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Eyal Pascovich

School of Political Sciences, University of Haifa, 199 Abba Khoushy ave., Mount Carmel, Haifa 3498838, Israel

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Not above the law: Shin Bet’s (Israel Security Agency) democratization and legalization process

Eyal Pascovich*

School of Political Sciences, University of Haifa, 199 Abba Khoushy ave., Mount Carmel, Haifa 3498838, Israel

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Shin Bet – Israel’s internal security agency – has been active for many years in the gray areas of the law. This reality originated from the clandestine nature of Shin Bet and its missions, primarily the war against terror. However, scandals that erupted in the 1980s, in which Shin Bet high-ranking officials have knowingly broke the law and in fact placed themselves above it, have compelled the agency in particular and Israeli law and justice authorities in general to implement a fundamental revision in the legal status of Shin Bet, its regulation, and the definition of its authorities. Following this revision, a better balance has been achieved between national security needs and the values of the democracy. This article describes the democratization and legalization process Shin Bet has undergone since its foundation and the existing regulatory mechanisms aimed at ensuring that Shin Bet’s activity is executed according to law and fits Israel’s democratic values.

Keywords: Shin Bet; Israel; intelligence and security services; accountability and surveillance; law and legislation; interrogations of terror suspects; Bus Line 300 Affair; the Nafso Affair

Our motto is to act in favor of the state, subject to the law, and no less – out of total loyalty to the values of the rule of law and democracy (Yuval Diskin, former Shin Bet Director, 2005–2011).

Introduction

Israel Security Agency (ISA), commonly known as Shabak or Shin Bet, is responsible, first and foremost, for ‘foiling and preventing illegal activities aimed at harming homeland security, the order in the democratic regime or its institutions’.

Of the three main Israeli Intelligence apparatuses – AMAN (Military Intelligence), MOSSAD (Foreign Intelligence), and Shin Bet (Internal Intelligence) – the latter is the one most exposed to the inherent tension that exists in democracies between national security needs and democratic values. This tension stems, first and foremost, from the nature of Shin Bet’s missions, with special emphasis on combating terrorism, and from the

*Email: eyalkudu@gmail.com

1Yuval Diskin, “Challenges for the Israel Security Agency,” in Masterpiece: An Inside Look at Sixty Years of Israeli Intelligence, ed. Amos Gilboa and Ephraim Lapid (Ramat Hasharon and Tel Aviv: The Israel Intelligence Heritage & Commemoration Center and Yedioth Ahronoth–Chemed books, 2008), 23 (Hebrew).

fact that it operates internally (within Israel and the Palestinian Territories). In the words of former Shin Bet Director, Yaakov Perry:

Shin Bet directly touches and deals with issues that concern us all, the citizens of the State of Israel, on a daily and hourly basis and touches personal interest areas of each one of us, our political views, the debates and the differences of opinion at the heart of the Israeli society and the different way each one of us perceives our future in Israel.⁴

Since its establishment, shortly after the State of Israel received its independence in 1948, Shin Bet has made a long way in adapting itself to the democratic nature of the State and in finding the proper balance between national security needs and the values of the democracy. This article will elaborate on the democratization and legalization process Shin Bet has undergone in the past 66 years.

**Early years**

Shin Bet’s first Director, Isser Harel,⁵ was fully aware of the sensitivity surrounding the activity of a security service operating within the framework of a democracy, as stated in his retrospective book ‘National Security and Democracy’:

> A democratic state would risk its existence and way of life if it does not maintain effective security services. But it would also risk its democratic essence if it does not find the proper way to endow these services with its democratic values and if it does not insist on their implementation.

Internal security is essential, but also involves risks. It may be compared to a sharp and hazardous tool – a surgeon’s knife. When used in a proper, reliable and responsible way – it may be considered a lifesaver. But when used improperly, irresponsibly or needlessly – it may be lethal. Security may also be compared to a shovel – when used by an experienced and responsible hand, it uproots bad weeds; but when used by an inexperienced and irresponsible hand, it might chop off the very plants one is growing.⁶

Despite the aforementioned, in the name of defending the newly born State of Israel which, at the time, was still struggling for its existence, Shin Bet was active during its formative years in the gray areas of the law. Thus, Israel’s first Prime Minister, David Ben-Gurion, and his governing political party Mapai had used Shin Bet for the execution of several controversial missions, such as assisting the police in preventing disruption of public order by socioeconomic or political protesters.⁶ Another example for this misuse

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³The Israeli Intelligence Community – Where to? A Balance of Fifty Years of Activity’ – Leaders and Intelligence (Ben-Gurion University and The Israel Heritage & Commemoration Center, 1998), 18 (Hebrew).
⁴Isser Harel (1912–2003) served as the first Shin Bet Director (1948–1952) and the second MOSSAD Director (1952–1963, while simultaneously serving also as the Supervisor of Security Services – the only one in Israel who ever served in this position – thus continuing de facto to oversee Shin Bet’s activity). See his biography: Michael Bar-Zoahr, Spies in the Promised Land: Isser Harel and the Israeli Secret Service, trans. from French by Monroe Stearns (Boston, MA: Houghton Mifflin, 1972).
⁵Isser Harel, Security and Democracy (Tel Aviv: Edanim Publishers/Yedioth Ahronoth, 1989), 34 (Hebrew).
was presented when Member of the Knesset (Israeli parliament) Meir Ya’ari, a left-wing political opponent of Ben-Gurion and Mapai, found a bugging device in 1953 that had been concealed under his office desk by Shin Bet agents.\(^7\)

Another sensitive field of activity was Shin Bet’s surveillance on Israeli Arab citizens, who were placed after the establishment of the State of Israel under a military administration. The latter, which was completely abolished only in 1966, severely abused Israeli Arabs’ civil rights such as the freedom of movement and employment. As part of Shin Bet’s activity in this field, the agency monitored Arab school teachers (and teaching candidates), their political views, and ‘loyalty to the state’.\(^8\)

During its first decade of activity, Shin Bet has been active under complete secrecy and without any actual regulation, neither public nor other. Shin Bet’s existence has been denied by the government, and the censorship prohibited the press from even mentioning its name. This restriction led the left-wing oppositional magazine, ‘HaOlam HaZeh’, Hebrew for ‘This World’, to simply refer to Shin Bet as ‘the apparatus of darkness’. In light of this magazine’s heavy criticism on Ben-Gurion, his political party, and the State’s security apparatuses, Shin Bet even established a competing magazine, called Rimon. Officially, the authorities argued that ‘This World’ magazine was sexually provocative and might corrupt the Israeli youth, and indeed, Shin Bet’s magazine, Rimon, appeared to be less provocative, but politically rather than sexually.\(^9\)

In 1957, the existence of Shin Bet was made known to the public,\(^10\) and at that time, it seemed that both the State and Shin Bet had overcome their ‘birth pangs’. Under the leadership of Amos Manor, Shin Bet’s third Director (1953–1963), the agency ceased all its politically affiliated activities. However, most of Shin Bet’s activities still remained clandestine, as entailed, perhaps, by the nature of its roles. In the absence of a law to regulate its activities, Shin Bet has acted throughout the years by force of the general authority of the government and its decisions, which often remained clandestine. With the development of public and legal awareness for citizens’ rights and human rights and the legislation of laws for the protection of these rights, Shin Bet’s authority has been partially outlined within the framework of these laws, such as the 1979 Wiretapping Law and the 1981 Protection of Privacy Law.\(^11\)

These two laws marked the first step in the process of subjecting Shin Bet activity to Israeli law. Of the two, the Wiretapping Law merits a special attention, since until its

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\(^7\)Aviva Halamish, *Meir Yaari: The Rebbe from Merhavia – The State Years*, vol. 2 (Tel Aviv: Am Oved, 2013), 80–1 (Hebrew). Isser Harel claimed that Yaari’s pro-Communist political party, MAPAM, had been acting illegally while risking Israeli national security secrets; see Harel, *Security and Democracy*, 207–12.


\(^9\)Uri Avnery, *Optimistic* (Tel Aviv: Miskal – Yedioth Ahronoth Books and Chemed Books, 2014), 381–7 (Hebrew). Avnery, a prominent left-wing activist and owner and editor of ‘HaOlam HaZeh’ magazine (published until 1993), claimed that Isser Harel had advised Ben-Gurion to arrest him, without a trial, accusing Avnery of being a Soviet agent. This recommendation has not been realized only due to the objection of Menachem Begin, then head of the Israeli political opposition. See Ibid., 418.

\(^10\)Prime Minister Ben-Gurion was the one who publically exposed Shin Bet’s existence in his speech to the Knesset in June 1957, stating that it is ‘one of our most successful [security] services, of which any government, regardless of its political affiliation, would be proud’ (as quoted in the Israeli newspaper Haaretz on 20 June 1957).

\(^11\)The Protection of Privacy Law permits Shin Bet to infringe on a person’s privacy ‘only if done reasonably and as part of its missions’; see *The Protection of Privacy Law – 1981*, clause 19-b (Hebrew), [http://www.nevo.co.il/law_html/Law01/087_001.htm](http://www.nevo.co.il/law_html/Law01/087_001.htm) (accessed June 3, 2014).
legislation in 1979 Shin Bet was free to conduct wiretapping with almost no limitation or supervision. The law states that:

A minister is allowed to authorize in writing a wiretapping [on an Israeli citizen], [only] if he was asked to do so, in writing, by a head of a security service and if he was convinced, after considering also the extent of privacy infringement, that this act is necessary for reasons of national security.

The Wiretapping Law and the Protection of Privacy Law – combined with a few other laws, such as the 1979 Emergency Powers (Detention) Law – symbolized the efforts made by the then new Likud government, headed by Prime Minister Menachem Begin, to tighten the regulation over the Israeli security and intelligence community.

However, two scandals that erupted in the 1980s have indicated on a lack of efficient regulatory and control systems on Shin Bet’s activity and on the fact that the agency perceived itself as being above the law. In the name of homeland security, Shin Bet’s high-ranking officials have taken the law into their own hands. The public exposure of their acts severely harmed the faith Israeli citizens have entrusted in Shin Bet and its methods of action.

**Bus Line 300 Affair**

The first scandal, known as Bus Line 300 Affair or the Shin Bet Affair, began on 12 April 1984, when four Palestinian terrorists hijacked an Israeli bus line 300 which departed from Tel Aviv southbound. During the military takeover operation, two of the terrorists were killed, while the remaining two were captured alive. After the terrorists have been handed over, on site, from the military to the custody of Shin Bet, they were executed by Shin Bet agents – headed by then Chief of Operations Division, Ehud Yatom – most likely following a direct order from then Shin Bet Director, Avraham Shalom.

The public was informed that all four terrorists had found their death during the takeover operation. However, a few days later, an Israeli newspaper published – based on foreign sources and without receiving the censorship’s authorization – a different version, followed by a photograph that clearly showed that at least one terrorist had been captured alive.

The committee of inquiry that was appointed by the Minister of Defense for the investigation of this affair – the Zorea committee – had no chance to reveal the truth: Shin Bet’s high-ranking officials knowingly lied before the committee in order to protect their

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15Brigadier General (Res.) Ephraim Lapid (former senior AMAN officer), in discussion with the author, September 2014. Lapid emphasized that both Shin Bet – headed by then Director Avraham Ahituv (1974–1980) – and AMAN were involved in the staff work that preceded the legislation of these laws.
16The newspaper, Hadashot (Hebrew for ‘News’), was shut down by the censorship – in an unprecedented act – on 28 April 1984 for a period of 4 days following the newspaper’s deviation from the censorship’s regulations on the affair’s media coverage.
own skins and, in their view, also to protect their agency, while trying to falsely put the blame on a high-ranking IDF (Israel Defense Forces) officer who also had contact with the captured terrorists that night. Moreover, these officials were fed with confidential information that was deliberately leaked from the committee’s discussions by one of its members – another high-ranking Shin Bet official, Yossi Ginosar. For obvious reasons, it was Shin Bet Director Shalom who insisted on the appointment of a representative from the agency in this committee.

A subsequent committee of inquiry, the Blatman Committee, has also failed in its mission due to Shin Bet’s disruption of proceedings. Shalom’s conspiracy would have probably been successful if not for three other high-ranking Shin Bet officials who united in order to reveal the whole story before the Attorney General, Yitzhak Zamir, and the deputy State Attorney. It should be noted that the two Israeli Prime Ministers who rotationally served during the affair’s period, heading a national unity government – Yitzhak Shamir (1983 to September 1984) and Shimon Peres (1984–1986) – were aware of the whole story and shared the efforts to bury it. In a last-minute attempt, they even dismissed Attorney General Zamir in light of his insistence on launching a police investigation against the involved Shin Bet seniors.

Retrospectively, Zamir explained his firm approach as follows:

> If we permit the Prime Minister, the Shin Bet Director or any other civil servant to act against the law or to approve such an act only because he feels that this act is required for the public’s sake, we will be found placing him above the parliament. This can undermine the foundations of democracy and, with time, put human rights at risk. This is particularly relevant to Shin Bet or to any other type of secret police in light of the tremendous power and clandestine nature characterizing such organizations.\(^{17}\)

Zamir added that ‘there is no real contradiction between the rule of law and national security. The claim that national security may necessitate breaking the law is inadmissible’.\(^{18}\) Perhaps surprisingly, Zamir’s substitute in office, Yosef Harish, who was appointed by Peres and Shamir specifically for burying the affair, appeared to be sharing Zamir’s approach as well.

After all efforts had failed, Israeli President, Chaim Herzog, has issued in June 1986 – in an unprecedented act – a blanket pardon to Shin Bet Director, Avraham Shalom, and to other high-ranking Shin Bet officials, including Yatom and Ginosar, even before the beginning of their trial. Herzog explained his controversial decision by claiming that a public trial would severely harm Shin Bet and Israeli national security.\(^{19}\) Shalom himself was forced to resign, while continuing to assert that everything he had done was with the knowledge and permission of the Israeli Prime Minister.\(^{20}\) This accusation was completely

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18 Ibid., 54.

19 President Herzog’s willingness to end this affair with such a controversial act was probably affected by his Intelligence background as two-time AMAN Director (1948–1950, 1959–1962).

20 Shalom claimed that he and Shamir shared the same rational behind killing – in some cases – of terrorists who have been captured alive: ‘I did not want them [the terrorists captured in Bus Line 300 Affair] to stay alive … I did not want to have more living terrorists in courts. It would have strengthened terrorism … Therefore, I thought that the mission needed to be completed. I did not have partners for this [idea] except for Prime Minister Shamir. He was a full partner. I was acting according to his instructions. It was him who had given me an authorization [in principal] to kill them, already a year before’. See Dror Moreh, The Gatekeepers (Tel-Aviv: Miskal–Yedioth Ahronoth Books and Chemed Books, 2014), 38–9 (Hebrew).
rejected by Prime Minister Shamir, as well as the accusation that Shamir and Peres have been trying to protect not only Shin Bet but mainly themselves, for knowing and permitting alleged similar past incidences of executing captured terrorists and lying before judicial courts.

While some criticism was leveled at Shamir and Peres, as well as at President Herzog, for preferring national security interests over democratic values and the rule of law, Supreme Court Judge Miriam Ben-Porat, who set on the High Court of Justice’s panel that approved the legality of the aforementioned rare and controversial President’s blanket pardon, wrote the following in her decision:

Indeed, as much as the deviation from the legal norm is slighter it is better, and it is preferable to reach the optimal position where the law and defending national security co-exist. Nevertheless, as judges, who live within our people, we must not be unrealistic, and the current case [the Shin Bet affair and the President’s blanket pardon] is proof! This situation is embarrassing as well as unwanted. [However], there are, obviously, cases in which the State’s leaders, who bear responsibility for its existence and security, refer to some deviations from the rule of law for the sake of defending national security as an unavoidable necessity.

Ironically, the three high-ranking Shin Bet officials, who brought about the exposure of the whole affair, were treated as traitors and were forced to leave the agency, while at the same time, most of the seniors who were involved in the killing of the terrorists or the cover-up attempts that followed did continue to serve in Shin Bet after all, thus contributing to the continuation of the unrest inside the agency for a few more years.

The Nafso Affair and the Landoy Commission

In a second scandal that erupted in the 1980s – The Nafso Affair – Shin Bet officials have used improper interrogation methods, including torture, to obtain – under duress – a confession from Izat Nafso, an IDF officer and a member of the Israeli Circassian Muslim minority, who was accused of espionage for a terror organization.

21Carmi Gilon, Shin Bet Director in the mid-1990s, noted that as a lesson learned in this context, a new regulation has been established, according to which Israeli Prime Ministers and Shin Bet Directors cannot meet tête-à-tête anymore. Retrospectively, Gilon indicated that the Shin Bet affair shaped his worldview: ‘When I was serving in high-ranking command positions, the affair was always present somewhere in the back of my mind, even if I wasn’t consciously thinking about it. Once and again I reminded myself that acting without supervision is forbidden, that covering-up is both forbidden and impossible’. See Gilon, Shin Bet between the Schisms, 374.

22See for instance the following book, which firmly attacks both Peres and Shamir, as well as the Israeli President’s blanket pardon: Moshe Negbi, Above the Law: The Constitutional Crisis in Israel (Tel Aviv: Am Oved Publishers, 1987), 9–24, 117–26 (Hebrew).

23Miriam Ben-Porat, Through the Robe (Jerusalem: Keter Books, 2005), 163 (Hebrew). A few years after this ruling, judge Ben-Porat actually issued a very critical report on Shin Bet’s infringement on the democratic values (see note 31 later).

24Ehud Yatom retired from Shin Bet in the mid-1990s only. His attempt to be appointed chief of the Knesset Guard in 1998 was blocked by the Attorney General in light of Yatom’s involvement in the Line 300 Affair. The same reason brought the High Court of Justice to cancel his appointment to the head of the Counter-Terrorism Bureau in 2001, but did not prevent him from being elected as a Knesset Member in 2003. And Yossi Ginosar’s appointment as the Director General of the Ministry of Construction and Housing in 1993, 5 years after he left Shin Bet, was also canceled by the High Court of Justice. Nevertheless, Ginosar served later on as a special liaison to then Chairman of the Palestinian Authority Yasser Arafat on behalf of three Israeli Prime Ministers.
Nafso was arrested in January 1980 and was interrogated, day and night, by Shin Bet. Nafso’s interrogators, headed by Yossi Ginosar – who would play, a few years later, a leading role in the Shin Bet Affair – used violent interrogation measures against Nafso, including ‘shaking’ and beating, insulting, threatening, and depriving him of sleep. After 2 weeks of tortures, Nafso broke down and preferred to admit on the alleged crimes. Based on his admission, as well as on the interrogators’ affidavits and testimonies, Nafso was convicted of treason, espionage, and aiding the enemy during wartime by a special military court. The military judges rejected Nafso’s claim that he had been tortured by Shin Bet agents and sentenced him to 18 years in prison. His appeal to the supreme military court was rejected as well.\(^\text{25}\)

The military censorship prohibited the press from publishing any details on the affair or the trial. However, during Nafso’s prison term, details of the Shin Bet Affair were published, including the accusations against Ginosar. Nafso, who saw Ginosar’s photograph in a newspaper, identified him as the chief interrogator in his case. Utilizing a new regulation that instated the Israeli Supreme Court as the ultimate appellate jurisdiction over military courts too, Nafso appealed again, but this time to the Supreme Court. Concurrently, an internal Shin Bet investigation has uncovered the improper acts of his interrogators.

Consequently, the Military Advocate General and Nafso’s lawyer have agreed, in mid-1987, on a plea bargain, according to which Nafso was acquitted of most of the charges against him and was immediately freed from prison. Later on, Nafso has reached another compromise with the authorities, according to which he was granted a handsome monetary compensation in return for his promise to keep silent about his affair.

As a result of the Nafso Affair – and indirectly also in light of the Shin Bet Affair – the Israeli government appointed a National Commission of Inquiry into the methods of investigation of Shin Bet regarding hostile terrorist activity. This commission, headed by judge Moshe Landoy, former President of the Israeli Supreme Court, has found that the use of ‘physical pressure’ in interrogations, accompanied by perjury on behalf of Shin Bet agents in courts, did not characterize only the above-exposed affairs, but rather had become a norm inside the agency.\(^\text{26}\)

The commission concluded, in October 1987, the following:

The emerging picture … is a sad and regretful one: Shin Bet, that has made a highly important contribution for defending Israel’s national security and has accomplished many important achievements in this field, has gravely failed in permitting itself to systematically and continuously break the law by consenting, approving and even encouraging perjury in courts. Shin Bet’s leadership has failed to understand that no national security goal, as important and essential as it may be, could place the agency above the law. It did not understand that it was entrusted with a vital task that may justify the means, but not all means, and most certainly not perjury.\(^\text{27}\)

The commission indicated, ‘with relief, that this faulty norm has now completely ceased to exist’.\(^\text{28}\)

\(^\text{26}\) Ibid., 7.
\(^\text{27}\) Ibid., 34.
\(^\text{28}\) Ibid.
On the matter of Shin Bet’s interrogation methods, the Landoy Commission completely rejected the approach, according to which security services should be above the law for the success of the war against terror. However, the commission was convinced that ‘an effective interrogation of terror suspects is not possible without using methods of pressure … which are permitted by the law’, as was interpreted by the commission’s members. Furthermore, the commission added that ‘these methods should be primarily limited to a non-violent psychological pressure of an intensive and continuous interrogation and to the use of trickery, including deception’. But if none of these achieves the goal, the commission did permit the use of ‘moderate level of physical pressure’. Elaboration on the restrictions of this permission was detailed in a secret appendix to the commission’s report, which has never been made public.29

Yaakov Perry, who served as Shin Bet Deputy Director when the Landoy Commission’s report was issued, wrote the following retrospectively:

The Landoy Commission’s conclusions have had the utmost significance. It was the first time ever that a high-ranking level – a National Commission of Inquiry – has validated the distinction between a police investigation aimed at obtaining [legal] evidences and a [Shin Bet] intelligence investigation aimed at preventing acts of terror … The government has adopted the commission’s conclusions in full. As a result, Shin Bet’s activity [actually] did not become easier, however, a clear line has been drawn between the unregulated past and a new reality – regulated and subject to binding rules. The commission’s guidelines enabled us to establish an internal set of authorities and permissions that unequivocally binds all interrogators in all levels.30

Nevertheless, Shin Bet has very rapidly relapsed, mainly due to the violent uprising that erupted in December 1987 in the Palestinian Territories, the Intifada; as stated in a secret report issued in 1995 by then Israeli State Comptroller, Miriam Ben-Porat:31

In Shin Bet’s interrogation facility in Gaza, deviations from the Landoy Commission’s rulings and Shin Bet’s regulations have been continued, and on a large scale. Some deviations have been found also in other facilities. These deviations did not stem, for the most part, from not knowing the line between the permissible and the forbidden, but rather were committed with full awareness … Even after the Landoy Commission’s report was published, the phenomenon of lying has not been uprooted from among the interrogators: Some of them lied when testifying before judicial courts or other investigating committees, while others lied on their reports to their supervisors or to others inside Shin Bet itself …32

It was only the Israeli High Court of Justice that finally prohibited Shin Bet from using ‘physical pressure’ in interrogations of terror suspects, excluding ‘ticking time bomb’ scenarios, as will be detailed in the following.

29Ibid., 69–72.
30Yaakov Perry, Strike First (Tel-Aviv: Keshet, 1999), 145 (Hebrew).
31It was the same Ben-Porat, who just a few years earlier, following the Shin Bet Affair, actually displayed sympathy toward the approach, according to which deviations from the rule of law for reasons of national security are sometimes an unavoidable necessity.
The High Court of Justice’s ruling and the Shin Bet Law

Since the rise of the Palestinian terrorism following the 1967 Six-Day War, fighting terrorism has become Shin Bet’s most important mission. Interrogations appeared to be the most effective tool for this goal, but also the one most prone to external legal and moral criticism. Human rights organizations have been scrutinizing Shin Bet’s activities in this field and have published numerous reports over the years and, even more frequently during the late 1980s and the 1990s, claiming that Shin Bet continued to systematically deviate from the Landoy Commission’s guidelines.33

These allegations, which were supported by the 1995 State Comptroller’s report, were reinforced by a few incidences of severe injuries and even deaths of Palestinian interrogates in Shin Bet custody. Following the death of a Hamas activist, Abd Al-Samad Harizat, during an interrogation in April 1995 – as a rare result of an adult being ‘shaken’ – a bitter debate has erupted between then Israeli Attorney General Michael Ben-Yair and Shin Bet Director Carmi Gilon, as it has been retrospectively described by the latter:

Shin Bet is coping with terrorists of the most despicable kind, and the only way to deal with them is by use of clandestine measures. In this kind of situations, a balance has to be found between security needs and the law. Security is not the most important thing, nor is the law. However, Ben-Yair maintained that the law and human rights are above all, and by saying that he ignored the reality, that desperately needed balances … I fought strongly for putting Harizat’s interrogator on disciplinary rather than criminal proceedings.34

Human rights organization, such as The Association for Civil Rights in Israel and The Public Committee against Torture in Israel, have submitted, during the 1990s, several petitions to the Israeli High Court of Justice, asking it to completely prohibit Shin Bet from using any type of physical pressure in its interrogations. The judges did as much as they could to postpone their ruling on this sensitive issue, perhaps hoping that the Knesset will precede them and finally legislate – after years of preparations, as will be detailed later – a law that will regulate Shin Bet.

Nevertheless, Israeli politicians chose not to deal with this ‘hot potato’; therefore, the High Court of Justice was forced to make a decision, and finally ruled in 1999, that ‘Shin Bet does not have the authority to “shake” a person, hold him in the “Shabach” position,35 force him into a “frog crouch” position and deprive him of sleep in a manner other than what is inherently required by the interrogation’.36 The only exception that was ruled is a ‘ticking time bomb’ scenario that may justify – retrospectively only – using methods of


35An interrogate held in a Shabach position sits on a small and low chair whose seat is tilted forward and downward. His Hands are handcuffed behind his back in an unnatural, contorted way so that they have to support his weight. His head is covered with a hood that reaches down to his shoulders, and loud music is being played in the room.

‘physical pressure’ and may exempt the interrogators from being accused of a criminal offence. By ruling this, the High Court of Justice further limited the permissions that had been previously outlined by the Landoy Commission.

The High Court of Justice also referred to the democratic dilemma it was faced with while ruling on the above, stating the following:

Making a decision on these petitions weighed heavily on this court … We are well aware of the harsh reality of terrorism in which we are, at times, immersed. The possibility that our decision will hamper the ability to properly cope with terrorists and terrorism is disconcerting us. Nevertheless, we are judges. We must instruct to act according to the law … This is the fate of democracy – it does not justify all the means, and cannot allow itself to follow the ways of its enemies. A democracy often fights with one hand tied behind its back. Nevertheless, the democracy prevails, since maintaining the rule of law and recognizing liberty rights constitute an essential component in how it perceives its national security. At the end of the day, they reinforce its spirit and strength and allow it to overcome the difficulties it is facing.

It is important to note that both the Landoy Commission and the State Comptroller, as well as the High Court of Justice, have not put the blame only on Shin Bet but also on the State of Israel itself or, more precisely, on the legislative and executive authorities, which have deliberately not regularized Shin Bet’s authorities within a framework of a law, and de facto left its agents legally exposed and unprotected. As stated by the High Court of Justice’s ruling:

The question whether it is appropriate for Israel – in light of its national security challenges – to permit measures of physical pressure in interrogations of terror suspects and what should be the scope of these measures, which deviate from ‘standard’ interrogation’s guidelines, has to be answered by the legislative authority, which represents the Israeli people. This is where the various considerations should be weighed. This is where the heated debate should take place. This is where the needed legislation can be made, provided, of course, that the law ‘befits the values of the State of Israel and [infringes on the interrogatee’s liberty] for a proper purpose and to an extent no greater than required’ (Article 8 of the Basic Law: Human Dignity and Liberty).

Perhaps somewhat surprisingly, this time the change came quite rapidly, with the legislation of the General Security Service Law, or the Shin Bet Law, by the Knesset in 2002, after years of preparations. The process of regulating Shin Bet’s authority and legal status has reached its peak with the legislation of this law, which defines Shin Bet’s status, roles,
and authorities and also regulates Shin Bet’s external and internal supervision. Thus, the law states the following:

Shin Bet shall operate in a stately manner; no mission shall be imposed on the Service for the promotion of party-political interests.\(^{41}\)

The Government shall appoint a Ministerial Committee for Shin Bet’s Affairs … Shin Bet Director shall report to the Ministerial Committee, from time to time and no less than every three months, on the activity of the Service …\(^{42}\)

The Sub-Committee for Intelligence and Secret Services of the Knesset’s Foreign Affairs and Defense Committee shall serve as the Knesset’s Service Affairs Committee for the purpose of this Law … Shin Bet Director shall report to the Committee from time to time … and special reports shall also be submitted to the Committee, upon its request …\(^{43}\)

The Prime Minister shall appoint, in consultation with Shin Bet Director, a Service Comptroller having the appropriate background and experience … Shin Bet Comptroller shall conduct internal auditing of the Service … and shall assist the Government and the Ministerial Committee in fulfilling their functions …\(^{44}\)

A Shin Bet employee or a person acting on behalf of the Service will not bear criminal or civil liability for any act or omission reasonably performed by him in good faith within the scope of his work and for the purpose of executing it …\(^{45}\)

Somewhat surprisingly, the Shin Bet Law does not specifically deal with the issue of interrogation of terror suspects, although this was, possibly, the main and initial reason behind this legislation process. The Knesset had preferred not to add or subtract from the 1999 High Court of Justice’s ruling, and this ruling is still keeping a tight leash on Shin Bet until today. The Knesset’s approach may be explained, among other things, by the bitter debate among the jurists, some of whom believed that Israel must not disgrace its statute book with a provision of law that permits torture, even if in exceptional cases only.

It should be noted that Shin Bet was fully involved in the legislation of its law. This appeared to be highly important, as described by former Shin Bet’s legal advisor, Arie Rotter (1999–2006):

The internal work [for preparing the bill] inside Shin Bet took no less than six years,\(^{46}\) not only because of the broad scope of the work and the burden of daily tasks and more urgent missions, but also because of the objective prerequisite that the essence and the spirit of the law, including its advantages and costs, would gradually develop in the hearts and minds of Shin Bet and its agents, in such a way that the law will be accepted out of profound understanding rather than out of constraint.\(^{47}\)

\(^{41}\) General Security Service Law, 2002, clause 7b.

\(^{42}\) Ibid., clauses 5a, 12a.

\(^{43}\) Ibid., clauses 6a, 12b.

\(^{44}\) Ibid., clauses 13a, 13c.

\(^{45}\) Ibid., clause 18.

\(^{46}\) The cooperation between Shin Bet and other authorities, mainly the Ministry of Justice, for the legislation of the Shin Bet Law has indeed begun in the mid-1990s; however, staff work within Shin Bet to process its needs for legislation had already begun in 1989.

\(^{47}\) Arie Rotter, *The Shin Bet Law – An Anatomy of Legislation: From the Intra-Organizational Processes to a Knesset Law – An Indication of the Perceptual Metamorphosis in the Relations between Law and Security in Israel* (Haifa and Tel Aviv: Chaikin Chair in Geostrategy at the University of Haifa and the National Security College Research Center, IDF, 2010), 90 (Hebrew).
Similarly to the aforementioned Service Comptroller, Shin Bet’s legal advisor and his department are another organizational mechanism that serves as an internal gatekeeper, whose mission is to ensure that Shin Bet’s activity is executed according to law.48 The legal advisor reports directly to the Attorney General, who serves as an external gatekeeper, together with the Israeli government and parliament.

Shin Bet’s legal department had already been established in 1973. Line 300 Affair was a critical milestone in its history, as described by Eli Bahar, who served as Shin Bet’s legal advisor between the years 2006 and 2011:

Shin Bet’s legal advisor and his deputy were deeply active and involved in the cover-up that followed the Line 300 Affair ... It was not because of a legal error in understanding what had occurred ... but rather because of the way they perceived their role – to protect Shin Bet’s secrets as an essential part of Israeli national security ... Shin Bet’s legal department has completely changed following the Line 300 Affair and the Landoy Commission.49

Thus, Shin Bet’s website states the following, symbolizing not only the process its legal department has undergone throughout the years but also the entire agency:

The core values of the legal department put emphasis on ensuring a proper balance between the public’s interest and national security needs on the one hand and human rights and civil rights on the other, while continuing to fulfill Shin Bet’s mission; on maintaining the legal discretion independent; and on credibility and transparency when representing Shin Bet’s activity before national and legal authorities.”50

Shin Bet in the 2000s

The Shin Bet Law, together with the High Court of Justice’s ruling, opened a new era for Shin Bet and its relationship with the legislature, the executive, and the judiciary. Shin Bet has learned how to operate in this new legal reality, while continuing to strive for fulfilling its missions,51 which have become even more challenging following the eruption of the al-Aqsa Intifada in the Palestinian Territories in September 2000. Palestinian terrorism has become more intense than ever, including several horrible suicide attacks in Israeli cities, and Shin Bet’s as well as IDF’s efforts to combat terrorism have reached another peak.

Precisely in this context, human rights organizations have argued that Shin Bet has continued to use physical interrogation methods even after the 1999 ruling, either by deceiving its gatekeepers or by predominantly using them as a fig leaf, that is, the new legislative and juridical reality simply legalized acts that had been formerly considered

48See in this context the following publication of former Shin Bet’s legal advisor: Arie Rotter, On the Mission and Concept of Roles of Gatekeepers in Intelligence Organizations: The Case of the Israeli Security Agency, National security Studies Series, no. 6 (Tel Aviv: Research Center, Israeli National Defense College, 2009).


51Ami Ayalon, who served as Shin Bet Director at the time of the High Court of Justice’s ruling, has indicated – in discussion with the author (September 2014) – that although Shin Bet did learn, with success, how to operate in the new legal reality, there is always a chance – the size of which neither Ayalon nor anyone else could assess – that in some cases Shin Bet could have succeeded better if it was able to continue interrogating terror suspects using the old methods. According to Ayalon, this is precisely the price Israel pays for being a democracy.
immoral or illegal. These allegations are based on numerous interviews human rights organizations have held with Palestinian detainees, as well as on their findings according to which, during a period of more than a decade after the High Court of Justice’s Ruling, the Attorney General has systematically disregarded hundreds of complaints of torture and ill-treatment submitted by Palestinian detainees. The Attorney General’s decisions — whose excuse was that these complaints were either incorrect or concerning ‘ticking time bomb’ scenarios — were based on the findings of inquiries conducted by the Officer in Charge of Shin Bet Interrogee Complaints (this function was part of the agency and traditionally manned by a Shin Bet senior/ex-senior; only in 2010, it was taken out of Shin Bet and transferred to the Ministry of Justice).

In his 1999 book ‘Strike First’, former Shin Bet Director Yaakov Perry has referred to the widespread allegations of Palestinian detainees, according to which they have been tortured by Shin Bet, by saying that ‘detainees have always used to systematically blame their interrogators for allegedly deviating from the proper interrogation regulations; some of them have done it to provide justification to their friends for the fact that they gave full confessions to their interrogators’.

However, in order to give a balanced picture, another quotation given by Perry on a different occasion should be brought here, according to which:

> Fighting terrorism using the tools of a democratic state is almost impossible … I think that on the whole, Israel should be given positive marks in this regard … It certainly wouldn’t be acceptable to many bleeding-heart liberals. But I think Israel has tried its best to do what it could. You can’t be a hypocrite and say ‘we do it only democratically, that is, only using democratic tools’.

Taking into account both the aforementioned allegations of human rights organizations and these two quotations by former Shin Bet Director Perry may give us a balanced point of view concerning the outcome of the democratization and legalization process Shin Bet has undergone throughout the years. On the one hand, this process is definitely quite impressive; on the other, there is always room for making more efforts for finding an even better balance between national security needs and those of the democracy. The tension between these two often-opposing forces is well familiar to Israel, as well as to almost every democratic state.

And indeed, one may find some similarities between the democratization and legalization process Shin Bet has undergone throughout the years, as well as the challenges, successes, and also the failures it has experienced, and between the history

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53 Perry, Strike First, 152.

and experience of security services in other democratic states. Nevertheless – as indicated by former Shin Bet Director Ami Ayalon (1996–2000)\(^{55}\) – an emphasis should be put on the uniqueness of the terror threat Israel has been facing, in terms of both its intensity and duration, which have turned it into a strategic threat. It is precisely this reality that makes the process Shin Bet has undergone throughout the years so impressive.

Shin Bet’s shift from a clandestine organization to an overt organization operating in covert yet regulated ways has spanned over a few decades. Shin Bet has learned a good deal of lessons from the serious affairs it was involved in during the 1980s, and it seems that in the beginning of the new millennium, its agents have finally assimilated not only the limits and limitations of the rule of law, but also its significance in a democratic regime.\(^{56}\)

Today, Shin Bet is much more regulated and supervised, at least theoretically, than it used to be. In addition to its external gatekeepers instituted by the Shin Bet Law, the Israeli Civil Service Commission has started to play a similar role in 2004 when it was awarded the authority to interrogate, submit complaints, and try – in the Civil Service Disciplinary Court – Shin Bet (and MOSSAD) employees who had committed various disciplinary offenses – like any other civil servants in Israel.\(^{57}\) Until then, such cases were usually handled by internal mechanisms, headed by the [Israeli] Intelligence Community Disciplinary Court.\(^{58}\)

Moreover, Shin Bet today is much more open to the public and the media, which serves as an external gatekeeper too. Nowadays, Shin Bet has its own spokesperson, as well as a website (in Hebrew, English and Arabic)\(^{59}\) that provides information about the agency and its history (including the aforementioned 1980s’ affairs), as well as monthly reports, surveys, and data on the Palestinian terror and on the other fields in which Shin Bet is active. And since 1996, Shin Bet Directors have become publicly known, following the censorship’s authorization to publish their full names (until then they were mentioned in the media only by the first letter of their given name).

Furthermore, in 2012, all living former Shin Bet Directors (Ya’akov Peri, Carmi Gillon, Ami Ayalon, Avi Dichter, and Yuval Diskin), as well as Avraham Shalom who passed away in 2014, have agreed to take part in an extraordinary Israeli documentary

\(^{55}\) Ami Ayalon (former Shin Bet Director), in discussion with the author, September 2014.

\(^{56}\) Ibid. In this discussion, the author held with Ami Ayalon, the latter emphasized the significance of the five core values of Shin Bet – Discretion, Circumspection, Integrity, and especially Allegiance (‘Shin Bet employees shall conduct themselves as loyal representatives of the State, serving the State impartially, according to the rule of law and with respect for the principles of the democratic governance’) and lastly Restraint of Power (‘Shin Bet employees shall exercise the authority vested in their hands for the performance of their duties in a measured and appropriate manner, with consideration of human rights and dignity’); see “Core Values of the Israel Security Agency [Shin Bet],” *Shin Bet’s Website*, [http://www.shabak.gov.il/english/about/pages/valuseen.aspx](http://www.shabak.gov.il/english/about/pages/valuseen.aspx) (accessed September 25, 2014).


\(^{58}\) The Intelligence Community Disciplinary Court is comprised of three judges: a district court judge, a MOSSAD head of department, and a Shin Bet head of department. While this court may still be assembled from time to time – mainly in exceptional cases, when confidential operational details may be at risk if exposed – there has been, in recent years, a marked decline in its standing. An elaboration on The Intelligence Community Disciplinary Court can be found in Shlomo Shpiro, “No Place to Hide: Intelligence and Civil Liberties in Israel,” *Cambridge Review of International Affairs* 19, no. 4 (December 2006): 637–9.

film, symbolically titled ‘The Gatekeepers’. 60 This documentary is based on in-depth filmed interviews of the aforementioned six Directors, in which they openly speak, at times with criticism, about the Israeli–Palestinian conflict, the war against terror, and the moral dilemmas they were facing on a daily basis during their service time. 61

The film, as well as the bitter debate it has awakened among the Israeli public and in the media, 62 illustrates well the sensitive fields in which Shin Bet is active and the inherent tension that exists, in democracies in general and in Israel in particular, between national security needs and the war against terror on the one hand and the democratic values on the other. As former Shin Bet Director Carmi Gilon expressed himself when interviewed for the film:

Indeed, Israel is a democracy. However, at the same time, we must understand that a democracy – and I quote here former Supreme Court President Aharon Barak – ‘is not a prescription for suicide’. He also established the phrase ‘a defensive democracy’. A democracy can [certainly] defend itself. 63

Indeed, former Supreme Court President Aharon Barak stated the following in his 2006 ruling that approved, with limitations, the legality of the Israeli government policy of targeted killing of Palestinian terrorists (a policy that has been executed by IDF with the intelligence assistance of Shin Bet):

The struggle against terrorism has turned our democracy into a ‘defensive democracy’ or a ‘militant democracy’. Nonetheless, we cannot allow this struggle to deny our State its democratic character. The question is not whether it is possible to defend ourselves against terrorism. Of course it is possible to do so, and at times, it is even a duty to do so. The question is how to respond. On this issue, a balance between security needs and individual rights is needed. This balancing casts a heavy load upon those whose job is to provide security. 64

Shin Bet, whose main job is indeed to provide security for the citizens of Israel, is in the heart of the daily effort to maintain this balance. Bearing in mind the long way this agency had undergone since its establishment, Shin Bet is in a good position to accomplish this

60Dror Moreh, director, The Gatekeepers, produced by Dror Moreh, Estelle Fialon, and Philippa Kowarsky (Culver City, CA: Sony Pictures Home Entertainment, 2013) (in Hebrew, English subtitles). The film, which has been nominated for a Best Documentary Oscar, was followed by a five-part television series and a book containing the full interviews with the six former Shin Bet Directors: Moreh, The Gatekeepers.

61Dror Moreh, The Gatekeepers’ director and producer, was inspired by the 2003 American Oscar-winning documentary film ‘The Fog of War’ that has been directed and produced by Errol Morris and was based on his interviews with former US Secretary of Defense, Robert S. McNamara. Moreh has indicated that while watching this film for the first time, he ‘was astonished when faced with the powerfulness of a first-hand account coming from the heart of hearts of American strategic decision making. I was amazed by the exposure of the way in which decisions that touch the fate of millions are being made’. See Moreh, The Gatekeepers, 9–10.

62A part of this debate surrounded the question whether it is appropriate for former Shin Bet Directors to criticize the political echelon and its policy, especially after they have avoided expressing the same criticism, at least publically, during their service time (however, at the same time, Yuval Diskin has been criticized for interviewing to the film while still in office).


mission as well. However, its internal and external gatekeepers are extremely important for ensuring that Shin Bet would not stumble again.

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Notes on contributor
Eyal Pascovich, PhD in Middle Eastern Studies from Bar-Ilan University in Israel, is an adjunct lecturer at the School of Political Sciences at the University of Haifa and the Security Studies Program at Tel Aviv University, Israel. Formerly, he served as an analyst officer in the Israel Defense Forces (IDF) Military Intelligence, a member of the Israeli Counter-Terrorism Bureau, and an advisor to the Israeli Prime Minister’s Office.