



Administrative Detention: A Mask for Political Control or a Fair Legal Instrument?

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Introduction

“To exclude evidence from one side only, leaving the door open to it on the other side, is the sort of arrangement which, to judge of it in the abstract, could have been dictated, one should have thought, by no other principle than of determination to do injustice.”¹

Administrative detention is a mechanism used by states to imprison people that have not yet committed any crime, in an attempt to prevent future danger for their countries. This mechanism in its very basis is a harmful tool to basic human rights, and therefore should be used only in extreme cases where all other forms of the law do not apply. But what happens when the extreme and the irregular become the regular and the reality?

The use of administrative detention by Israel has become an assertion of power, routinely holding hundreds of Palestinian detainees in detention. It is given a mask of judicial hearings and procedures, but in reality there is no fair procedure.

This paper will deal with the use of secret evidence in administrative detention according to the Israeli legal system. I will discuss how this system has become a useful way to hide behind the shadows of inappropriate legal instruments (laws/military orders/regulations/judicial system) in order to justify the unfair treatment of Palestinian detainees who have been

1 Justice, Secret Evidence 135 (2009), pg 214 (Following: Justice).

detained for an unlimited amount of time with no interrogation, no revealed evidence, no open charges and no substantial case against them, leading to a breach of their right for a fair trial and depriving them of their basic human rights.

The first part of the paper will explain the system of administrative detention and the use of secret evidence, the problems accompanied by this system, and how Israel deals with it. The second part will provide suggestions for improving the current situation, including looking at other countries. I will discuss briefly Canada and the United Kingdom's legal obligations concerning a fair trial and the use of secret evidence and how they have dealt with the use of secret evidence in their legal systems in establishing the "special advocates" model as part of suggestions for change in Israel.

Part 1:

Administrative Detention and the Use of Secret Evidence

Legal Basis

Administrative detention is a measure taken by the Israeli government, where an individual is imprisoned without charge or trial through administrative procedures. It permits the detention of individuals for an indefinite amount of time based on secret evidence.² The use of administrative detention on residents of the Occupied Territories is governed by the military authorities, while in Israel (including East Jerusalem) it is the civilian executive and judicial branches that govern this procedure.³

Israel uses secret evidence in administrative detention and in criminal law for security reasons. There are three different administrative detention regimes: one of which is used against Israelis (which is the least harmful to individual freedom out of the three), the second is used against Palestinians from the West Bank and the third against foreign unlawful combatants (the most harmful and which I will not discuss in this paper (Israel uses this law to place Gaza residents under administrative detention)⁴).⁵

The basis of administrative detention in Israel is the Defense (Emergency) Regulations of 1945 inherited from the British Mandate, which were later replaced by a new law- the Emergency Powers

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- 2 Mara Rudman & Mazen Qudus, *The Emergency Powers (Detention) Law: Israel's Courts Have a Mission-Should They Choose to Accept It?*, 21 Colum. Hum. Rts. L. Rev. 469, pg. 470 (1990). (Following: Rudman & Qudus); Lecture presented by Attorney Lila Margalit, ACRI, Yale Law School, pg. 1 2008. (Following: Lila Margalit).
 - 3 Rudman & Qudus, pg. 470.
 - 4 https://www.btselem.org/administrative_detention
 - 5 Shiri Krebs. *Lifting the Veil of Secrecy: Judicial Review of Administrative Detentions in Israeli Supreme Court*, 45 Vanderbilt Journal of Transnational Law 639, pg. 656 (2012). (Following: Krebs).

(Detention) Law of 1979.⁶ This law functions as long as Israel is in a declared state of emergency, which it has been ever since its creation.⁷ It is already important to point out that in a situation where the irregular (state of emergency) has become the regular and the permanent reality, it should be expected that one would find many defects in the system.

Administrative detention in Israel allows the Defence Minister to decide whether a person is to be placed in administrative detention on the grounds that he has reasonable cause to believe that the security of the state or public require the detention of that person for indefinitely renewable periods of up to six months at a time.⁸ In addition, the Chief of General Staff is authorized to order the detention of a person for up to 48 hours if he has reasonable doubt that the conditions considered by the Minister of Defence exist, but he is not entitled to extend the order.⁹ The detainee must be brought before the President of the District Court within 48 hours of his detention, who will decide whether to uphold, shorten the order or undo it. In the case it is not cancelled, the court must then review the matter every three months.¹⁰ In reviewing the order, the court is not limited by the rules of evidence, and it may rely on secret evidence if it finds that revealing the information will harm state security and public interest.¹¹ This means that the evidence is not revealed to the detainee or the detainee's lawyer.¹² The District Court decision may be appealed to the Supreme Court.¹³

Israel has used this measure in very isolated cases against Israeli citizens, including settlers, where most of them lasted only a few months.¹⁴

6 Matthew C. Waxman & Daphne Barak-Erez, *Secret Evidence and the Due Process of Terrorist Detentions* 48 Colum. J. Transnat'l L., pg. 20 (2009). (Following: Waxman and Barak-Erez); Lila Margalit, pg. 2.

7 Lila Margalit, pg. 2.

8 Article 2(a)- 2(b) of the Emergency Law; Lila Margalit, pg. 2.

9 Article 2(c) of the Emergency Law.

10 Article 4-5 of the Emergency Law.

11 Article 6 of the Emergency Law.

12 Krebs, pg. 658.

13 Lila Margalit, pg. 2.

14 https://www.btselem.org/administrative_detention

Administrative detention in the West Bank is based on the Order regarding Security Provisions. The West Bank area is held by the State of Israel in belligerent occupation, where military law applies. After the 1967 war, Israel extended the British Mandate law into the occupied territories through military orders. Administrative detention is permitted through these military orders.¹⁵

Under the current military order, IDF military commanders are able to detain a person for up to six months, with an indefinite amount of extensions, in the case that they have reasonable basis that the security of the region or the public is at stake.¹⁶ From the day that the person is detained, or the day the detention order is extended, the detainee must be brought before a military judge, holding at least the rank of major, within eight days in order to review its objectivity. The judge may confirm, cancel or shorten the detention order.¹⁷ In their revision of the order, the judge may deviate from the rules of evidence and may rely on secret evidence if they find that the security of the region and the public requires so.¹⁸ The military court's decision may be appealed to the Military Court of Appeals.¹⁹ Petitions challenging the military authorities' decisions are made to the Israeli Supreme Court, where most administrative detention cases have been reviewed throughout the years.²⁰ In reviewing the case, the military judges rely on written material, they do not hear witnesses, and the security personnel in charge of the investigation usually do not show up in court, instead the case is left with an army prosecutor who is not necessarily familiar with the it.²¹

The use of secret evidence in criminal law is based on the Evidence Ordinance. According to Article 44 of the Evidence Ordinance, the Prime Minister or the Minister of Defence may sign a certificate

15 Krebs, pg. 660.

16 Krebs, pg. 660; Military Order Regarding Administrative Detention (Judea and Samaria) (No. 1591) 5767-2007, § 1 (Isr.). (Following: Military Order).

17 Military Order, § 4.

18 Military Order, § 7.

19 Military Order, § 5.

20 Krebs, pg. 661.

21 Lila Margalit, pg. 3.

that prevents the disclosure of evidence if the disclosure may harm the state's security. The Prime Minister or the Foreign Minister may sign a similar certificate if the disclosure harms the foreign affairs of the country. The High Court of Justice can overturn these certificates if they find that the disclosure of the evidence for just reasons is preferable to its non-disclosure.²² According to Article 45 of the Ordinance, every minister can issue such a certificate if the disclosure of the evidence might harm an important public interest. The same court dealing with the situation can deal with the disclosure of the secret evidence.²³

We can conclude from the above two main points concerning administrative detention: 1) that the classification of evidence from the detainee and his lawyer violates the right to a fair trial (which I will discuss below). 2) That the law and orders concerning administrative detention in their own words require the judge to consider only the danger to state security rather than balance the classification of the evidence with the detainee's interests and rights.²⁴

In criminal law, in its rulings, the court established rules of balancing that must be carried out when it is determining the use of secret evidence, as opposed to administrative detention cases. In the **Livni** case, Justice Barak explains the secret evidence dilemma: according to Article 44 of the Evidence Ordinance, the court must balance between the interest that underlies the criminal proceeding that is the discovery of the truth and the interest of the public good and the security of the state. In order to fulfil the element of truth discovery, all investigation material, secondary and main material, must be disclosed to the defendant, his attorney and the

22 Article 44 of the Evidence Ordinance.

23 Article 45 of the Evidence Ordinance.

24 Waxman and Barak-Erez, pg. 21.

court. When the disclosure of the material is liable to endanger state security, the judge must determine whether the disclosure of the evidence in order to fulfil truth discovery is preferable to non-disclosure. If the court decides that the evidence needs to be disclosed, the prosecution must then decide whether it wants to continue the hearing and expose the evidence or if it believes that there is harm to state security, to stop the criminal hearing. The court manages this balance by giving the same weight to both interests (the defendant's and the state's) and will test the threat to each if the other is fulfilled.²⁵ In the case of **Abu Sa'ada**, the court decided that in the event that there is evidence that might raise doubt as to the guilt of the defendant, it is necessary to protect the defendant even if it is secret evidence. In such a case, the state must decide whether the security of the state and the public interest outweigh the interests of the defendant's conviction, and if they decide that the security is more important than the conviction, the proceeding will be discontinued, and the defendant acquitted.²⁶

Reasoning

The use of administrative detention is justified in that it is used for preventive purposes, in the sense that the evidence is of two types and looks at future dangers: 1) the worthiness of past offenses and actions committed by the potential detainee that can indicate, with some degree of probability, a future danger of the detainee, 2) proper and specific evidence attesting to an intention to commit criminal activity in the future.²⁷

25 CrimA 838/84 Livni v. State of Israel (1984) IsrSC 38(3) 729 (1984).

26 CrimA 4765/98 Abu Saada v. State of Israel (1998) IsrSC 53(1) 832, pg. 838.

27 Eyal Nun, *Administrative Detention in Israel* 168, pg. 169 (1992). (Following: Eyal Nun).

Another reasoning for administrative detention is the need to use “secret evidence”. Evidence of the dangers discussed above should be kept secret for various reasons, mainly the fear of witnesses from testifying in court, preventing the detection of intelligence methods and preventing the disclosure of informants.²⁸

Problems of Secret Evidence in Administrative Detention

The deepest flaw of secret evidence is the absence of the detainee from the proceedings against him. He therefore is unable to present the court with his case and with counter-arguments concerning claims against him. He is deprived of cross-examining witnesses and presenting exculpatory evidence. The court is presented with a one-sided case and does not hear evidence that only the defendant might be able to supply, and therefore does not receive a full picture of the case and an informed argument from the individual. Although in reviewing the evidence, the judge might represent the individual's interest and might challenge the executive's case on behalf of the individual, they will not be able to do with the same detail as the detainee's own lawyer. Because of these missing pieces of information that the detainee might have provided the judge with, and because the judge must remain neutral, he cannot fill the shoes of the defendant's lawyer. The defendant's lawyer is the only player who has an obligation only to the defendant and his interests, and therefore is

28 Eyal Nun, pg. 170.

the only one who will advocate for them correctly.²⁹ In depriving the accused and his lawyer from defending their case, the very essence of the basic right to a fair trial and justice is violated. These hearings become a sort of “play” of justice, where only two “actors”- the court and the prosecutors- perform and the main character (the accused) is left out of the play. There can be no real justice when one side of the procedure is not heard, is not informed of why he is being detained and cannot present his defence.

Another problem of privileged evidence is that alongside the defendant’s absence from the procedure, the public also has no access to these proceedings and therefore the right to a public trial is violated. The absence of the public from the proceedings raises scrutiny against the courts in general and security-related proceedings specifically. Firstly, secret evidence means that witnesses testimony and the prosecution’s presentation of their claims are not carried out under public scrutiny, which can prevent third parties who can bring relevant information to testify because they are not aware that a procedure is ongoing. This raises concerns about judicial decisions based on incomplete and irrelevant or selective information.³⁰

Secondly, in removing the public from the process, there is an inability to hear the opinions of external experts. The possibility of hearing experts’ opinions is reserved for a certain group of experts who have connections with the government and the security services and who may be former state security officials. Therefore, a situation is created whereby the judges’ default is reliant on the security forces and a special dynamic and trust between the courts and the state representatives is created. In this way, the courts

29 Gus Van Harten, *Weakness of Adjudication in the Face of Secret Evidence*, 13 Int'l J Evidence & Proof 1, pgs. 10-11 (2009). (following: Gus Van Harten); Waxman and Barak-Erez, pg. 25; Krebs, pg. 684: “The judges cannot differ with the ISA story. How can I? I don't have the defence lawyer jumping to say 'it never happened,' 'this is not true.' My ethos, as a judge, is that I have two parties. Of course, I can think by myself, but I need tools, which are missing... to the most I have very limited tools.”

30 Gus Van Harten, pgs. 14-15.

assume that the security forces will be fair in providing the secret evidence, in describing the ways in which they were acquired, how they chose the relevant evidence to present to the court and to present evidence that may be helpful to the defendant. As a result, there is a greater chance of errors in these procedures and a slighter chance for the court to reject the secret evidence or disagree on their significance.³¹

Lastly, the review of administrative cases is carried out by a limited number of judges, who are the presidents of the District Courts and the Supreme Court justices, and therefore the same judges deal with all these cases. While this situation may result (positively) in the expertise of judges in the field of security-related matters, it may lead to the preferability of the judges of the security services over the defendants in the proceedings because they encounter each other regularly, and because they continually rely on them to provide information.³²

Judicial Review in Israeli Courts

As can be concluded from the legal measures stated above, the only safeguard that is left to the detainee from administrative detention is the judicial review on the secret evidence. The Israeli Supreme Court has developed an “activist” role in reviewing the secret evidence and should examine them critically. The court should, as far as possible, review the evidence through the eyes of the detainee as if he is exposed to the evidence and act as “appointed defence attorney” and as the “detainee’s mouth” where he cannot defend himself.

31 Gus Van Harten, pgs. 15-16; Krebs, pgs. 683- 685; Waxman and Barak-Erez, pgs. 48-49.

32 Waxman and Barak-Erez, pgs. 46-49.

The judge in these proceedings of judicial review is “required to question the validity and credibility of the secret evidence that is brought before him and to assess its weight”.³³

The Supreme Court examines the case de novo, through assessing and analysing all the relevant evidence, although it is a procedure of either an appeal to reverse the district court’s decision or a petition to reverse the Military Court of Appeal’s decision. The state and the detainee are both allowed to present their case before the court. After that, the court conducts a one-sided hearing where the secret evidence for the specific administrative detention is provided by the state attorney, without the lawyer or the detainee being present. The court examines the secret evidence and investigates the Israeli Security Agency’s representative who collected the evidence but does not investigate the informants themselves.³⁴ Therefore, the judges have two functions in their review: an inquisitorial judge and the detainees’ “lawyers”.³⁵

In addition to the role that the Supreme Court plays, it is clear that this does not replace the obligation to reveal the gist/core of the allegations against the detainee. The court has demanded in its decisions that along the full disclosure of the evidence to the court itself, the state must disclose the basic allegations to the detainee. However, it is doubtful that the information given to the defendant is sufficient in these cases. For example, if a detainee is said to belong to a specific group or that they are active in a particular organization (e.g. Hamas), or that they “pose a threat to the security of the area”, it is not clear to what extent this information will help the detainee defend his case.³⁶

33 Waxman and Barak-Erez, pgs. 23-26.

34 Krebs, pg. 667; Waxman and Barak-Erez, pg. 24.

35 Krebs, pg. 671.

36 Waxman and Barak-Erez, pg. 26; Lila Margalit, pg. 3.

At first glance, this may make it seem like the court has developed an “active” role and has provided adequate protection to the violations of the detainees’ rights in its judicial review, but as we will see the reality of the situation is less “active” as the theory, and of little practical benefit.³⁷

Statistics

The use of administrative detention is affected by political changes and is used as a means of political control. It was used to round up political activists during the first intifada and people who agitated the peace process during the Oslo years.³⁸ The highest number of detainees was 1,794 Palestinians during the first intifada. Starting from the 1990’s the numbers started decreasing, until it reached 12 detainees in 2000, ten weeks after the second intifada had erupted.³⁹ By the end of 2002, during Operation Defensive Shield, the number of administrative Palestinian detainees was more than 900. Since then, numbers have decreased but not a single month has passed without more than a 100 detainees in administrative detention, especially after the “Jerusalem Outbursts (Habba)” in October 2015, when the use of administrative detention once again escalated.⁴⁰ As of February 2018, 427 administrative detainees are held in Israel Prison Service facilities, including four minors between the age of 16-18 years, and two women. It is also important to note that many of the detainees are university students who do not associate with any political party.⁴¹

37 Krebs, pg. 671.; Lila Margalit, pg. 3.

38 Lila Margalit, pg. 1 and 9.

39 Krebs, pg. 654; https://www.btselem.org/administrative_detention/statistics

40 Krebs, pg. 654.; https://www.btselem.org/administrative_detention; https://www.btselem.org/administrative_detention/statistics; according to reports by the Palestinian Prisoner’s Club.

41 https://www.btselem.org/administrative_detention/statistics; Reports by the Palestinian Prisoner’s Club.

Administrative detention was used against Israeli citizens (Arabs and Jews – mostly settlers) in very few cases, and most of them were held for short periods (up to six months).⁴² Currently, there are no Israeli administrative detainees.⁴³

Although military orders require that the detainees should be brought before a judge for review of the order, in the majority of the cases, detention orders are approved, and the prosecution's position is accepted. According to statistics by B'tselem, between 2015-2017, 3,909 administrative detention orders were issued. 2,441 of them were extensions of existing orders. Only 48 of them were cancelled, 2,953 of them were approved with no amendments or limitations, 390 were instructed to be shortened, and 501 of them were approved with a demand that they can be extended only if new (undisclosed) evidence came to light. In addition, the prosecution's demand that the evidence remains secret for "national security reasons" has always been accepted.⁴⁴

As noted above, the Supreme Court has established a role in administrative detention, which some scholars have viewed as a highly "active role". It is true that the Supreme Court's decisions have demonstrated an understanding of the problematic nature of administrative detention, yet they have rarely intervened in the military court's decisions, and have "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".⁴⁵

42 Krebs, pgs. 654-655.; https://www.btselem.org/administrative_detention/statistics

43 Lila Margalit, pg. 3.

44 https://www.btselem.org/administrative_detention (as noted in the website, the difference between the total number of orders and the number of court decisions appears from the figures provided by the IDF Spokesperson to B'tselem).

45 Lila Margalit, pg. 4.

There have been six different cases in which the Supreme Court ordered the release of administrative detainees: only one of those cases was a detainee from the West Bank where the court decided that the secret evidence did not justify his detention, four others were regarding Israeli detainees and one was the release of Lebanese detainees who were detained as “bargaining chips”.⁴⁶

From the first ten years of the 21st century, the Supreme Court reviewed 322 cases of administrative detention. None of the cases ended in the release of the detainee, only 14% of the detainees received an elaborated decision and 95% of the rulings were based on secret evidence.⁴⁷ I have not found any case so far where secret evidence has been disclosed to the detainees.⁴⁸

In conclusion, although the rhetoric of the Supreme Court implies that it has developed an activist role in judicial review of the use of secret evidence in administrative detention, the reality is that the outcome of these reviews is the acceptance of the overwhelming majority of the orders. There is, therefore, no “active” role of the courts, rather an “enabler” role. The gap between the rhetoric and practice is a dangerous erosion of norms and is diluting the elements of natural justice from the legal system.

46 Krebs, pg. 670.

47 Krebs, pg. 672 (for more specified statistics, see: pgs. 675-680).

48 See also: https://www.btselem.org/administrative_detention: “Nonetheless, the justices have upheld nearly all the administrative detention orders brought before them”. “True, the military judges and the HCJ justices have stated that, given the confidentiality, they must fill the void and act as defense for the detainees. However, this statement is not followed up in practice. In the overwhelming majority of cases, the judges do not ask to see the ISA’s information, do not examine the military prosecution regarding the information that led to the detention, and simply accept the arguments presented to them as fact.”

Part 2

Suggestions for Change

It is extremely important to not only look into the problems in administrative detention and the legal system, but to also find ways to deal with such issues and to find different ways to protect the basic human rights of detainees. This section will discuss different suggestions on how to deal with the use of administrative detention and changes that ought to be made to the current legal system. The use of secret evidence in administrative detention is not unique to Israel and several countries in the world have tried to deal with the issue, as will be discussed below. I will discuss changes in the current “judicial review model” as well as incorporating models which have been used in these countries.

Systematic Change

Administrative detention is a means for a state to prevent a person from committing a certain crime based on an uncertain fear in the near or far future, by detaining them for an unlimited amount of time. It is supposed to be an extreme measure taken when the security of the state is in real danger based on clear evidence and a concrete threat that administrative detention would prevent. It is supposed to be the last resort for the state and for the legal system, and that is justified by a real and certain threat from the detainee in which the purpose of his detention is to prevent the damage that is liable to occur with absolute certainty and cause. The detention of the

object of the order is intended to prevent the serious and dangerous outcome, provided that the suspicions based on the issuance of the order are based on convincing, clear and unequivocal evidence, which must be thoroughly examined and after all the information has been cross-checked. Instead of treating administrative detention (based on secret evidence) as a last resort, it has become the easiest and the most accessible tool that the Israeli authorities take. The reason is, mainly, that the judicial review system has adopted a policy of loose and sympathetic criticism towards the security services. The rulings that the court has established remain empty slogans and have no connection to reality.

Therefore, there needs to be a change in the process of examining the orders both in the military courts and the petitions in the Supreme Court where they are more action-based rather than just theory-based. It needs to reflect fairness and a reasonable judicial process that actually guarantees the rights of prisoners who are deprived of their right to view the evidence against them and to know what they are suspected of.

Judges who are reviewing these orders must use their broad powers and examine the evidence against the detainee in a more critical and suspicious way than they currently do. They must investigate the security official who has issued the order, and not just a representative that they send who does not know the details of the specific case.

Secondly, the limited number of judges who currently deal with cases of administrative detention should be broader. As mentioned above, this may cause the judges to become 'specialists' in this

area, but it also creates a trust relationship between the judges and the security forces and they do not perform their examination fully. Moreover, because there are so few judges and so many cases to deal with, it will end up being exhausting so that they would want to move the cases forward rapidly without careful scrutiny. Therefore, if there is a bigger pool of judges who deal with these cases, more diverse opinions would be available.

Thirdly, under the current regulations, there is basically no time limit to how long a detainee will remain in detention. The detention order can be renewed for an unlimited amount of time, six months at a time. A person can be kept in administrative detention for years without having the evidence against them revealed to them and without having a trial. This is an imposition on the most basic human right: that a person must have at least some sort of limit on time. It is not only the right to a fair trial that is being violated, but also the person's freedom of movement. Moreover, this imprisonment of a person for an unlimited amount of time leaves the prisoners suffering from mental health issues that are caused only by the uncertainty of being held in prison for reasons they are not aware of and for an amount of time they do not know. For these reasons, there should be a certain ceiling to protect these basic rights.

Fourthly, the current reviewing system has no balancing between the contradicting interests. The court has not established a clear way of balancing between the personal interests of the detainees and the state's interest for security. As I have mentioned above, in criminal law, the court decided in its rulings that these interests are given the same weight and will test the threat to each one if the other is fulfilled. Especially when speaking of people who have not yet

committed any crime and are only suspected of futuristic intentions. These people need to have their rights protected more heavily than in the case of someone who is going through a process of a fair trial.

Fifthly, there should be a complete end of administrative detention of minors. The authorities must find an alternative way to remedy the future danger of a minor, assuming that it does exist, but surely not through administrative detention.

Sixthly, there are two ambiguous terms that need to be defined clearly by the courts:

a) When a court is reviewing a detention order, it bases its decisions on secret evidence that it tests without the presence of the detainee or his lawyer and only based on the security forces' testimony. Although it would seem that the burden of proof in this case should be on these security forces, the law/military order does not specify who the burden of proof falls on or what degree of proof is demanded. It is acceptable that the degree of proof should be "clear and convincing evidence", and if it does not meet this demand, the detainee should not remain in administrative detention.⁴⁹ Therefore, the courts should ensure that this degree of proof is reached, rather than remain in their friendly-like, family-like enabling system that they manage currently.

b) A person shall not be detained in administrative detention if he does not pose a "certain and real danger", that cannot be prevented other than if he is detained immediately and for a fixed period of time. The definition of "certain and real danger" is not clear. Reality shows that (as stated above) whenever the political situation is "heated", waves of administrative detentions begin emerging in a

49 Gross, *Administrative Detention and the Use of Bargaining Chips*, pg. 310 (in Hebrew).

way where people are detained without posing a threat to security or to human life. This reality calls for a re-thinking process of what falls in the definition of “real danger” and what types of danger allow the use of administrative detention despite the unfairness of this process. For example, should a person who has expressed certain thoughts but did not act upon them, or a person who is an activist or supporter of a certain organization but does not plan actual activities to harm human life and public safety, be considered a “real and certain danger”?

A person shall not be arrested for a danger that does not derive directly from him but rather as a result of the existence of general circumstances, even though he is not responsible for their formation. Recently, the authorities and the courts have renewed the administrative detention of prisoners after a new circumstance or atmosphere has been created. The change of atmosphere and routines is sufficient, therefore, to sustain the claim of danger. There should be a deeper consideration of personal freedom and individual rights than the breadth of the definition of danger.

Special Advocates

In this part, I will propose the adoption of the “Special Advocate” model, however it should be clear before I elaborate that the use of this model is not a permanent way to deal with the use of secret evidence in administrative detention, rather it is a temporary remedy. Assuming that the current system remains as it is, there needs to be a way to try to remedy the violations of rights by the use of secret

evidence, and therefore a “Special Advocate” model might be able to help with some of the issues.

The purpose of special advocates is to provide defendants who have been administratively detained and have had evidence against them classified, a measure of procedural fairness and to further their procedural protection. The model tries to balance between the need for secret evidence for security reasons and a person’s right to a fair trial and his right to have evidence against him disclosed to him. This model is a tool to expose more secret evidence to the detainee. The role of the special advocate is to test the legitimacy of the secret evidence and the public interest at risk, to try to push for more disclosure, and to strive to provide the defendant with an acceptable open summary of the secret evidence.⁵⁰

A special advocate is a lawyer who has a high level of security-clearance and is exposed to all the evidence, even secret evidence that has not been disclosed for security reason to the detainee and his attorney.⁵¹

This model is used in the United Kingdom, Canada, New Zealand, Hong Kong and Australia.⁵² It is worth mentioning in short how the special advocates in the United Kingdom are chosen and given security clearance:

There are a number of special advocates, some of whom have been approached by the government to register, and some of them who send a resume with recommendations that are sent for security checks. They are not government representatives, the majority are lawyers in the fields of human rights, criminal law and immigration,

50 John Ip, *The Adoption of the Special Advocate Procedure in New Zealand's Immigration Bill*, *New Zealand Law Review* 207, pg. 208-210 (2009) (following: John Ip, *New Zealand*); Waxman and Barak-Erez, pgs. 27-31.

51 John Ip, *New Zealand*, pgs. 208-210.; Waxman and Barak-Erez, pg. 27.

52 Justice, pg. 170.

and are experienced in the field of litigation. The advocates work in a team composed of two: a senior advocate and a junior advocate. They do not have a security or intelligence background, but some have acted in cases where they had to receive security clearance. Therefore, they receive a day of training with the security services. The security classification they receive is based on an examination of characteristics or behaviours, particularly details of the situation and conduct in the financial and family spheres that might make the attorney susceptible to blackmail. The security services do not examine the attorneys on the basis of a professional background, i.e. a list of their clients in the past or their political opinions. As noted, the government tries to bring in human rights and civil lawyers, and the process of approving the security classification is not politically-oriented.⁵³

After exposing the evidence to the special advocate, they become “tainted” because they have been exposed to secrets they can not disclose to the defendants. Thus the special advocate is no longer in a position to be in contact or to meet with the defendant even regarding different cases (which involve the same evidence).⁵⁴ The relationship between the special advocate and the defendant is not that of a client-lawyer, nonetheless, they must act according to the best interests of the defendant.⁵⁵

In order for the special advocate to be able to communicate with the detainee he must ask for the permission from the court, which is granted only after the government has been given an opportunity to respond to the request. These limitations do not apply to the government or security services, where they can question the defendant even if the material has been exposed to them.⁵⁶

53 Craig Forcese and Lorne Waldman, *Seeking Justice in an Unfair Process: Lessons from Canada, the United Kingdom, and New Zealand on the Use of “Special Advocates” in National Security Proceedings*, Available at SSRN 1623509, pgs. 25-28 (2007) (following: Forcese).

54 Forcese, pg. 28.

55 Forcese, pg. 31.; Waxman and Barak-Erez, pg. 30.

56 Forcese, pgs. 35-36.

The materials disclosed to special advocates depend on the government's assessment of relevance, and therefore in some cases the materials disclosed to them is incomplete, but contains parts that have been removed because they are allegedly irrelevant.⁵⁷

It is important to note that what I am proposing is the adoption of the model that existed in Canada in hearings before the SIRC (Security and Intelligence Review Committee), rather than the existing model. According to this model, the advocates could communicate with the defendants even after the materials were exposed to them, so that they could defend themselves in the defendant's name more effectively in the proceedings closed to the defendants and their attorneys. The SIRC model never resulted in problems of inadvertent exposure to defendants by mistake by the special advocates, and they always carried out post-exposure questioning to the defendant in a manner that protected confidentiality. The prevention of meetings with the defendants was the result of a mistake by the British Court, in the case of **Chahal**,⁵⁸ in examining this method used in Canada and not on the basis of proven factual determinations of undesirable exposure of the evidence to the defendants. The model was later implemented once again into the Canadian system in the case of **Charkaoui**⁵⁹ borrowing from the United Kingdom's understanding of the model.⁶⁰

Therefore, the adoption of the special advocate model that I am suggesting in Israel is one where the advocate will be able to meet with the defendant even after his exposure to the secret evidence, as it was in Canada in proceedings in front of the SIRC, with a mixture of security clearance as it is described in the current use of the model in the United Kingdom.

57 Forcese, pg. 41.

58 *Chahal v. The United Kingdom* (1996) 23 EHRR 413.

59 *Charkaoui v. Canada (Citizenship and Immigration)*, (2007) 1 S.C.R. 350 (Can.).

60 For reasons of time and space, I did not provide a full history of the use of special advocates. For a more detailed history on the use of special advocates in Canada, or as they were called "legal agents" read the full article by Forcese. See also: Joseph Chedrawe, *Assessing Risk*, OUCJ Vol 12 No 1 (2012); Justice report; David Jenkins, *There are Back Again: the Strange Journey of Special Advocates and Comparative Law Methodology*, 42 Colum. Hum. Rts. L. Rev. 279 (2010-2011); Waxman and Barak-Erez.

What can be learned from the United Kingdom and Canada, despite the limitations, is that the special advocate model can advance fairness to defendants when the advocate succeeds in revealing more evidence to the defendant. The model in the present does not fulfil the efficiency that it was supposed to achieve because the attorney cannot meet with the defendant or his attorney after the evidence is disclosed to him. His job therefore encounters limitations that prevent him from fulfilling the complete purpose of the model.

On the other hand, the special advocate serves as an independent procedural examination of the decision-makers regarding the detention process, in addition to allowing the defendant to participate in the proceedings against him without being present. Although the defendant is not present in closed proceedings and cannot fully defend himself against the secret evidence, the special advocate serves as his messenger, making claims on his behalf, questioning witnesses and challenging the credibility of the secret evidence, thus making him an “invisible” participant.⁶¹ In addition, the special advocate is ethically independent of the governmental institutions and therefore does not wish to deny the defendant’s liberty but rather is acting in the interest of achieving a fair trial for the defendant.⁶² Adding an additional body to a process that challenges confidentiality can increase the likelihood that the procedure will be more accurate and more reliable.⁶³

Moreover, the sole focus of the special advocate is the defendant and his interests, therefore their tendency to make decisions will be based solely on those interests. This is contrary to the system in Israel where the judges try to fulfil two goals: 1) to raise arguments on behalf of the defendant and 2) to consider the evidence in

61 Waxman and Barak-Erez, pg. 40.

62 Waxman and Barak-Erez, pg. 41.

63 Waxman and Barak-Erez, pg. 42.

a balanced manner. Hence, special advocates dare to raise dangerous, courageous and radical arguments on behalf of the detainee than judges can raise.⁶⁴

One of the main oppositions to the adoption of this model in Israel, however, has been that the variety of advocates who will be part of the special advocates will be limited. Since a special attorney must obtain a security clearance to be exposed to the material, the question will be whether Arab advocates who did not serve in the army will be able to be part of these advocates? As the models in other countries have shown, security classification is not given to lawyers according to political affiliations. Rather, it is given according to marital status, financial status and any situation that may endanger them in terms of bribery or extortion (see above). The classification therefore is both protective of the state and of the advocates themselves. Therefore, if Israel adopts this security clearance system, the answer to the question above would be that lawyers who did not serve the army could indeed be part of this model.

The question then becomes: how can the state of Israel still ensure that these advocates maintain secrecy and be sure to reveal secret evidence to them without harming the security of the state? There should be a system developed where they are given workshops and training courses, which they will afterwards be given tests before they are accepted as special advocates. Keeping in mind that there will be no bias against Arab lawyers when these exams are given, which means that advocates will be objectively evaluated and not politically. Therefore, Arab attorneys can also enter the selection of special advocates without preferring advocates who have previously served in the army, and at the same time the security of the state will be protected.

64 Waxman and Barak-Erez, pgs. 49-50.

The court will provide the defendant or his attorney with the list of special advocates, and they can choose one to represent them in disclosure of secret evidence procedures. The defendant's attorney will thus be able to choose the advocate they think can best represent their client and ensure maximum protection of his rights.

Conclusion

The use of secret evidence in administrative detention is a violation of defendants' rights to a fair trial and freedom amongst their right to dignity as basic human rights that all humans are expected to enjoy. In order to carry out such a profound violation of these important rights, it must be justified by strong evidence. The State of Israel, as shown in this paper, does not provide sufficient protection for defendants in cases of secret evidence in administrative detention, and surely does not justify confidentiality by strong evidence. It has been shown that the use of secret evidence and administrative detention has been carried out against a group of people and has been targeting Palestinians especially in times of political unrest. It is therefore important to realize the problems raised by administrative detention and to try to find ways to improve a system that plays with human rights so lightly. The paper does not suggest that protecting state security is not important and should not be taken into consideration; rather it suggests that the balance with the defendant's rights should be a balance that is carried out more carefully and more considerably.

In conclusion, in the words of Jeremy Bentham: "evidence, is the basis of justice and publicity its very soul".⁶⁵ The use of secret evidence in administrative detention is a breach of basic human rights that countries should consider using only in rare occasions where there is a concrete and certain danger to the security of the state. The right to a fair trial for defendants in the Israeli system has been shown to be at the bottom of its priorities, therefore it is time that it starts working towards providing better protection to these defendants in order to establish a fairer and more just legal system and stop hiding behind the shadows of the system to encourage the unjust treatment of Palestinian prisoners.

65 Justice, pg. 214.

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