

# Fire and Advance

## The Promotion of Benzy Sau

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Benzy Sau is an officer in the Israel Police Force. He was the Border Police Northern Brigade commander, and during the first two days of October 2000, commanded Police and Border Police forces in Umm al-Fahem and Jatt village in the Triangle. At that time and place, four young Arab citizens of Israel were killed and dozens were wounded by live ammunition and rubber-coated steel bullets fired by police forces.

Sau testified before the Commission of Inquiry, chaired by Justice Theodore Or, which questioned him about the part he played in these events and his personal and command responsibility for what occurred, primarily the death of the four young men. Sau's testimony, as well as the testimony of the other police officers who were involved in those events, indicated that Sau, as the commander of the Police and Border Police forces, issued instructions to his forces to open fire. The testimony also revealed that Sau did not have basic knowledge about the Israel Police forces' Open-Fire regulations. Sau testified that he knew nothing about the circumstances surrounding the deaths of the four young men. The autopsies indicated injuries that were inconsistent with proper implementation of the Open-Fire regulations. The Commission's hearings further revealed that Sau, together with the commander of the Northern District, Alik Ron, ordered the use of snipers to disperse the demonstrations in Umm al-Fahem, in violation of the Open-Fire regulations. Also, it was Sau who ordered snipers to fire at one of the young men who was killed in Umm al-Fahem by a bullet to the head. It was also found that Sau ordered his forces in Umm al-Fahem to seize control of one of

the houses in a populated area. This action, which he took despite his superiors' opposition, created a substantial danger to people's lives. Moreover, Sau's testimony to the Commission contradicted in significant details many of the other testimonies that were given to the Commission. These contradictions laid a firm basis for questioning the truth of his testimony to the Commission.

Following the events of October 2000, Police Commissioner Shlomo Aharonishky requested the Minister of Internal Security, Prof. Shlomo Ben Ami, to promote Sau to the grade of brigadier general. The Minister denied the Police Commissioner's request. Several months later, in March 2001, Uzi Landau became the new Minister of Internal Security. The Police Commissioner resubmitted his request, this time to the new Minister, that Sau be promoted to brigadier general. The new Minister approved the request, and appointed Sau commander of Border Police forces in Jerusalem, with the rank of brigadier general.

The Committee of the Martyrs' Families, composed of the families of 13 Arab citizens of Israel who were killed during the October 2000 events, petitioned, together with Adalah, the Supreme Court (sitting as the High Court of Justice) against the Minister of Internal Security's decision to promote Sau in rank and position. The petition, filed by Hassan Jabareen, Advocate, requested the Supreme Court to order the Minister to explain why he does not suspend Sau until the Or Commission publishes its final conclusions or alternatively, why Sau's promotion to brigadier general should not be frozen until the publication of the Commission's final conclusions.

The Supreme Court held a very short hearing on the petition and did not issue an order to show cause (*order nisi*). The Court gave its judgment in one and a half lines [in Hebrew], as follows:

We read the petition and the Respondents' response. We heard the supplemental comments of the counsel for the Petitioners. We conclude that the petition does not provide grounds for the Court's intervention in the decision of the Respondents.<sup>1</sup>

Indeed? This is the question before us, and this article will critique the Supreme Court's decision, in part, by considering it in the context of the Court's decisions in similar cases.

The Supreme Court's very brief decision conceals more than it reveals. It does not face the arguments raised in the petition nor does it examine the petition in light of the Court's own prior judgments in comparable cases. Such a laconic decision makes the Court's work easier. At the same time, the decision creates problems for the litigants and their counsel as well as the commentators who seek to understand the grounds for the decision. The hearing was also extremely brief. The justices did not dedicate more than a few minutes to hearing arguments; as a result, it was impossible to learn anything from the comments usually made by the justices, when hearing petitions, because in this case, they were minimal.

Two other cases decided by the Supreme Court are relevant to *Sau*. In these cases, the petitioners opposed the appointment or promotion of civil servants, basing their challenge on the grounds of

breach of public trust as a result of the appointment or promotion. The first case, which involved the appointment of Yossi Ginossar as Director General of the Ministry of Construction and Housing, preceded *Sau*; the second, which involved the appointment of Ehud Yatom to head the War on Terror Office, was decided after *Sau*.

In *Ginossar*, the Supreme Court ruled that even though there exists no clear prohibition as to the power of public authorities to appoint or promote a candidate with a criminal past, nevertheless, "the criminal past of the candidate for a public position is a relevant consideration that the authority making the appointment may and must take into account before making the appointment."<sup>2</sup> The Supreme Court added:

The duty of the public authority to take into account the criminal past of the candidate when it appoints a person to a public position is derived from the status of the public authority. The public authority is a trustee of the public. It has nothing of its own. Everything it has is held in favor of the public.<sup>3</sup>

In the same matter, the Supreme Court also held:

The duty to take into account the criminal past of the candidate before making the appointment is derived from the public authority's status as trustee. The appointment of a public servant with a criminal past affects the functioning of the public authority and the attitude of the public toward it. It has direct and indirect ramifications on the public's trust in the public authority. The appointing authority must take these considerations into account.<sup>4</sup>

The Supreme Court added:

Public trust is the underlying foundation of public authorities and enables them to perform their functions. The appointment of a person with a criminal past - particularly a serious criminal record, such as when a person has committed a crime of moral turpitude - harms the vital interests of the public authority. It impedes the proper performance of its functions. It damages the moral and personal authority of the person holding the position and his ability to persuade and lead. It harms the trust that the general public gives to the governmental authorities.<sup>5</sup>

As noted, the Supreme Court nullified the appointment of Ginossar as Director General of the Ministry of Construction and Housing, after it had been approved twice by the government. On this point, the Supreme Court held:

Is it possible to establish trust between the citizen and the government when the government speaks to the citizen through the Respondent [Ginossar]. What is the social and ethical message that the government transmits to the citizen by its action, which the citizen will retransmit to the government?<sup>6</sup>

In its conclusion, the Supreme Court ruled as follows:

The appointment of the Respondent [Ginossar] to the position of Director General of a government ministry seriously damages civil service. It will almost certainly have a negative effect on the

functioning of the service. But most importantly, it gravely harms the public's trust in the public authority and in the civil service.<sup>7</sup>

In numerous cases decided long before *Ginossar*, the Supreme Court discussed the importance of public trust in government institutions. For example, in *Barzilai*, the Court ruled that:

Without trust, governmental institutions are unable to function. Such is the case regarding public trust in the courts... Such is the case regarding public trust in the other governmental institutions.<sup>8</sup>

In another case, the Court held that it is necessary to:

protect public administration from corruption, to ensure that it acts properly, on the one hand, and to safeguard the prestige that the public bestows on the public administration and the public trust regarding the proper manner in which it acts, on the other hand.<sup>9</sup>

Furthermore, the Supreme Court paid special attention to the public's trust in the state's policing authorities, which is relevant to the decision regarding Benzy Sau. In *Suissa*, the Court ruled that:

It should be noted that police officers are civil servants (in the broad meaning of the term). Like other civil servants, they too are public trustees. The ability of the police to perform their function depends on public trust, their integrity, fairness and reasonableness. Without trust between the police

officers and the community that they serve, the police would be unable to perform their tasks... Moreover, in light of the special function of police officers and their powers, in light of their exposure to the public and contacts with it, police officers must give special care to all details, whether minor or major, to attain the public's trust... Accordingly, it is necessary to ensure the appointment of the proper person to the position of police officer. This also is the basis of the logic in granting the power to dismiss a police officer even before he has been convicted by law, if the circumstances indicate that he is no longer suitable to perform his functions.<sup>10</sup>

In another case, then Chief Justice Meir Shamgar held that:

The police are charged with enforcing the law, and its actions are always subject to supervision and public criticism. Its image in the public's eyes is extremely important among all the factors that contribute to its success. One of the means to preserve its image is by ensuring that its forces do not contain persons with a tainted past.<sup>11</sup>

In *Yatom*, which was decided after *Sau*, the Supreme Court nullified Yatom's appointment as head of the War on Terror Office. The Court held that:

In his decision to appoint Yatom to the position of head of the War on Terror Office, the Prime Minister did not give proper weight to the grave offenses that Yatom committed in the Bus Line 300 affair, and to the connection between his offenses and the position intended for him.<sup>12</sup>

By adopting the principle established in *Ginossar*, the Court concluded that the appointment of Yatom would probably damage public trust in the governing authorities and in the rule of law.

In *Ginossar* and *Yatom*, Chief Justice Aharon Barak and Justice Yehoshua Matza stated the considerations that the authority making the appointment must examine and balance in formulating its decision whether to appoint a person who has committed a criminal offense. If the criteria established in these two judgments were applied in *Sau*, the Supreme Court should have intervened and nullified the appointment. In *Ginossar*, Chief Justice Barak held:

The criminal past of a candidate for a public position must be taken into account by the authority making the appointment. The weight of this consideration varies depending on the effect of the reasons lying at the foundation of the consideration of the particular factor. A person who committed a crime in his youth is not the same as one who committed a crime as an adult; nor is a person who committed one offense the same as a person who committed many; nor is a person who committed a petty offense the same as a person who committed a serious offense; nor is a person who committed an offense in mitigating circumstances the same as a person who committed an offense in aggravated circumstances; nor is a person who committed an offense and expressed regret for the action the same as a person who committed an offense and expressed no regret at all; nor is a person who committed a "technical" offense the same as a person who committed an offense involving moral turpitude; nor is a person

who committed an offense many years previously the same as a person who recently committed the offense...

Furthermore, the type of position that the civil servant is slated to fill affects the weight to be given to the criminal past. A junior position is not the same as a senior position, a position that does not entail contact with the public is not the same as a position in which there is such contact; a position that does not entail control, supervision, direction, and instruction of others is not the same as a position entailing command over others and responsibility for discipline; a person whose position is to be led is not the same as a person whose position is to lead...

Finally, the necessity that the specific candidate for the public position be the person to fill the position must also be taken into account. A candidate who is one of many is not the same as a single, unique candidate who alone is likely, under the specific and exceptional circumstances, to fill the position. Also, consideration must be given as to whether there is a real emergency situation that requires widespread recruitment, including those with a criminal past, or perhaps it is the normal activity of the public administration, in which case it should draw its sources from employees with integrity.<sup>13</sup>

Why then did the activist Supreme Court decide to issue a brief, laconic decision without giving reasons in *Sau*? Are there really no grounds for the Court to intervene, not even by issuing an order to show cause?

Argument can presumably be made that *Sau* was never convicted of a criminal offense, as put forward by the Legal Advisor to the Ministry of

Internal Security in her response to Adalah's petition, and that at the time of the petition, the Or Commission had not yet issued its 27 February 2002 letter of warning to *Sau*. However, a criminal conviction is not required to establish a person's criminal past. On this point, the Supreme Court held in *Ginossar* that:

For the purposes of appointment of a person, a criminal past is not to be considered identical to a criminal conviction. Our interest in this matter is the administrative decision of the government to appoint John Doe to a public position, and not the decision to impose on John Doe the punishment set by law. Punishment for a crime does not precede the conviction for the crime. Appointments are different. With them, it is relevant to examine the data and facts that were available to the administrative authority. If based on these data, a reasonable authority could have concluded that a criminal offense had been committed - that is sufficient to provide a foundation for "criminal past" for the purposes of determining the reasonableness of the appointment. Indeed, regarding the reasonableness of the decision of the governing authority making the appointment, the decisive factor is the commission of the criminal acts attributed to the candidate. A criminal conviction, of course, constitutes proper "proof," but the proof may be provided in other ways as well.<sup>14</sup>

The Supreme Court held that the applicable principle in such cases is the "administrative evidence rule." A governmental authority may base a finding on evidence that, taking the circumstances into account, is such that "a

reasonable person would consider it to have evidentiary value and would rely on it.”<sup>15</sup>

In *Sau*, there was administrative evidence of great weight regarding his involvement in illegal acts. Sau gave a written statement and testified before the Or Commission. His subordinates also testified before the Commission. They all testified to the grave acts committed by Sau, as described above. Their statements clearly indicate that Sau authorized the police officers under his command to open fire; that he lacked basic knowledge of the Open-Fire regulations; that he was involved in summoning and positioning snipers; that he ordered one of the snipers to fire at one of the young men (who was killed as a result of the sniper-fire); and that he ordered his forces to seize control of a house in a populated area, in violation of the instructions and orders of his direct superiors in the police. Sau’s acts and omissions reflected his flawed judgment, which endangered the public safety. In addition, his testimony to the Commission was ambiguous. He was evasive and his testimony contradicted the other testimonies and evidence in numerous significant details. He even contradicted himself, making statements and later stating the opposite. He retracted earlier statements, made statements and a few seconds later testified that he did not recall the very same things.

All of these facts readily lead to the conclusion that the petitioners met their burden of proof and provided administrative evidence that was sufficient to convince a reasonable person that Sau acted unlawfully, that the tragic killing of the four young men was the result of a chain of illegal acts, and that Sau, who was the commander at the

scene of the events at the relevant time, bore personal and command responsibility for the deaths. It should be noted that neither Ginossar nor Yatom had been convicted; they were granted a presidential pardon prior to prosecution. Nevertheless, in examining the question of appointments to public positions, the Court held that, in accordance with the administrative evidence rule, they had criminal pasts.

Others may argue that Sau’s acts were less serious than those committed by Yatom and Ginossar, and for this reason the Supreme Court decided not to intervene. However, this argument is not sufficiently persuasive to explain the Court’s decision. The acts of Yatom and Ginossar were indeed very serious, with Yatom’s acts being substantially more severe than those of Ginossar. Yatom, together with his subordinates, took two of the men who had abducted Bus 300 to an isolated spot. They struck the men in the head with rocks and a metal bar and killed them. Yatom also obstructed justice, committed perjury before the Zorea’ Commission, and directed his subordinates to commit perjury before the same commission. Yatom was assisted by Yossi Ginossar, who was a member of the Zorea’ Commission. Ginossar was aware of the secrets being kept by the General Security Service (GSS) and leaked information to the GSS from the commission’s hearings. The cooperation between Yatom and Ginossar and the false testimony given to the Zorea’ Commission obstructed its inquiry. In addition, Yatom repeated his lies when he testified before a committee headed by the Attorney General, who was appointed to investigate the circumstances surrounding the deaths of the two abductors of



Bus 300. In his application for a presidential pardon and after the Attorney General had filed a complaint with the police to investigate the matter, based on information that was presented to him, Yatom finally admitted his illegal acts.

The offenses committed by Ginossar and Yatom were indeed severe; however, the acts and omissions attributed to Sau were not insubstantial. Sau had direct responsibility, and certainly command responsibility, for the deaths of four citizens. He personally summoned snipers and gave the order to one of them to fire at one of the young men, causing his death. Sau's acts and omissions were not miniscule. They certainly exceed the minimal threshold necessary for the Supreme Court to intervene.

Moreover, based on any criteria that guided the Supreme Court in other cases for weighing the criminal past of a candidate for a position or for promotion, the Supreme Court should have intervened in *Sau*. Sau committed several criminal offenses and not just one; he was an adult and not a youth, when he committed them; the offenses were not minor offenses, but were very serious; Sau did not express regret for his acts, rather he contended that he had acted properly and tried to evade responsibility; and most importantly, the offenses did not take place in the distant past, but just a few months prior to his promotion.

The passage of time, which is generally an important consideration that should be taken into account, is grounds for strict scrutiny in *Sau*, compared with *Yatom* and *Ginossar*. The appointments in those two latter cases were made some seventeen years after Yatom committed his offense and about eight years later in Ginossar's

case. Furthermore, both Yatom and Ginossar were granted pardons. The two also contended that they had been promised that their advancement would not be impeded.

In addition, the criteria that the Supreme Court established regarding the type of position to which the candidate was to be appointed does not explain the Court's decision in *Sau*. Sau was appointed commander of Border Police forces in Jerusalem and was promoted to brigadier general. This position is a senior position in the Israeli Police Force. It is also a position that entails contact with the public. Furthermore, the position involves the control, supervision, direction, training, and command of others. In addition:

When there is a clear and direct connection between the offenses that the candidate committed in the past and the position that he is a candidate to fill, it may be concluded that his criminal past completely prohibits him from filling the particular position. In these circumstances, considerations that should have been taken into account in support of his appointment had he been a candidate for another position (such as the time that has passed since he committed the offenses, his expression of regret, the quality of his performance since he committed the offenses, and his professional expertise) will not assist him, and his candidacy must be rejected.<sup>16</sup>

No one denies the clear and direct connection between the offenses that Sau committed a few months prior to his appointment and the position of commander of Border Police forces in Jerusalem with the rank of brigadier general. The

offenses attributed to Sau relate to the essence of his function as a commander in the field at the time of the confrontations between police officers under his command and a citizen population, which resulted in the killing of four citizens and the wounding of others.

Furthermore, the considerations regarding the necessity to appoint the particular candidate to fill the public position because he is uniquely suited to the position, as mentioned in the case law, does not support the Supreme Court's decision in *Sau*. Sau was not given the appointment because of his unique talents or because only he could fill the post. Furthermore, the respondents did not contend there was an emergency situation that required the recruitment of all forces, including those with a criminal past. These factors make the Supreme Court's unwillingness to intervene in Sau's appointment even more difficult to understand.

Some will argue that the Supreme Court did not intervene because the Or Commission had not yet completed its inquiry, and the Court did not want to be perceived as interfering with the Commission's hearings by drawing conclusions before the Commission reached its own conclusions. This, too, is not sufficient reason to refuse to intervene. At the very least, the Court could have issued an order to show cause and a temporary injunction, and left the petition pending, without issuing a final judgment, until the Or Commission completed its work. The Court has taken this course many times in the past, leaving petitions pending for prolonged periods. A more cogent argument is that the Supreme Court should have intervened to protect the Commission

of Inquiry, which is a quasi-judicial statutory body on which two judges sit, one of them a justice of the Supreme Court. The necessity for this support is particularly evident following the position taken against the Commission by the executive branch, primarily that of Minister of Internal Security Landau, who ordered Sau's promotion. Landau stated that, "It was a serious mistake to establish the Commission of Inquiry... I received a problem, I solved it, and everything worked out." His decision to appoint Sau was, therefore, a kind of challenge to the Commission, and was even intended to strengthen, by concrete measures, his statements against the legitimacy of the Commission. For this reason, it was necessary for the Supreme Court to protect the Commission of Inquiry. The Court's intervention could have frozen the situation, thus maintaining the status quo until the Commission completed its hearings and preventing its work from being undermined.

In light of the above, the Supreme Court's decision in *Sau* is hard to understand. Examining the decision in light of *Yatom* and *Ginossar* does not solve the puzzle. Why, then, did the Supreme Court refuse to intervene and nullify the appointment?

It seems apparent that judicial activism terminates at the "national boundaries." When the Court speaks about public trust in government institutions, it does not see the public of one million Arab citizens of the state. The Court is mainly concerned with the Jewish public. In general, the point of view of these two publics differed greatly regarding the October 2000 events, the manner in which the police functioned during the events, and the establishment of the





Commission of Inquiry. Arab citizens of Israel believed that the actions of the police forces were a reflection of its institutionalized discrimination against them, its treatment of the Arab population as an enemy, and its lack of concern for the value of Arab lives, which required in-depth inquiry and the punishment of those responsible. By contrast, many among the Israeli Jewish population perceived the actions of the police as necessary to protect “state security and public welfare,” keep the traffic arteries clear, and ensure freedom of movement. Thus, when damage to public trust is discussed, the identity of the public involved is crucial.

Arab citizens of Israel have not expressed much trust in governmental institutions, particularly in the Israel Police Force. Unlike other governmental agencies, the Arab public affords some degree of trust in the judiciary. It appears that the Minister of Internal Security’s decision to promote Sau and the refusal of the Supreme Court to intervene struck a fatal blow to the already low degree of trust in the police. More than this, however, it damaged the trust of the Arab public in the judicial branch.

#### End Notes

1. H.C. 3286/01, *The Committee of the Martyrs' Families, et. al. v. Minister of Internal Security, et. al.*, unpublished decision delivered 31 May 2001 [hereinafter: *Sau*].
2. H.C. 6163/92, *Yoel Eisenberg, et. al. v. Minister of Construction and Housing*, P.D. 47 (2) 229, 256-257 [hereinafter: *Ginossar*].
3. *Id.* at 258-259.
4. *Id.* at 259.
5. *Id.* at 261-262.
6. *Id.* at 271.
7. *Id.* at 270-271.
8. H.C. 428/86, *Barzilai v. Government of Israel*, P.D. 40 (3) 505, 522.
9. See Deputy Chief Justice, Menachem Elon, in Civ. App. 121/88, *The State of Israel v. Darwish*, P.D. 35 (2) 663, 682.
10. H.C. 7074/93, *Meir Suissa v. Attorney General*, P.D. 38 (2) 748, 783-784.
11. H.C. 66/85, *Haim Lariyeh v. Brigadier General Ibtzan, et. al.*, P.D. 39 (2) 724, 726.
12. H.C. 4668/01, *MK Yossi Sarid, et. al. v. Prime Minister Ariel Sharon, et. al.*, unpublished decision delivered 27 December 2001 [hereinafter: *Yatom*].
13. See *Ginossar*, supra note 2, at 262-263.
14. *Id.* at 268-269.
15. See Chief Justice Agranat in H.C. 442/71, *Lansky v. Minister of the Interior*, P.D. 26 (2) 337, 357.
16. See *Yatom*, supra note 12, at 12.

