused physical injury to a large group of people, or created a real risk of such injury is punishable with a life sentence.

Furthermore, the Bill addresses the unique threat of harm posed the use of weapons of mass destruction, stating that an act of terrorism by means of non-conventional weapons, shall be also punishable with a life sentence.

The Bill extends the maximum periods of imprisonment set down in regular Israeli criminal law for non-mandatory life imprisonment to 30 years in respect of an act of terrorism (instead of 20 years for non-terrorist offenses).

Similarly, in relation to parole granted after a sentence of mandatory life imprisonment in the case of an offense of terrorism - the parole committee is entitled to recommend that the imprisonment period will be shortened to no less than 40 years (instead of 30 years for non-terror offenses). However, the authority to decide upon parole is granted to the President, and is not limited.

#### 5. Administrative measures

The Bill comprehensively regulates the powers of seizure and forfeiture of property associated with terrorism, based on existing arrangements set out in the Terrorism Financing Prohibition Law, and adopts arrangements set out in the Fight Against Organized Crime Act. The Bill also endeavors to create rules that are consistent, to the extent possible, with the arrangements being formulated in the draft bill for the new Forfeiture Law.

According to the rationale underlying the proposed arrangements, the seizure and forfeiture of property related to terrorism or to terrorist organizations are among the main measures in the fight against terrorism, by targeting the economic infrastructure that allows terrorists to operate. Thus, for example, the property of a designated terrorist organization may be seized pursuant to an administrative order of the Minister of Defense. Two years after the seizure, subject to the appeal procedures, the Minister of Defense may order the forfeiture of the property (the decision is subject to court approval).

The Bill includes provisions for the forfeiture of property related to an offense of terrorism, following the conviction of a person for that offense. There are also provisions regarding forfeiture of property of a terrorist organization following a conviction for an offense of leading a terrorist organization. Alongside these provisions, the Bill enshrines the option for forfeiture of

property through judicial order in civil proceedings (which is not incidental to a criminal conviction). The Bill also includes wide protections for third parties' rights in the targeted assets and humanitarian limitations of seizure of private property.

#### 6. Abolishing Old Laws

Finally, it should be noted that there has been another legislative process that is related to, and runs in parallel with, the Counter-Terrorism Bill.

Currently, many offenses relating to terrorist organizations or acts of terrorism are enshrined in the Penal Law, and it can be learned from their circumstances that they were committed by a terrorist organization or in order to achieve its goals. Additional offenses related to terrorism are prescribed in the Defence Regulations (Times of Emergency), Prevention of Terrorism Ordinance, and the Terrorism Financing Prohibition Law.

The Defence Regulations were enacted in 1945 by the British government during the time of the British Mandate, as a means of protecting the Mandatory government in what was then Palestine, by incorporating all the governmental powers related to security and public order. The Regulations covered many areas, including powers of arrest and deportation, seizure and confiscation of assets by the government, authority to enter and search in private premises, adjudication and punishment in civilian courts and military courts, definition of crimes, taxation, extensive legislative powers, and so on.

After the end of the British Mandate and establishment of the State of Israel, the Defence Regulations were incorporated almost fully into Israeli law, and remained applicable thereunder. Over the years, a few regulations were rescinded and replaced by new Israeli legislation. Thus, for instance, administrative detention in Israel is now regulated by an Israeli law which gives stronger assurances to human rights. However, most of the Defence Regulations remained valid and, in some cases, multiple rules apply simultaneously.

Since the Counter-Terrorism Bill includes provisions that replace many of the Defense Regulations, and as part of wider legal reforms that were being considered in the Ministry of Justice over the past few years, a parallel process is being conducted, the purpose of which is to abolish many of the unnecessary Defense Regulations. As part of this process, all the regulations

were reviewed and regulations that are to be replaced by the new law, or found to be unnecessary or inappropriate according to modern Israeli human rights values will be removed from the statute books. For us, this goal is not less important than enacting the new law.

I believe the Counter-Terrorism Bill, which is the product of prolonged and thorough preparatory work, embodies an appropriate balance between all the relevant considerations and provides a proper legal framework for the fight against terrorism. The Bill was approved by the Government, and in the coming weeks it is expected to be deliberated upon in the Knesset. During the Knesset deliberations and until the Bill is finally enacted, it is of course subject to revisions.