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The Association for Civil Rights in Israel

ADALAH עדאלה

HAMOKED Center for the Defence of the Individual
همركيد - مركز الدفاع عن الفرد

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# Proposed Civil Torts Law (Liability of the State) (Amendment No. 8), 5768-2008

# Position Paper

The proposed law seeks to establish a number of provisions intended to block compensation claims from being filed against the State – mainly those filed by residents of the Occupied Territories. These provisions would be added to the tools courts currently use when hearing such claims. Today, a plaintiff must persuade the Israeli court that the act of the security forces which harmed him was unlawful. Even an unlawful act by security forces does not lay claim to compensation if it is an act of war. Additionally, the court examines whether the plaintiff is in any way culpable for the damage he incurred. The purpose of the proposed law is to deny compensation even in those cases where Israeli judges believe that the acts of the military were unlawful and did not constitute acts of war.

## The Proposed Law: A Re-Enactment of a Law Struck Down by the High Court of Justice

There is no escaping this statement at the very outset: The proposed law is an abomination. Its purpose is to overrule the judgment of the Supreme Court in H.C.J. 8276/05 *Adalah v. The Minister of Defense* (judgment dated 12 December 2006). To what end does the State seek to overrule the judgment? Is it to lend the executive authority and the security forces supra-statutory status, and to exempt them from the judicial review of the courts in Israel and from responsibility for their actions (so long as they were committed in the occupied territories or against anyone perceived as the "other")? Or is it in order to cement an oppositional approach against the Court, to provoke it and to challenge its authority? These two objectives go hand in hand: What they share is the prevention of judicial review over human rights violations by the government.

The authors of the proposed law find it difficult to explain the need therefor. They completely avoid any attempt to explain how its provisions conform to the **Adalah** judgment. The explanatory notes to the memorandum of the law include the statement that the **Adalah**

judgment and the disengagement created a "need" for renewed regulation of the subject matter. What need? That question remains unanswered.

The nature and limits of the relevant need have already been unequivocally determined in the **Adalah** judgment. In Section 40 of the judgment, the Court dismisses the State's reasons regarding the need for Amendment No. 7. Even earlier, in Section 35, it points out that Amendment No. 4 is sufficient to meet the need to adjust the law of torts to the context of acts of war:

> **This amendment [Amendment No. 4] is proportionate, and poses no constitutional difficulty. Thus will the object underlying Amendment No. 7, which concerns the need to "adjust the law of torts to the special characteristics of the war with the Palestinians", be fulfilled. […] Amendment No. 7 reaches far beyond the aforesaid. It bars liability in torts for any damage caused by the security forces in a conflict zone, even due to acts performed other than through an act of war of the security forces. This expansion of the denial of State liability is unconstitutional… only belligerent acts justify, as sought by the object of Amendment No. 7, the exclusion of the arrangements from the realm of the ordinary law of torts. The exclusion of tort cases in which the security forces are involved, and which have no belligerent aspect, is not designed to achieve the proper purpose of adjusting the law of torts to belligerent situations. It is designed to achieve the improper purpose of releasing the State from any liability in torts in conflict zones, and certainly so in view of the retroactive nature of this provision.**

And what of the disengagement? This too was addressed by the Court:

> **Of course, we make no determination about the legal status of the Gaza Strip after the disengagement. Even if Israel's belligerent occupation thereof has ended, as the State claims, there is no justification for a sweeping exemption from its liability in torts (Section 36 of the judgment).**

The new proposed law seeks to reach, the same objective sought by Amendment No. 7. Its substance is the same, its violation of human rights is the same, and the arguments in its justification are the same. Just as Amendment No. 7 was unanimously struck down by nine Supreme Court justices – so should the proposed amendment; and it is difficult to shake the

feeling that precisely this is the purpose of the memorandum: To pass a law in the Knesset whose illegality is blatant, after the Supreme Court struck down a similar provision for being unconstitutional, in order to stage a frontal challenge of the Supreme Court's authority. Neither the Knesset nor the Court – and certainly not human rights in Israel – will benefit from such an adventure.

## The Provisions of the Memorandum: A Sweeping Denial of State Liability

A review of the provisions of the memorandum attests that its drafters seek to reach – by somewhat different legal tools – the same result which they sought to attain in Amendment No. 7: Lending sweeping immunity to the State for the army's actions in the territories – and to a large extent also inside Israel. In a series of matters, the provisions of the memorandum far exceed even the provisions of Amendment No. 7 which has been struck down.

Illegal, wrongful and even criminal acts will remain unanswered for. The victims of such acts – orphans and widows, disabled persons or persons rendered destitute by the destruction of their property – will be left without any remedy. Certain savings will be recorded on the books of the Ministry of Defense.

The importance of the right to compensation, under the law of torts, was pointed out by the Supreme Court in the **Adalah** judgment:

> **The liability in torts protects several rights of the injured party, such as the right to life, to liberty, to dignity and to privacy. The law of torts is one of the main instruments via which the legal system protects such rights; it is the balance determined by the law between the rights of individuals, amongst themselves, and between the individual's right and the public interest. The denial or restriction of the liability in torts prejudices the protection of such rights. Thus are such constitutional rights prejudiced. Indeed:**
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> **"The basic right to compensation of a person who is injured by a civil wrong, is a constitutional right which arises from the protection of his life, body and property… Any restriction of the right to compensation for a civil wrong must meet the constitutional test of a proper purpose and proportionality" (Y. Englard, *Damages to Motor Accident Victims*, 3rd Ed. (5765), 9) (paragraph 25 of the judgment).**

One cannot overrate the importance of subjecting the State's actions to review by the Courts in Israel, if only in retrospect; of the courts being allowed to hear witnesses, examine

evidence and decide – through Israeli judges and in accordance with the values of Israeli society – whether or not the security forces acted legally. This basic principle of government accountability was expressed by Prof. Ariel Porat, former Dean of the Law Faculty of Tel Aviv University and an expert on torts, at the hearing held on 15 June 2005 at the Constitution, Law and Justice Committee of the Knesset:

> **A situation in which soldiers are legally allowed to do as they please without anyone paying the price, is a situation which, I think, if it will come to pass, each one of us should simply be ashamed of… This expansion means that it is permitted to engage in acts which are not fighting, not even fighting terror: A soldier is posted somewhere, nothing happens for two weeks, he goes into a house and makes havoc – don't let anyone tell you that in other countries there is no liability in torts in such situations. It's not true… moreover, don't let anyone tell you that there is another law of this type anywhere else in the world. There is no such law anywhere in the world. We, as Israeli citizens – I as a citizen cannot accept that there will be a law allowing our soldiers, my children, to do anything they please without somebody paying the price for it. This is what's going to happen.**

International law harbors the well-established principle that an illegal act entails compensation, even if committed in a time of war in breach of the laws of war, and *a fortiori* if it is unrelated to the belligerent acts themselves. This principle was established in as early as the Hague Convention of 1907, and has been implemented in recent years via diverse mechanisms in respect of injuries caused to civilians in international disputes. The International Court of Justice has reiterated this principle only recently in its opinion on the separation wall. In that case, the Court ruled that dismantling the wall running through the occupied territories was not enough, and that Israel was required to fully compensate the persons injured by the wall on the basis of the reinstatement principle. The proceedings for the legislation of Amendment No. 4 and Amendment No. 7 were accompanied by the severe protest of human rights organizations not only in Israel, but also abroad. Legislation which will lend Israel immunity against suits before the Israeli courts, will not exempt Israel from the duty of compensation, but will create an incentive to shift the disputes to courts outside of Israel.

The **Adalah** judgment ruled that the provisions of Section 5C of Amendment No. 7, which denied the right of compensation and cancelled the State's accountability before its own courts, are null and void. The constitutionality of another part of the Amendment (Section

5B), was left for future reference. The current proposal seeks to return to the book of laws provisions parallel to those which had been revoked, and even to add further-reaching provisions thereto.

## Sections 1 and 2 – Amendment of the Definition of an "Act of War"

According to the current law, the State is exempt from liability for acts of war. The current definition was adopted a mere five years ago, in Amendment No. 4 to the law. It, in itself, exceeds the original sense of an "act of war", and also includes "any act of war against terror, acts of hostility or uprising, and any act for the prevention of terror, acts of hostility or uprising performed under circumstances of mortal or bodily danger". The requirement in the latter part, that the act be performed under circumstances of mortal or bodily danger, was designed to slightly mitigate the sweeping provision, and to adjust it somewhat to the reason for the exemption, as described in case law[1]. The current proposal includes a different definition for an "act of war" so as to determine state liability on the basis of where the act occurred rather than its nature.

The definition is somewhat narrowed as regards Israeli territory. However, the fact that the phrase "combating terror, hostile actions or uprising" remains, raises some questions regarding the scope of immunity the State is seeking for itself. It must be noted that the State needs this immunity when the military has acted unlawfully and when, if it were not for the immunity, the victims would have been entitled to compensation. Is the State preparing itself for suits regarding events such as the killing of demonstrators in Israel in October 2000?

Regarding the Territories (and enemy states), the proposal seeks to lend the State blanket immunity for all actions taken for the "prevention of terror, hostile actions or uprising", including in circumstances under which soldiers were not in any danger. The result is that virtually all of the military's actions in the territories will confer immunity upon the State against legal action, for any damage caused in the course thereof. This consequence is even further-reaching than that of Amendment No. 7, which limited the State's exemption only to those parts of the territories which had been declared as conflict zones. The statements of the Court in the **Adalah** affair (Section 36) are applicable here *a fortiori*:

> **We must keep in mind that the areas of Judea and Samaria, and until August 2005 also the areas of the Gaza Strip, have been subject to belligerent occupation for close to forty years. In this framework, the Israeli security forces are present in these regions on a permanent basis and in a large scope. The residents of the region come into close,**

[1] C.A. 5964/92 *Bnei Uda v. The State of Israel*, *Piskei-Din* 56(4) 1 (2002).

**ongoing and daily contact with them, when coming and going, on their way to work and schools, at checkpoints, roadblocks inside the region and crossings to and from Israel. The security forces maintain a permanent and prolonged presence in the region. They are deployed and operate in the region in both fighting tasks, and in acts of a policing nature; in both areas in which hostile terror activity is conducted, and quite areas; in both periods of conflict, and periods of relative calm. Under these circumstances, immunity as sweeping as that rendered to the State by Section 5C of Amendment No. 7 spells the granting of an exemption to the State from liability in torts in respect of broad areas of activity which are not acts of war, not even according to the broad definition of this term. It means leaving many victims, who were neither involved in any hostile activity, nor injured incidentally to acts of the security forces which were designed to deal with hostile activity, stripped of any remedy for the violation of their lives, persons and property. Such a sweeping violation of rights is not required in order to fulfill the purposes underlying Section 5C of Amendment No. 7. The denial of the State's liability in Section 5C does not "adjust the law of torts to the state of war". It excludes from the realm of applicability of the law of torts many acts which are not acts of war. It does not conform to the duty of Israel, as holding Judea, Samaria and the Gaza Strip under belligerent occupation. Such occupation imposes upon the State special duties under international humanitarian law, which are not consistent with a sweeping exemption from any liability in tort.**

## Section 2(2): Ruling on a Claim of an Act of War Prior to Hearing the Evidence

In section 2(2), the State seeks to be awarded unfair procedural advantages over the victims of military actions. According to the proposal, a claim made by the State that the act in question was an act of war is to be examined at the outset, during the court's preliminary examination of the case. The claim of an "act of war" is a factual claim which requires careful study of the details of the act and the circumstances in which it occurred. The courts currently rule on this claim based on all the evidence brought before them and after having heard witnesses in the case. Naturally, the State is in possession of a substantial part of the evidence relating to the character of an act. The plaintiff's primary tools for confronting a claim of "act of war" are cross examination of the State's witnesses and discovery of its evidence. Such evidence is often discovered only in the late stages of the court case. Moving the examination

of the claim to the preliminary phase of the case means that the claim would be decided before the plaintiff will have had the chance to exhaust his tools to compel the State to discover all of its evidence and without having the witnesses (of both sides) and their versions examined.

Even today, courts do have the discretion to examine the claim of "act of war" as a preliminary claim and they will do so when the circumstances on which the State bases its claim are not factually controversial. Forcing the courts to do so as a matter of course neither serves the purpose of efficiency of the hearing nor that of uncovering the truth. It is intended to achieve erroneous rulings rejecting claims which, if reviewed in the ordinary manner, might have been accepted.

## Section 3: Expanding Section 5B

Section 3 of the proposal seeks to exempt the State from liability for any damage caused to a resident of "enemy territory" – regardless of whether he was in said territory or in Israel, and of whether the damage was caused by the security forces or by another State body.

What is "enemy territory?" This will be determined not by law, but by government proclamation. The proposed law does not set forth any criteria on this matter. The explanatory notes indicate that the State currently intends to use this section to gain immunity in all claims filed by residents of the Gaza Strip retroactively to "Disengagement." As demonstrated, in the **Adalah** judgment, the Court explicitly ruled that there was no justification for granting the State a sweeping exemption from its liability for damage, which it either caused in the Gaza Strip or would cause after the disengagement (Section 36 of the judgment).

The proposed section will allow the State to achieve blanket immunity also regarding residents of the West Bank, or parts thereof, in the same manner. It is, in fact, an expansion of section 5c which was struck down by the HCJ. The arrangement that was cancelled allowed the Defense Minister to proclaim certain areas as "conflict zones." Anyone harmed by actions carried out by state security forces in a "conflict zone" was denied the right to compensation. Before the section was struck down by the HCJ, vast areas within the West Bank and Gaza Strip were proclaimed "conflict zones" for much of the time between 2000 and the date of the proclamation. In the current proposal, the phrase "conflict zone" is replaced by the phrase "enemy territory" and state immunity is expanded such that it applies not only to acts carried out in the territory so proclaimed but also acts performed outside it where the victims are residents of the "enemy territory".

Section 5B is unconstitutional also in its present language. It denies the victim compensation absolutely and sweepingly, based on his identity and affiliation rather than on the

circumstances of occurrence of the damage. Also when the victim is partly culpable for the occurrence of the damage, the existing rules of the law of torts should be followed, to determine the relative culpability of all parties involved. The **Adalah** judgment ruled that the entire provisions of Section 5B raise a constitutional question, which was left, in that case, for future reference. The Supreme Court ruled that the civil courts are authorized, in the context of specific tort claims, to hear arguments against the constitutionality of the section (Section 31 of the judgment).

Mention should also be made of the position of the Ministry of Justice, which at the time asked the Constitution, Law and Justice Committee of the Knesset not to approve Section 5B in its current language. The Ministry of Justice put on the Committee's table a proposal by the Attorney General for alternative language, which conditioned the exemption upon a link between the act for which the exemption was given, and the individual's personal affiliation with a terrorist organization, for instance. In the **Adalah** judgment, the Court mentioned that the question of how the section would be implemented, and of whether such a link would be required, was meaningful with respect to the question of its constitutionality.

It is puzzling, therefore, that the proposed amendment does not include a modification of Section 5B in the spirit of the Ministry of Justice's amended proposal and in the spirit of the Court's comment.

## Section 4: Venue Restriction

According to this section, suits against the State for the security forces' actions in the Territories and suits filed by those defined as "enemies" or "activist or member of a terrorist organization" would only be heard by the Courts in Jerusalem.

The restriction of venue prejudices the constitutional right of access to the courts, and requires substantial justification, which meets the conditions of the restriction clause.

The provision would place a great burden on attorneys who are not from Jerusalem, mostly from the Northern and Haifa districts, some of whom have gained much experience in this sort of claims. The effort and expenses involved in conducting the suits in distant courts will impede plaintiffs' ability to obtain the services of these lawyers and victims will be confined to lawyers in the (relatively small) district of Jerusalem.

The explanatory notes tout the claim that the purpose of the provision is purely pragmatic: "for reasons of efficiency and uniformity of case law."

These arguments are unfounded.

From the point of view of efficiency, the new provision will only lead to inefficiency. Thus, for instance, the question of whether a certain person is a "member of a terrorist

organization" is a clearly factual question, which the State may raise after the suit is filed. The significance of the new provision is that complex factual hearings, which pertain to the merits of the suit, will be conducted merely to determine the issue of territorial jurisdiction.

From the point of view of "uniformity of the case law" – many such suits have been heard over the years in the courts in Haifa the North, Tel Aviv and the Center. These have made their contribution to the development of the case law. Issues of principle were heard in appeals brought before the Supreme Court. In Israel, case law uniformity is achieved through the hierarchy of the courts. Geographic jurisdiction of a court must not be determined on the basis of the issue: this would be tantamount to establishing that suits filed by car crash survivors against insurance companies be heard in one district only (the Northern district for example).

The rule in suits against the State is that they may be filed in any court within the State. All of the arguments regarding "efficiency", "specialization", "convenience", etc. are equally true – or untrue – with respect to other suits, which are filed against the State in other subject matters. The restriction of venue only for suits which are the subject matter of this proposed law calls for further investigation.

With the initial reasons given for the amendment clearly unfounded, it is necessary to look for other – irrelevant – reasons. It appears that the irrelevant reason hidden behind the current proposal is the desire to "dispose" of certain judges in those districts, who have not favored the State in their judgments.

## Section 6: Applicability Provisions

Section 6 applies the proposed amendment retroactively to acts which occurred from 2000 (and with respect to immunity against claims by residents of Gaza in general – from 2005). In this respect too, the proposal follows Amendment No. 7, which was annulled by the Court. However, the proposal is even further reaching than Amendment No. 7: Further from the point of view of the period of time, which is taken up by the retroactive applicability (seven years versus five in Amendment No. 7); and further also from the point of view of the transitional provision: Whilst it was ruled with respect to Amendment No. 7 that the law would not apply in certain cases even if the hearing of witnesses had not yet commenced, but affidavits in lieu of direct testimony had been filed[2], according to the proposed amendment, a suit would be excluded from the applicability of the law only if the hearing of witnesses had commenced.

[2] C.C. (Tel Aviv) 1409/02, Daoud v. The State of Israel (2006) – published by Nevo.

The memorandum of the law is, therefore, defective from every perspective: From the perspective of its purpose, from the perspective of its object and from the perspective of its details. It is even more injurious than the provisions of the law which was struck down by the Supreme Court in the **Adalah** case. It violates basic principles of Israeli and international law. It is a proposal which, even if adopted, would in any event be null and void. The proposed law should be shelved already at this stage.