



# Position Paper on New Law Prohibiting the Consumption of Terrorist Publications





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## Background

Israel's Knesset has introduced a new temporary amendment to its counterterrorism law, designating "consumption of terrorist materials" as a new criminal offense. Tamleh has requested a legal analysis that sheds light on the law's repercussions and its expected impact on Palestinian citizens of Israel and East Jerusalem residents.

Given the use of unclear language and broad definitions, the law is expected to have far-reaching implications for freedoms and rights as well as contributing towards fear and intimidation. It is highly likely that this law will have a chilling effect, discouraging political participation, freedom of expression or activities that oppose Israeli policies, particularly those related to Israel's war on the Gaza Strip. As this position paper analyzes Israeli law, the terms and definitions used in the paper are adopted straight from the law's text. This is to examine the law in the context of Israel's legal and legislative environment and to assess its impact on the freedoms of Palestinian citizens of Israel and residents of East Jerusalem.

## Position Paper on New Law Prohibiting the Consumption of Terrorist Publications<sup>1</sup>

On November 8, 2023 the Knesset approved the second and third readings of proposed legislation, The Counter-Terrorism Law (Amendment No. 9 and temporary order)(Consumption of terrorist publications) – 2023. The law passed with 17 members of Knesset voting in favor and 4 opposed.

More specifically, the law states that systematic and continued **consumption** of material published by a terrorist organization which includes a direct call to perpetrate an act of terror, or words of praise, sympathy or encouragement for an act of terrorism, under circumstances that indicate identification with a terrorist organization, is punishable by up to one year's imprisonment. The law also holds that systematic and continuous consumption of published **documentation** of the perpetration of an act of terror is prohibited only if consumption of the published material was accompanied by a direct call to commit an act of terrorism, or to praise, express sympathy for or encourage an act of terrorism. The law is valid for two years.

When an individual consumes such materials randomly, in good faith or for a legitimate purpose, such as providing information to the public, preventing terrorist offenses or conducting research, this is not considered prohibited consumption. The organizations referred to in the law today are Hamas [the Islamic Resistance Organization] and ISIS<sup>2</sup>. The designated organizations can be changed through a decision of the Minister of Justice with the concurrence of the Minister of Defense and the approval of the Knesset Constitution, Law and Justice Committee. The Explanatory Notes accompanying the law outline that its purpose is to provide law enforcement authorities with an additional tool for combating terrorism, with an emphasis on individuals who carry out attacks after being influenced by publications by designated groups.

Numerous civil society organizations in Israel expressed opposition to the law in contrast to right-wing organizations, which applauded its introduction into law<sup>3</sup>.

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1 Writing and editing: Attorney Abeer Baker; translation from the Hebrew: Deb Reich.

2 The Islamic State, "Islamic State", "Al-Qaida of Iraq", "ISIS", "ISIL".

3 Among organizations opposing the law were Adalah: The Legal Center for Arab Minority Rights in Israel; the Association for Civil Rights in Israel; the Office of the Public Defender (in the Ministry of Justice); the Union of Journalists in Israel; and the Israel Internet Association. Among supporters of the law are organizations identified with the right such as the Btsalmo Organization and the Movement for Governability and Creating Democracy ("Meshilut").



## • **A Law Designed to Further Entrench Surveillance of Palestinians**

**It is our position that** this is a predatory law that will ultimately harm Palestinian citizens and residents of the country who are the main consumers of information from various publications in Arabic from both traditional media channels and various social networks.

A Jewish Israeli who views materials published by Hamas or ISIS is not likely to be accused of showing sympathy or allegiance with those organizations. Additionally, it is always easier for Jewish Israelis to find an acceptable reason for viewing such content for acceptable reasons outlined under the law, such as research or curiosity. On the other hand, a Palestinian caught consuming these materials, even if for an acceptable purpose or out of curiosity, is much more likely to be accused of doing so as an act of allegiance or support for those organizations. The law paves the way for the preemptive criminalization of people who have neither committed nor planned any crime. And above all, the law only increases the authorities' surveillance of Arab citizens while infringing on their rights to privacy, freedom of expression and the right to access information<sup>4</sup>. Indeed, Palestinian citizens and residents of East Jerusalem are already subjected to increased monitoring on social media since 7 October, suffering more repercussions for showing solidarity with Gazans, compared to Jewish Israelis<sup>5</sup>.

This legislation has no equivalent elsewhere in the world. On the contrary, attempts to enact similar legislation in France were invalidated twice by the Constitutional Court<sup>6</sup> which stated, among other things, that the law provisions would be unconstitutional due to both the violation of rights and the absence of a criminal intent (*mens rea*) to commit an act of terrorism. Even the anti-terrorism law in Great Britain, which enshrines a provision criminalizing the consumption of publications, does so in the context of publications that are useful to a person **planning** to commit a terrorist act such as making a bomb, meaning that viewing the material is part of their preparation for committing a prohibited act.

## • **The Law Seeks to Penalize Thoughts and Feelings**

The first and fundamental principle of criminal law is that thoughts alone cannot constitute a criminal offense. Criminal liability must be based on minimal act (*nullum crimen sine actu*). Israel's new law seeks criminalization even in the absence of any causal relationship between a person's consumption of the materials and that person's intention to act. This contravenes the rule regarding offenses of expression and incitement, which must involve an act taken with criminal intent to perform, encourage, or identify with an act defined as prohibited; or at a minimum require the existence of a probabilistic test for assessing the risk of carrying out a prohibited act after the initial act of consuming publications from prohibited groups.

## • **Ambiguity and Vagueness**

Penal laws are based on the principle of legality that distinguishes between what is permitted and what is prohibited and states that there is no penalty except according to a law that defines the limits of the permitted and the prohibited.

The vague wording of the law discussed here blurs the boundaries between what is forbidden and what is permitted in a way that does not enable the individual to fully understand whether their actions are permitted or not. The law does not clearly define what constitutes "systematic and continuous" consumption. Is it systematic to view posts for a week on a website found to be affiliated with one of the organizations? Is someone who follows the posts of a certain page on social media and is passively exposed to its posts on their "feed" while scrolling, considered a systematic consumer of those posts? Does clicking "like" on one of the videos, which can subsequently lead to exposure to other videos, also constitute systematic consumption? What are the circumstances that prove consumption is occurring due to identification with the aforementioned publication? The use of the term "consuming" as opposed

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4 UN Universal Declaration of Human Rights, Article 19

5 Arabs in Israel face reprisals over online solidarity with Gaza, The Guardian. Accessed here: <https://www.theguardian.com/world/2023/oct/20/israeli-arabs-reprisals-online-solidarity-gaza>

6 Decision no. 2016-611 QPC of 10 February 2017; Decision no. 2017-682 QPC of 15 December 2017.



to another word which denotes active engagement such as saving, downloading, or purchasing could turn any passive viewer of certain posts into an involuntary criminal.

How can viewing, for example, the acts or crimes of an organization constitute evidence of support, rather than suggesting denunciation or an authentic realization of the individual's desire and right to have access to information?

- **The Fear of Turning the Consumption of Newsworthy Documentation into a Criminal Act**

Based on the wording of the law, the systematic and continuous consumption of published **documentation** of an act of terrorism is prohibited only if the consumption of the published material was accompanied by a direct call for a terrorist act, or statements of praise, sympathy or encouragement for a terrorist act. This means that viewing a news publication documenting an act of terrorism is generally legitimate except in cases where the documentation is accompanied by a direct call for an act of terrorism, sympathy or praise. Israel's Knesset has also introduced emergency legislation allowing it to provisionally close foreign media outlets it deems as a threat to national security. This has led to threats to close media bureaus which are more critical of Israeli policies, such as "Al Jazeera," which Israel has accused of sympathizing with Hamas. Under the new laws on consumption of terrorist materials, such accusations could potentially criminalize consumers of such media outlets for viewing material Israel deems as sympathetic to designated terrorist organizations.

- **Violations of Freedom of Expression and the Public's Right to Access Information**

The current wording of the law violates citizens' rights to freedom of expression and their right to receive information in general and from the media in particular. These rights are considered universal human rights, and are enshrined in the UN Charter of Universal Human Rights. Journalists whose work relies entirely on consuming content and having maximum exposure to facts, especially during emergencies, may well be wary of having this law weaponized against them and restricting their activity. Limiting a journalist's freedom of action not only harms the journalist professionally, it also interferes with the public's right to freedom of expression and the right to seek, receive and impart information through any media.

- **The Protections in the Law Transfer the Burden of Proof to Persons**

The law, as noted, outlines several defenses that are supposed to protect the person from criminalization, such as consumption in good faith and for a legitimate purpose. The ambiguity of these expressions is enough to preemptively thwart any attempts to soften the predatory character of the law, by means of those same protections. As a general rule, in criminal cases the burden is on the state to produce evidence that consumption of the publications was not done in good faith. The law as it currently stands, transfers the burden of proof to persons, who have become suspects, to show that their consumption was in good faith or for legitimate purposes as outlined in the law. This reversal of the burden will make it difficult for the suspect to succeed in meeting these requirements, in the absence of clear criteria and a clear understanding of the limits of what is permitted consumption and what is prohibited consumption. In today's reality, when any expression by Palestinians that is perceived as political can easily become grounds for arrest, the fear of criminalization and biased interpretation of the terms "legitimate purpose" and "in good faith" only increases. The likelihood of attributing a lack of good faith to the viewing of published material is much greater for a Palestinian than for a Jewish Israeli, even if both were viewing the same published materials and with the same frequency.



- **Violation of the Right to Privacy**

Given that most published materials are consumed via various social media platforms, implementing this law will mean monitoring citizens' activity in the digital space before they have been convicted, accused or even suspected of any crime. Surveilling people based on the extent of their viewing of publications deemed by the state to signify sympathy for or encouragement for acts of terrorism, means that anyone who viewed those publications, even randomly, will be exposed to state surveillance – with all that this implies in terms of the violation of the right to privacy. The fear of slipping into a grey or forbidden area will inevitably lead to self-policing and self-censorship, which is generally viewed as a serious violation of the right to freedom of expression.

- **Enacting the Law During a National Emergency may well Amplify the Pattern of Criminalization**

Adopting this legislation when Israel has declared war on Gaza increases the risk of those who view Hamas content being misrepresented as criminals and unfairly penalized. Once upon a time, people may have attached little or no importance to Hamas publications. Now, however, consumption of those materials will naturally increase, whether due to simple curiosity, a desire to learn about the organization and its actions, or as an exercise of the right to information. This is especially relevant during chaotic times when many are seeking a variety of news sources with no other ulterior motive but staying informed.