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مركز القاهرة لدراسات حقوق الإنسان

CIHRS legal comment on the proposed terrorist entities law

Five reasons to reject the bill among them its loose definition of terror and its confiscation of political rights and liberties

On November 26, 2014, the Cabinet, led by Prime Minister Ibrahim Mehleb, approved a bill on terrorist entities drafted and endorsed by the Legislative Reform Committee, led by the prime minister, on November 24.

The Cairo Institute for Human Rights Studies believes that the proposed law, referred to the president for confirmation and promulgation, constitutes an assault on the constitution and the rulings of the Supreme Constitutional Court (SCC) and breaches Egypt's international obligations under conventions it has ratified. The CIHRS is wary of government claims that the law will support the state's counterterrorism efforts and stresses that if the state wishes to pass a law on terrorist entities it must do so without sacrificing the constitution and while ensuring that the law meets international standards.

The CIHRS realizes the catastrophic magnitude of the near daily terrorist attacks in North Sinai and various governorates, but sees that the government is using its war on terror and its associated law as a means to silence independent voices and political opposition.

The CIHRS thus urges the Legislative Reform Committee—which was formed by the president to review laws for their compliance with the constitution and propose new laws to realize its intent—to stop proposing laws that constitute an assault on the constitution and SCC rulings and to turn to its primary mandate to review laws to ensure compliance with the constitution and for submission to the parliament, the body with original jurisdiction over legislation.

CIHRS urges the president to withhold approval of the draft law on terrorist entities in light of the following reasons:

- The bill uses a definition of terrorist entities that is even broader than the definition of terrorism set forth in Article 86 of the Egyptian Penal Code, despite our concerns about the latter. It uses vague, overly broad legal terms that will allow it to become a means to suppress dissident voices, political opponents, and advocates of reform and change in civil society. This contravenes the constitution and SCC rulings that dictate that penal statutes should be narrowly and clearly defined to prevent their abuse or misapplication.
- Under the proposed law, any group may be included on the list of terrorist entities and subject to arbitrary penalties and sanctions simply for advocating by any means, even peaceful, for the suspension of a certain law or calling for a peaceful demonstration to change a government law or regulation.

- The bill does not make inclusion on the list conditional on the commission of a specific, clear crime under the law. It is enough that the prosecution bring charges and that the competent court circuit issues a provisional decree. The terrorist designation and the subsequent prejudicial penalties last for a renewable term of three years, pending a final court judgment declaring the entity to be a terrorist entity or removing it from the designated list.
- The bill could be used to dissolve political parties and deny political opponents their political rights and their participation in elections for a period of up to three years in the absence of a final court ruling, simply for their affiliation with what might be declared a terrorist entity by a provisional decree. This contravenes Article 2 of the law on the exercise of political rights, which states that citizens can only be denied their right to political participation by a final court judgment.

The 11-article bill endangers citizens' remaining rights and freedoms and what is left of the dignity of the constitution. It uses vague, unspecific terms to define terrorist entities, thus making legitimate, peaceful entities such as opposition parties, independent unions, and rights organizations potentially subject to inclusion on the designated terrorist list. The definitions are also broader than the definition of terrorism used in Article 86 of the Penal Code, which has been the object of international criticism and reservations by rights groups due to its ill-defined nature. The result is that the bill could equate a terrorist group like ISIS with a youth group or opposition party that only engages in peaceful action.

In the following pages, the CIHRS explains in detail the grounds for the rejection of the bill and reiterates its call not to ratify the bill.

I. Uses vague, broad terms and expands the definition of terrorist entities beyond the definition of terrorism found in Article 86 of the Egyptian Penal Code

Article 1 of the proposed law defines terrorist entities as “any association, organization, group, or gang that practices or whose purpose is advocating by any means infringing the public order, or endangering the safety of society, its interests, or its security, or harming individuals, terrorizing them, or endangering their lives, liberties, rights, or security, or harming national unity, or harming the environment, natural resources, antiquities, communications, or terrestrial, aerial, or maritime transport, or assets, buildings, or public or private property, or their occupation and seizure, or public utilities, or preventing or impeding the operation of public authorities, judicial bodies or authorities, government works, municipal units, houses of worship, hospitals, institutions and institutes of learning, diplomatic or consular missions, or international organizations and agencies in Egypt, or preventing them executing some or all of their activities, or resisting them, or obstructing public and private transportation or preventing or impeding its movement or endangering it by any means, or harming national unity or social peace, or impeding the application of the provisions of the constitution, laws, or regulations, whenever force, violence, threat, or intimidation is used with the goal of achieving or carrying out its purposes.”

As is clear from this definition, the bill uses vague, overly broad terms and expands the definition of terrorist entities. In fact, the definition of terrorist entities here is broader than that used to define terrorism in Article 86 of the Penal Code, which is also a source of concern due to its imprecision and lack of compliance with international standards.¹ Under

¹ “...an act, in order to be classified as terrorist, must have been:

(a) Committed against members of the general population, or segments of it, with the intention of causing death or serious bodily injury, or the taking of hostages;

(b) Committed for the purpose of provoking a state of terror, intimidating a population, or compelling a Government or international organization to do or abstain from doing any act;

the Penal Code, terrorist acts are limited to those that involve the use of force, violence, or intimidation with the objective of executing a criminal enterprise. The definition of terrorist entities in the proposed law expands this definition, allowing an entity to be designated as terrorist simply for “advocating by any means,” which includes peaceful means of expression.

The broad terms used to designate terrorist entities are wholly disproportionate to the severity of the charge of terrorism. How should we interpret phrases such as “infringing the public order,” “harming national unity,” “the safety of society or its security,” “harming individuals,” and “harming the environment”? How can it be proved that a particular activity harmed the safety of society or damaged the social peace, or that the purpose of establishing a particular organization or group is to harm the environment, natural resources, antiquities, assets, buildings, public or private property? All of these flawed terms will be interpreted differently depending on who possesses the power of interpretation, without reference to a clear legal standard, insofar as these terms are relative and not easily pinned down in a concrete meaning.

The bill’s explanatory memorandum does not clarify or define these terms, which constitute the moral element of the crime of terrorism—that is, the criminal objective desired by the entity or its affiliated members—instead simply repeating the definition without further elaboration.

This article also contravenes the most important principle of criminal justice, the principle of the legality of the offense and punishment, which is enshrined by the Egyptian constitution amended in January 2014. Article 95 of the charter states, “There is no crime or punishment except by statute.” This principle means that individuals can only be punished for crimes that are defined by law and only with the legally prescribed penalties, given the severity of criminal sanctions, which may include the deprivation of liberty for life or even execution and the denial of the right to life. Hence, individuals must have knowledge of criminal offenses and their penalties in order to avoid such acts. In interpreting this principle, the SCC concluded that it is not enough for there to be a statute criminalizing an act and setting forth a penalty; in addition, the statute must be clear, specific, and unambiguous, because statutes that include vague terms such as “the public order” cannot be easily defined with any specificity. The interpretation of such phrases is thus subject to the discretion of the authorities, which may use them to undermine rights and liberties. Moreover, vagueness in penal statutes precludes the judiciary from applying strict, definitive rules that unambiguously define the elements of each crime and determine its penalty.²

According to one of the SCC rulings, the meaning of a penal statute must not:

...be concealed from the people by their disagreement over its content, the scope of its application, and its real aims. Such a statute does not unequivocally define the proscribed acts but rather obscures them and makes them unintelligible. As such, its application rests on personal norms that may be tinged with subjective inclinations. The reference for these standards is left to the discretion of those applying the law, to determine the truth of its content and substitute their personal understanding of its intent for the law’s intent, which they often exceed, whether by twisting or distorting it, to harm innocents. More specifically, the ambiguity of the penal statute precludes

(c) Correspond to all elements of a serious crime as defined by the law.”

For more details see UN document A/HRC/13/37/Add.2., Oct. 2009, report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G09/167/93/PDF/G0916793.pdf?OpenElement>.

² Judgment 183/31JY, session of Apr. 1, 2012.

the subject-matter court from applying strict, definitive rules defining the elements of each crime and passing sentence without confusion. These are rules that cannot be abridged and they represent the inviolable framework for its work. In addition, ambiguity in the penal text carries social dangers that should not be discounted, for citizens may be confused about the scope of criminalization, leading them to suspect that [a certain act] is criminalized even if the law in its general meaning permits it. In fact, the contemporary, comparative trend on penal statutes confirms that the harm resulting from their ambiguity is not only in obscuring the acts they proscribe, but has a more dangerous, pronounced effect in application. Namely, they lack the minimum foundations necessary to contain them within their limits, which, as a general rule, prevents law enforcement from giving free rein to their own whims or misperceptions.³

II. Permits the erosion of the right of association and peaceful assembly

Due to the imprecision of the terms of the bill, as discussed above, the CIHRS fears that the vague definition of a terrorist entity will be used prejudicially against civil society organizations, groups that engage with public affairs, political parties, trade unions, or youth movements. Article 1 of the bill describes a terrorist entity as any association, organization, group, or gang that advocates by any means for the obstruction of the provisions of the constitution, laws, or regulations or harms national unity.

Remarkably, the phrase “advocating by any means” is not qualified by the use of armed force or violence. The phrase is left unconditional, meaning it covers peaceful means as well, such as statements or reports, or a call for a peaceful assembly to bring pressure for the suspension or amendment of a certain law. Under this definition, numerous human rights organizations that, for example, advocate for the repeal of the protest law could be designated as terrorist entities, insofar as they advocate by any means for the obstruction of the provisions of the constitution and law (Article 1 of the bill).

In addition, demonstrations organized by political groups demanding policy changes or urging against the adoption of a law or statute because they view it as repressive could be considered preventing or impeding the operation of a state authority, thus entailing inclusion on the designated terrorist list.

To take a flagrant example, if the bill was law when the No Military Trials group organized a demonstration in front of the Shura Council to protest the inclusion of a constitutional provision allowing civilians to be tried in military courts, the group could have been classed as a terrorist entity under the law, and this designation would apply to all members of the group, even those who did not take part in the demonstration or rejected it.

The bill’s conception of terrorist entities also includes a phrase likely to curtail the freedom of peaceful expression—namely, “obstructing public and private transportation or preventing or impeding its movement.” This could apply to nearly every demonstration, which may obstruct or impede traffic. Should the organizing group and its members be designated terrorists for obstructing traffic, even if they did not intend to do so?

The article also confiscates the right of individuals and organizations to exercise their right to peacefully protest laws or regulations using various public forums and platforms for peaceful expression, including peaceful protest, writing or the expression of opinion in traditional or digital media, and social media outreach or direct outreach. By using the term “advocating by any means” at the outset of Article 1, the bill establishes an unqualified generalization.

³ SCC, appeal 105/12 JY, session of Feb. 12, 1994, technical bureau 6, pt. 1, p. 154.

III. Designating terrorist entities by provisional decree rather than judicial ruling

Under Articles 2, 3, and 5 of the bill, the Public Prosecution and the competent circuit of the Cairo Court of Appeals may place entities and persons on the designated terrorist list, along with other individuals or entities who provide them with information or support in any form. This requires no criminal ruling substantiating the accuracy of the designation, although Article 2 of the bill does use the term “ruling.” This raises a question: is this a ruling or a provisional decree?

A judicial ruling is “a decision issued on the substance of the suit by a body entrusted by law with the authority to adjudicate disputes.”⁴ A ruling thus assumes that some dispute put before the courts has been adjudicated. In contrast, there is a type of ruling or provisional decree by which is meant “a remedy for a temporary condition that requires swift action pending the adjudication of the substance of the suit.”

The difference between a judicial ruling and a provisional decree is that the court that issues the latter may amend it at any time.⁵ In contrast, a judicial ruling severs the court’s relationship to the case as soon as it is issued, leaving the court no authority to revoke or amend it.

This reading is confirmed by Article 4 of the bill, which states, “Inclusion on the list of terrorist entities shall not exceed a period of three years. If this period elapses without the issuance of a final ruling substantiating the criminal description set forth in Article 1 of this law against the designated entity, the Public Prosecution must again appear before the circuit defined in Article 3 of this law for consideration of the perpetuation of the designation for another term. Otherwise, the entity shall be considered to have been dropped from the list by the force of law starting on the date the term elapses.”

If this were a judicial ruling that designated an entity or persons affiliated with it as terrorists for committing terrorist crimes, why is inclusion on the list limited to a three-year term? Did the framers of the statute choose this period hoping that members of terrorist entities would forswear their actions under criminal sanctions? Definitely not, for the Code of Criminal Procedure defines how criminal convicts can have their convictions expunged and themselves exonerated.⁶

The designation of entities or individuals as terrorists for three years is onerous and contravenes best practices for designated terrorist lists, which require “the effect of an individual or entity’s inclusion on the list and all subsequent sanctions to automatically expire after 12 months have elapsed, provided it has not been extended.”⁷

Further evidence that the “ruling” referred to in the bill is a provisional decree comes in Article 7, which permits appeals of the designation decree for either of the two lists set forth in the law in front of any criminal circuit at the Court of Cassation as determined by the court’s general assembly on an annual basis. The appeal must be filed within 60 days of the publication of the decree, and the circuit must consider it within seven days of submission.

If this were a judicial ruling, why does the deadline start from the date of the decree’s publication in the Official Gazette rather than the date the ruling was issued, as is the norm in the Egyptian legal system? Under the Code of Trial Procedure and the Code of Criminal

⁴ Mohammed Labib Shanab and Osama Abu al-Hassan Megahed, *Muhadarat fi qanun al-ithbat*, 2001, p. 180.

⁵ It is established that the court that issued provisional rulings may revoke them at any time, for it is not bound by them. *Ibid.*, p. 181.

⁶ Article 552 of the Code of Criminal Procedure states, “Exoneration shall entail the expunging of the conviction in the future and the termination of all consequences including lack of competence, the denial of rights, and other criminal effects.”

⁷ Report of the special rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Dec. 22, 2011, best practices in designated terrorist lists, p. 23.

Procedure, appeals may be filed starting on the following day the judgment is pronounced. Neither of these two codes specifies a different date, except in the case of judgments issued in absentia.⁸ And under no circumstances can we believe that the framers of the bill believed that the persons or entities in question or their representative would necessarily not be present during trial sessions.

Having examined the distinctions between a ruling and a provisional decree, we must take special note of the problematic aspects of the latter. A provisional decree is issued based on a prima facie examination of the case files, evidence, and charges brought by the Public Prosecution against the entity or persons; it is not based on a close examination of the charges and permits no defense. This is because a provisional decree or ruling applies to mutable facts and circumstances but does not adjudicate the veracity of the claims. This is demonstrated by the fact that what is today considered a terrorist entity may change tomorrow after the issuance of a final verdict in the competent criminal court, or if the court circuit named in Article 3 of the bill rules that the designation of terrorist entity is inapplicable.

How can an entity be placed on a designated terrorist list pursuant to a provisional decree, liable to revision, without an investigation or defense? If we assume for the sake of argument that there is a process to challenge the decree before the criminal circuit of the Court of Cassation, as set forth in Article 7, nevertheless we must note that the criminal circuit is not bound by any deadline in settling this petition. This is the conclusion to be drawn from Article 4 of the bill, which states that if the criminal circuit does not adjudicate the petition within three years, the Public Prosecution must again appear before the competent circuit of the Cairo Court of Appeals.

In any case, the decree of inclusion on the terrorist list cannot be issued by the Public Prosecution or the competent circuit given the lack of specific criteria for inclusion, especially in light of the ambiguity of Article 1 of the bill. This makes judges themselves prey to public opinion, compelled to apply a poorly drafted, ill-defined law.

IV. Punishment without a crime

The bill does not make inclusion on the designated terrorist lists conditional on the commission of a crime by the designated entities or individuals; charges, even poorly supported ones, are sufficient for inclusion.

Article 4 of the bill states, “Inclusion on the list of terrorist entities shall be for a period not to exceed three years.” This means that the competent circuit of the Court of Appeals has the right to designate an entity as a terrorist organization for up to three years and, subsequently, enact all the prejudicial sanctions set forth in Article 9 of the bill, in addition to destroying the reputation of the entity, without even proving that the entity committed the vague acts criminalized in Article 1 of the bill. Moreover, the prosecution alone has the right to ask the competent court to extend the designation for an additional term, after it examines the entity’s practices for criminalized acts (three years after the application of sanctions). If the prosecution does not request an extension, the name of the entity shall be dropped from the designated terrorist list after three years and it will become a lawful entity.

⁸ The Court of Cassation has ruled, “The meaning of Article 213 of the Code of Trial Procedure is that the law, while setting the date of appeal of judgments to start from the date of pronouncement as a general rule, has excepted from this rule judgments not pronounced in presence under Article 83 of the Code of Trial Procedure and judgments whose proceedings and measures the legislator assumes the convicted person will have no knowledge of. Both of these types of judgments are subject to the rule that dictates that the date of appeal begins from the date the judgment is promulgated. Cases whose proceedings and measures the legislator assumes the convicted person will have no knowledge of include those in which sessions have been interrupted for any reason and it is proven that the convicted person was not present for any session subsequent to the interruption, even if he was present in the period preceding this.” Appeal 1005/46JY, session of Dec. 11, 1979, technical bureau 30, pt. 3, p. 224.

V. Arbitrary effects: additional sanctions await designated entities

Article 9 of the bill enumerates several arbitrary, prejudicial consequences of a decree for inclusion on the designated terrorist entity lists. It states:

The publication of a designation decree in the Official Gazette shall entail the following consequences: the dissolution of the terrorist entity and the suspension of its activities; the closure of its dedicated locations; the prohibition of its meetings and individuals' participation in any of them in any way; the prohibition of financing, the collection of funds, or similar for this entity, whether directly or indirectly; the freezing of the properties and assets owned by it or its members or those by which individuals contribute to financing or supporting the activities of these entities; the prohibition of joining, advocating joining, or promoting it or raising its slogans; the loss of a record of good conduct and repute; and the temporary denial of the exercise of political rights. These consequences shall endure for the entire term of the designation.

The CIHRS is troubled by these prejudicial measures, especially since some of them require by law the issuance of a final judicial ruling, not a provisional decree, among them the denial of political rights.

So, for example, under the proposed law, a political party could be dissolved and its members denied the exercise of their political rights, including the right to vote, if the party is designated a terrorist entity based on charges brought by the Public Prosecution and the issuance of a provisional decree by the competent circuit of the appellate court.

This is flagrantly incompatible with existing statutes still in force. For example, Law 40/1977 on political parties defines specific rules for the dissolution of political parties, which, according to Article 17,⁹ include the issuance of a judgment from the first circuit of the Administrative Court, based on a request of the chair of the political parties committee and the approval of committee members. Another flagrant violation is the denial of political rights. Article 2 of the law on the exercise of political rights enumerates the grounds for denial of political rights, among them the issuance of a definitive or final court judgment.¹⁰ That is, the judgment must stand after all avenues of appeal have been exhausted. In contrast,

⁹ Amended by Law 12/2011.

¹⁰ Article 2 of Law 45/2014 on the issuance of a law regulating the exercise of political rights states: The following categories shall be temporarily denied the exercise of political rights:

First:

1. A person placed under guardianship, for the term of his guardianship.
2. A person afflicted with a psychological or mental disorder for the period of his involuntary commitment in a psychological health facility in accordance with the provisions of the law on the care of psychiatric patients, issued with Law 71/2009.

Second:

1. Any person against whom a definitive judgment has been issued for the commission of the crime of tax evasion or the commission of the crime set forth in Article 132 of the income tax law, issued with Law 91/2005
2. Any person against whom a final judgment has been issued for the commission of one of the crimes set forth in Law 344/1952 on the corruption of political life.
3. Any person against whom a final judgment has been issued by the Court of Values for the confiscation of his assets.
4. Any person against whom a final judgment has been issued terminating or supporting his termination from service in the government, the public sector, or the public business sector, for the commission of a crime of breach of trust or honor.
5. Any person against whom a final judgment has been issued for the commission of a crime of insolvency by fraud or dereliction.
6. Any person convicted by final judgment of a felony.
7. Any person against whom a final judgment has been issued sentencing him to a liberty-depriving penalty for the commission of a crime set forth in Section 7 of this law.
8. Any person against whom a final judgment has been issued sentencing him to a jail term:
 - a. For the commission of a crime of theft, concealing stolen property, fraud, breach of trust, bribery, forgery, using forged documents, perjury, suborning testimony, or a crime to evade military or national service.
 - b. For the commission of a crime set forth in Chapter 4 of Book 2 on embezzlement or infringement of public assets or breach of faith, or in Chapter 4 of Book 3 of the Penal Code on rape and the corruption of morals.

The denial shall persist for a term of five years from the date of the judgment enumerated in the foregoing paragraphs.

The denial shall not apply if the person is exonerated or the sentence is suspended by judicial ruling.

the bill on terrorist entities requires merely a provisional decree—not a final judgment—from the competent circuit of the Cairo Court of Appeals to deny these rights.

Finally, we describe these measures as prejudicial because the publication of a terrorist designation decree in the Official Gazette will necessarily have irremediable consequences, first and foremost the dissolution of the entity. What if, after the executive authority dissolves the entity, the criminal circuit finds that the terrorist designation does not apply? Are the state authorities obligated to reinstate the entity to its preexisting status?

Conclusion

The CIHRS notes that the state has already designated several existing organizations as terrorist entities, such as Ansar Beit al-Maqdis, but this has not put an end to repeated terrorist operations, the most recent being the crime at the Karam al-Qawadis checkpoint in Sinai on October 24, in which 33 members of the armed forces were killed. This has renewed fears that the bill was drafted solely as a means to evade responsibility for the ongoing failure of the security apparatus to confront terrorist attacks and protect citizens, police and military personnel, and senior officials in the capital, major cities, and Sinai. The bill presumes that there is a statutory loophole preventing the apprehension and prosecution of offenders, although successive governments since 1981 to the present have all enacted statutory amendments or adopted new repressive legislation to counter terrorism to little positive effect.

The CIHRS urges the president not to ratify the law, but to wait for the parliament to ensure a detailed discussion and review of the bill.