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THE NEW COUNTERTERRORISM LAW

ANOTHER BLOW TO THE CONSTITUTION,

ENCOURAGES EXTRA JUDICIAL KILLING

Commentary on Law 94/2015

on Counterterrorism

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Introduction

On 7 July, a group of political parties, rights organizations, and public figures issued a statement urging a delay in the issuance of the proposed counterterrorism law pending a broad, genuine social dialogue on the law's feasibility, its articles, and the extent to which it achieves its desired objective and the seating of the incoming parliament to ensure an exhaustive discussion of the law's content. Before the statement, the Journalists' Syndicate had already rejected the draft law in view of its trampling of rights won by journalists and enshrined in the 2014 constitution, while several articles and essays were published against the proposed law arguing that it represented a grave threat to civil rights and liberties, contained seriously flawed language, and would not necessarily address the problem of terrorism. A joint statement endorsed by 20 rights groups set forth in detail how the proposed law would infringe the constitution and civil rights and liberties and could be used to harass and prosecute peaceful opposition forces.

Despite these appeals, on 15 August 2015, the president issued Law 94/2015 on counterterrorism by decree, ignoring all criticisms of the law and demands to postpone a consideration of it until the new parliament convenes, which should be late this year according to official presidential statements.

The law is yet another nail in the coffin of the rule of law and a heavy blow to the constitution. Despite some positive changes in the final version of the text, these amendments did not mitigate the law's repressive nature and its constitutional shortcomings and did not change the fact that the law encourages law-enforcement personnel to engage in extrajudicial killing with impunity.

This is the not the first slap to the constitution, which is tantamount to an insult against the will of all Egyptians who approved the document. Former interim President Adli Mansour and President Abd al-Fattah al-Sisi after him used the legislative power available to them due to the absence of a parliament to issue numerous laws that have dramatically expanded the scope of criminal acts and the severity of criminal penalties, erecting the legislative structure on a foundation of exceptional laws. This started with the protest law, followed by Law

8/2015 on terrorist entities, Law 89/2015 allowing the heads of state oversight bodies to be removed from their positions, amendments to Article 78 of the Penal Code, and finally the latest counterterrorism law. None of these statutes comports with the constitution, as if there is a political desire to negate the national charter approved by the people.

Following the assassination of Public Prosecutor Hisham Barakat on 29 June 2015, the president stated that the hand of justice was chained by laws. Condemning the cowardly assassination, rights organizations said that the response should not be exceptional laws and procedures that would trample rights and liberties. Nevertheless, the government again put forward the proposed counterterrorism law amid widespread objections, paying no heed and issuing the law with all the fundamental flaws intact with the exception of issues observed by the Supreme Judiciary Council.

The political polarization that has currently overtaken Egyptian society makes it easy to brand peaceful dissidents or rights groups as terrorists. A high-level state official accused a high-profile international rights organization of supporting terrorism when commenting on a report issued by the group on the status of human rights one year into President Sisi's rule. This demonstrates how the label of terrorism can be directed at critical, independent voices that differ with or criticize the current administration.

We have additional concerns about the enforcement of this law in light of the serious impairment of the Egyptian justice system, the utter lack of effective judicial oversight of law-enforcement personnel, and infringements of defendants' rights and guarantees of defense. This state of affairs has meant that with extremely rare exceptions, there has been no accountability for cases of extrajudicial killing committed by security forces since January 2011. At the same time, many political activists have been thrown in prison, sometimes for life. Meanwhile, the judicial apparatus colludes to allow long-term pretrial detentions, and the investigating bodies and courts rely wholly on reports from security bodies when deciding questions of innocence and guilt. As a result of this, the Court of Cassation has recently overturned several verdicts.

We reiterate that we are fully aware of the serious threat currently facing the Egyptian people, but we firmly believe that respect for human rights and the rule of law are the basic guarantees in this decisive battle. Casting them aside will not enable state bodies to effectively counter this danger as much as it will foster a fertile environment for the expansion of such activities in the long term.

Summary of criticisms of the law

- The law constitutes a legislative assault on civil liberties and the constitution and reintroduces provisions that the Supreme Constitutional Court (SCC) has previously declared unconstitutional.
- The law encourages law-enforcement personnel to use lethal force and ensures impunity.
- The law easily allows peaceful activities carried out by political parties, the media, civil society, and protest, student, and labor movements, to be classified as terrorist activities.
- The law criminalizes acts protected under the rubric of freedom of association, freedom of peaceful assembly and strike, and freedom of opinion and expression, prescribing prison sentences for such acts on the pretext of protecting the safety of society and national unity and prohibiting the dissemination of ideas and beliefs advocating violence.
- The law violates constitutionally protected guarantees and rights, especially Article 54 on the rights of suspects during arrest and questioning. It also circumvents the procedures for declaring national emergencies set forth in Article 154 of the 2014 constitution, adopting procedures that entrench an undeclared state of emergency that is not subject to constitutional protections and defies Egypt's international obligations. It does so by manipulating language and legal terms to permit or authorize the president to take any measures "to preserve public security and order" in the event of any terrorist danger.
- The law undermines the freedom to circulate information in the press, media, on the internet, and in social media; it permits online content to be blocked and prescribes prison sentences for users and content providers on overly broad, vague grounds.
- The law extends the death penalty to acts that do not lead to death, and because of ill-defined language, the law would allow capital punishment for peaceful groups that do not engage in violence.

The following is a detailed commentary:

I. Expanding criminalization

The first section of the law on general provisions entails a worrying expansion of criminal acts through the use of imprecise language, as is clear in Articles 1, 2, and 3. It criminalizes unspecified actions, such as Article 2(2), which criminalizes any conduct carried out in furtherance of a terrorist purpose and introduces provisions that punish persons for incitement, abetting a crime, or agreeing to a crime even in the absence of an overt act.

When harming the environment, occupying or seizing public or private property, or damaging property are included in the definition of a terrorist act, as they are in Article 2, it allows the charge of terrorism to be filed against people demonstrating in front of government buildings or companies or holding a sit-in in these buildings or on a public road. In turn, this constitutes a clear threat to the right of peaceful assembly. Furthermore the definition of a terrorist act includes the terms "force, violence, threat, or promotion"—all vague terms that permit the state to take prejudicial action against persons. Force[1] and violence[2] are not limited to physical force or armed force, but may take other forms, such as a popular demonstration organized to pressure the government to make some economic, social, or political change.

Terms used such as infringing "the public order," "the safety of society," "society's interests," and "national unity" are so broad that they can be interpreted in various ways depending on who holds power. These are relative concepts that are difficult to pin down in a precise definition, and since these terms are defined differently in all branches of law, penal law should avoid them. Moreover, these terms cannot be used in any circumstances to establish criminal intent in a crime punishable by death like terrorism.[3] By including these terms in the definition of terrorism, all crimes in the Penal Code, regardless of how trivial, could conceivably be subsumed under the crime of terrorism, because any crime is likely to achieve these same ends.

1- In explaining the concept of force, Dr. Ahmed Fathi Surour concluded, "It is conceivable that the force be military, represented by the use of arms. Force may also be constituted in some forms of physical violence such as the organization and marching of popular demonstrations as a means to pressure the government." al-Wasit fi qanun al-'uqubat, al-qism al-khass. Cairo: Dar al-Tiba'a al-Haditha, 1991, p. 85.

2- "Violence in its general meaning refers to any form of pressure (economic, political, or military) on a person with the objective of spurring him to an action he would not have undertaken were it not for this pressure. Violence is simply an attempt to impose a position or conduct on an individual which he generally rejects using various means, among them pressure and intimidation." Dr. Mahmoud Saleh al-Adli. al-Qanun al-jina'i li-l-irhab, pt. 1, al-Muwajahat al-jina'iya li-l-irhab. Dar al-Fikr al-Jami'i, 2003, p.43.

3- The Court of Cassation has said, "The idea of public order is relative. In determining its content, the judge is bound by the general current prevalent in his country and his time. It is thus considered a legal matter subject to the oversight of the Court of Cassation. In this is a supreme guarantee that this definition be erected on objective grounds." See Cassation 10132/78JY, session of 11 May 2010.

Paragraph 2 of Article 2 only further obscures the definition of a terrorist crime by criminalizing "conduct," which is difficult to precisely identify if it is not accompanied by an act. Moreover, harming communications or the national economy is not effected by individual or group conduct, for these are complex matters with numerous overlapping factors and causes. Such provisions permit the authorities to arbitrarily charge any individual or group with terrorism on the flimsiest of grounds, such as conduct damaging to the national economy. A newspaper article that raises questions about the president's health—the subject of a criminal suit involving former President Mubarak in 2007—could be an act of terrorism since it may spread rumors that damage the national economy.

Constitutionally speaking, the language of the statute contravenes all constitutional principles that govern the writing of penal provisions, which demand clarity and specificity that allows no confusion or ambiguity and which serve a well-defined public interest. Jurisprudence defines crime as an infringement of a basic pillar of society or a support of this pillar. The rule is that an interest is only given criminal protection if preserving this interest is a prerequisite for preserving society and its existence or a supplementary condition of this condition. The SCC has ruled that "criminal punishment is not justified unless it is socially beneficial, and it contravenes the constitution if it exceeds the bounds of necessity."[4]

II. Stiffening penalties for acts criminalized by other laws

The section on penalties includes stiff penalties for acts already punishable under the Penal Code. Most of these crimes have a cognate in the state security crimes chapter in the Penal Code and thus need not be enumerated again in a special law. Moreover, most of the crimes set forth in Article 2 have cognates in the thuggery law, issued by decree as Law 10/2011. Article 2 also enumerates the forms or practices that constitute the material element of a terrorist crime in the same form in which they exist in various places in the Penal Code.

III. Affirming presumptive liability

Following the Penal Code on crimes of state security, the framers of the law hold defendants liable for any deaths that result from their act, even in the absence of an intent to kill, and mandate the death penalty for such cases. This flagrantly ignores one of the most important rules of criminal law, which requires a direct causal relationship between the act committed and the consequence ensuing from it. The legislator has thereby disregarded the Court of Cassation's holding that murder requires an intent to take life and has instead adopted the concept of possible consequences of the crime, as is clear in Articles 16, 17, 22, 23, 24, 25, 26, and 27.

4- Case no. 49/17JY, session of 15 June 1996.

IV. Deviating from general norms for the exceptional

Article 5 of the law prescribes the same penalty for an attempted crime and a completed crime, which represents a departure from the general rules governing the Penal Code that hold that if the offender begins to implement the crime and fails to complete it through no cause of his own, it is considered an attempt. Attempt, in turn, calls for a lesser penalty in view of maintaining the proportionality of the penalty to the crime and the harm to the victim.

Article 6 prescribes the same penalty for incitement to a terrorist crime and the crime itself, regardless of whether the incitement is public or non-public or the crime is committed as a result of the incitement or not. Criminalizing incitement if it results in a criminal act is in principle consistent with the Penal Code, which considers the inciter to be a partner to the criminal offender. But insofar as the law makes inciters subject to the penalty for the completed terrorist crime, even if the incitement has no consequence, it directly contravenes provisions of the Penal Code and SCC rulings. For example, if a person incites another to commit a terrorist crime and the other person does not respond, the inciter is subject to the penalty for the completed crime. Since he has no opportunity to desist from the crime, he may continue to incite others or commit the crime himself. This provision therefore creates an indirect incentive to commit crimes, as often overly punitive measures have the opposite of their intended effect. This provision should be amended such that the inciter is subject to no penalty as long as the incitement results in no criminal acts. At the very least, if incitement to certain crimes is criminalized, the penalty should be less than that for completed crimes if the crime does not occur.

In practice, the provision allows a person to accuse another of incitement to a terrorist crime and prove it with false testimony, which opens the door to abuses.

With Article 30, the law revives Article 48 of the Penal Code, which was declared unconstitutional. The provision mandates life imprisonment or at least seven years imprisonment for any person who participates in a criminal conspiracy to commit a terrorist crime; the sentence is life imprisonment if the offender is an inciter to the conspiracy. A close look at the article reveals that the penalty is incurred simply for agreeing, whether the agreed-upon crime is committed or not—the criminalized act here is participation in a criminal conspiracy, not participation in the commission of the agreed-upon crime. When the SCC declared Article 48 of the Penal Code unconstitutional, it ruled that criminal agreement in and of itself was not punishable because the crime has no material element and because an agreement does not rise to the level of attempt, which is punishable by law. The SCC said in its ruling:

"The constitution indicates that every crime has a material element without which there is no foundation for it, constituted in an act or the omission of an act in violation of a penal statute. It therefore declares that what criminal law rests on, starting from its restrictions and prohibitions, is the materiality of the act perpetrated, whether by commission or omission. This is because the crux of the associations regulated by this law in the application of the provisions are acts themselves, in their external bearings, concrete manifestations, and material features. They are thus the object and the grounds for criminalization. They are what can be conceivably proven or denied, and they are the basis on which crimes are distinguished from one another. They are what the subject-matter court deliberates in rational fashion for the purposes of evaluation and the assessment of an appropriate penalty. It is therefore inconceivable under the provisions of the constitution that a crime may exist in the absence of its material element, or that evidence may brought proving causation between the criminalized material act and its consequences in isolation from the fact of this act and its substance. A corollary of this is that every manifest expression of human will, not the intentions that the human being harbors in his depths, falls within the realm of criminalization whenever it reflects an objective conduct punishable by law. If the matter is not related to acts created by the will of the perpetrator and expressed objectively in material, observable form, there is no crime."[5]

In addition, Article 34 of the law carries a sentence of one to three years in prison for any act of preparation or readiness. Aside from the fact that this provision conflicts with Penal Code norms, which do not punish preparation for a crime, the law has already set forth criminal conspiracy as a separate crime, as noted above, although it is an act prior to preparation. The penalty thus makes no sense. Under Article 30, anyone who participates in a criminal conspiracy to commit a terrorist crime, whether felony or misdemeanor, is subject to life imprisonment or at least seven years in prison, although some of these completed crimes carry a sentence that is less that that. This means that it is better for the defendant to carry out the crime rather than simply agree to do so, which the law seems not to have considered. Overall, these provisions defy reason, logic, and the principle of proportionality of punishment and encourage a potential offender to carry out the agree-upon crime. The SCC has ruled, "Since the objective of criminal penalties is to specifically punish the offender for what he has done and to deter others who may commit the crime by encouraging them to refrain from doing so, and since paragraph 4 of Article 48 prescribes the same penalty for the commission of a felony or misdemeanor and for simply agreeing to commit it, even if it is not actually committed, it thereby achieves no general or special deterrence. In fact, it may encourage conspirators to commit the crime under agreement as long as simply agreeing to commit it will lead to the same punishment as actually committing it." This is precisely what we face with the new law.

5- SCC ruling in case no. 114/21JY, published in the Official Gazette no. 24, July 14, 2001.

V. Criminalizing non-dangerous acts and undermining the right to know and freedom of information and freedom of opinion and expression

The law enumerates several ill-defined acts and criminalizes them, although they constitute no criminal danger that requires punishment. These include the promotion or re-promotion of ideas and beliefs, directly or indirectly, on the grounds that they advocate acts of violence or the commission of a terrorist crime, as in Article 28. The penalty is greater if these ideas are promoted among police or the armed forces or in houses of worship. Given the importance of international communications networks in spreading ideas, Article 29 addresses this point in particular.

Article 35 on the publication of information that contradicts official data released by the Ministry of Defense no longer carries a prison sentence as it did in the first draft of the law, limiting the penalty to a fine of no less than LE200,000. Nevertheless, the article still establishes the Defense Ministry's monopoly on information and the truth, while also not requiring it to release information, especially given the lack of an information law, which constitutes an obstacle to the citizen's right to knowledge. Moreover, although the law stipulates a fine, offenders could nevertheless face incarceration if they are unable to pay the fine. Article 511 of the Code of Criminal Procedure allows a jail sentence of no more than three months if fines are not paid, which again raises the specter of the imprisonment of journalists. In any case, the heavy fines could entail the closure of the newspaper or media outlet, since the second paragraph of the article states, "The legal person shall be jointly liable for court-imposed fines or compensation." This is further an infringement of the principle of personal liability for the crime. Though joint liability is permissible in civil compensation, it does not apply to criminal penalties, in which the person who commits the crime is solely responsible under the principle of individual punishment.

Paragraph 2 of Article 35 essentially reproduces Article 195 of the Penal Code—declared unconstitutional by the SCC—which established the liability of the editor-in-chief for crimes committed through an article in the paper and thus punishes him as a principal for crimes committed via the newspaper. In the aforementioned ruling, the SCC concluded that the "presumption of the defendant's innocence and the protection of personal freedom from every transgression against it are two principles upheld by the constitution in Articles 41 and 67. The legislative authority therefore may take no action that infringes them, particularly by usurping the prerogative granted to the judicial authority to determine whether a crime exists with the constituent elements defined by the legislator, including criminal intent if that is a requirement. Yet, the statute under appeal pre-

sumes that a newspaper editor's permission to publish conveys his certain knowledge of the material contained in the article in all its details and that its content is a punishable crime which the editor intended to commit and whose consequence he intended to achieve. In so doing, it establishes a legal presumption in which this permission supplants criminal intent, which is an element of an intentional crime that cannot be replaced." [6]

This provision also contravenes Article 70 of the constitution, which upholds freedom of the press. The constitution thus empowers expressive capacity, such that it flows freely and uninterrupted. No restraints may be placed on it, but will be considered an assault on its mission that may undermine it.[7]

Finally, Article 36 of the law prohibits the publication or dissemination of court proceedings except with the permission of the head of the competent court, which is a restriction on the public nature of trials. The head of the court circuit may thus issue an order banning the publication or dissemination of court proceedings without a statutory basis.

VI. Special protections for law enforcement that may entail immunity

Article 8 of the law exempts law-enforcement personnel from criminal liability for the use of force in the performance of their duties and in defense of lives and property. While the article states that the use of force must be proportionate to the danger, Article 61 of the Penal Code already establishes an exception for criminal liability in cases of legitimate self-defense, meaning there is no need to restate this principle in the counterterrorism law. In light of this, we believe that the reaffirmation is tantamount to giving law enforcement a green light to use lethal violence while guaranteeing they will not be held criminally accountable.

Article 31 establishes further protections for law-enforcement personnel by criminalizing the collection of information about them with the purpose of threatening them, inflicting harm, or assaulting them or their families in any way. Although the motive for this article may be understandable—to prevent more assassinations of officers working in terrorist crimes—among the information gathering criminalized by the article is that

6- The SCC added, "It is further established that the rule in a crime is that its penalty be borne only by the person who was convicted as responsible for it, and the severity of this penalty must be weighed against the nature of the crime in question. The meaning is that a person bears only his own bad acts, that only the offenders are punished for the fault of the crime, and that only the perpetrator receives its penalty. The individuality of the penalty and its appropriateness to the crime in question are linked to the person who is legally responsible for committing it. As such, the individuality of the penalty—upheld in Article 66 of the constitution—presumes personal criminal liability. Further confirming their inseparability is that a person is not responsible for a crime and is not punished except as a principal or accessory to it. The foregoing expresses criminal justice in its genuine meaning and reflects some of its most progressive aspects."

7-(SCC Appeal 59/18JY, session of 1 February 1997, Technical Office 8, part 1, page 286).

which harms the interests of law-enforcement personnel's place of work. This may be used to guarantee that law enforcement are not prosecuted or that reports of abuses by law enforcement are not published insofar as such information would harm the interests of their employer.

Article 54 of the law is notable for guaranteeing compensation for police and army personnel harmed as a result of a terrorist crime while disregarding the need to compensate all persons harmed, including civilians, as stipulated in the constitution in Article 237. The law makes the same omission when designating public monies to indemnify law-enforcement personnel against losses in terrorist crimes, to the exclusion of other persons.

Although the law grants far-reaching authorities to the investigating and police bodies, it does not mandate any obligations for them or include guarantees for the sound application of the law and observance of its provisions, nor does it specify penalties for the abuse of authority or its use to curtail the rights and liberties of citizens. For example, the law specifies no penalty for the abuse of the right to hold individuals without evidence or to spy on them for unspecified periods of time without evidence or grounds. In addition, the law sets forth no sanctions for an official who issues an official statement that includes erroneous information, although it punishes those who publish news that contradicts these statements.

VII. Arbitrary arrest of citizens under the guise of "holding"

The importance of criminal procedures is that they offer guarantees to protect the private life of individuals, as well as guarantees for individual liberty, fair trials, and the presumption of innocence. Any violation of a provision of the Code of Criminal Procedure therefore undermines the guarantees that all suspects and defendants ostensibly enjoy. This is why the second section of the counterterrorism law is so significant, because it introduces new procedural rules that undermine guarantees for criminal justice and the right to a fair trial.

The first article of this section, Article 40, is a catastrophe: it tramples personal freedom and liberties, flagrantly contravenes Articles 54 of the 2014 constitution, and obviously manipulates language in order to circumvent the SCC ruling on the unconstitutionality of arbitrary arrest. The article allows the arrest of a person not caught in a criminal act and without a court order from the judicial authorities, while trying to evade established law by calling this arrest a "holding." The phrase "holding procedures" appears in Article 35 of the Code of Criminal Procedure, which states, "In cases other than in flagrante delicto, if there is sufficient evidence to charge a person with the commission of felony or misdemeanor theft, fraud, aggravated assault, or resisting the public authorities with force and violence, the judicial police official may take holding procedures and immediately ask the Public Prosecution to issue an arrest warrant." But this article does not define precisely what it

means by holding procedures, in contrast to arrest, which is defined as the interdiction of the suspect's freedom by curtailing his right to move. As such, the procedures intended by the legislator in Article 35 of the Code of Criminal Procedure do not go beyond evidence-gathering powers granted to police officials, taken to prevent the suspect from fleeing and to preserve evidence of the crime. Although these may include some restriction of the suspect's freedom, they cannot exceed the degree of total interdiction of freedom in the way that arrest does. An example would be preventing the suspect from fleeing until an arrest warrant can be obtained from the Public Prosecution. These are thus prerogatives defined by their purposes, which is holding the suspect in custody for the time it takes to present the files to the Public Prosecution and obtain an arrest warrant. In turn, it is equivalent to a police procedure conducted when police personnel capture a suspect in the act of a crime, no more and no less.

Articles subsequent to Article 40 of the law confirm our fears, establishing the authority of the police official to take the statement of the person in holding, present him with the report to the Public Prosecutor, and place him in legally designated holding areas. This plain meaning of "holding" in these provisions is that it is a restriction of the suspect's freedom and freedom of movement. In other words, it is an arrest. The Public Prosecution also has the right to extend the holding period to seven days and to obtain a search warrant for the domicile of the person in holding.

The holding period could last for eight days, during which time the suspect can be denied contact with family and a lawyer. The new law allows the temporary suspension of these constitutional rights, set forth in Article 54 of the 2014 constitution, when the judicial police official deems them "prejudicial to the interests of evidence gathering." This is a clear violation of the right to consult a lawyer and the right of defense, and it impedes lawyers' constitutional and legal role. The article must therefore be amended to require the judicial police official to enable the person in holding to contact a lawyer unconditionally.

VIII. Applying an undeclared state of emergency

The constitution continues to be subverted in provisions of the law that permit the president to declare a state of emergency under the guise of countering the dangers of terrorist crimes or environmental disasters for a six-month period, renewable indefinitely with the approval of a parliamentary majority under Article 53. The intent to circumvent the constitution is clear in the language of Article 51, which grants the president the powers to issue a decree taking all appropriate measures to preserve public security and order, including the evacuation or isolation of certain areas or the setting of curfews in them. The final paragraph of the article

allows him to take these measures pursuant to oral orders, provided they are put down in writing within eight days—all language taken verbatim from the last paragraph of Article 3 of the emergency law.

This provision is a flagrant violation of Article 154 of the constitution, which allows the president to declare an emergency for a period of no more than three months, renewable only once with the approval of a parliamentary majority. Moreover, the constitution did not authorize the president to take such exceptional measures, and thus the statute cannot deviate from the higher law by affirming these exceptional prerogatives.

In conclusion, CIHRS and EIPR reiterate that current security, legislative, and judicial policies amplify acts of political vengeance and terrorism rather than contain them; they are part of the problem, not the solution to the ever-growing cancer of political retribution and terrorism. We affirm that these practices themselves constitute a flagrant assault on citizens' rights and liberties, first and foremost the right to life and freedom of conscience, belief, and expression. We deeply believe that exercising these liberties in an open, democratic climate, and under the rule of law is the primary guarantee against the spread of these violent practices and their intellectual underpinnings.