



Adalah's initial analysis of the Shin Bet ("Shabak") Coronavirus Cellphone Surveillance Case

Decision delivered by the Israeli Supreme Court on 26 April 2020

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On 26 April 2020, the Israeli Supreme Court issued a 37-page decision on four petitions challenging the legality of the Shin Bet's tracking and monitoring of coronavirus patients and people who came within their vicinity, via their cellphones and by other means.¹ In a unanimous, precedent-setting decision, the court ruled that the Shin Bet (also known as the General Security Service (GSS) or the "Shabak") cannot track citizens without legislative authority, even during this exceptional coronavirus pandemic, accepting the argument initiated by Adalah that the government exceeded its power in expanding the scope of the Shin Bet's activities beyond issues of strict national security. However, despite this position and the court's acknowledgement of the illegality, the court nevertheless allowed the Shin Bet's tracking program to continue, as long as the government initiated a legislative process in the Knesset by 30 April 2020.² This short paper will provide an initial analysis and critique of this decision, and explain why it is important.

The Israeli government initiated the Shin Bet surveillance program via Emergency Regulations that it decreed in mid-March 2020. Adalah and the Joint List submitted a petition to the Israeli Supreme Court on 18 March 2020³ arguing that the government had no authority to issue

¹HCI 2109/20, Adv. Shahar Ben Meir v. Knesset (joined with HCI 2135/20, ACRI v. Prime Minister, HCI 2141/20, Adalah and the Joint List v. The Prime Minister, et. al and HCI 2187/20, The Journalists' Union in Israel v. Prime Minister) (decision delivered 26 April 2020) available in Hebrew at:

<https://supremedecisions.court.gov.il/Home/Download?path=HebrewVerdicts\20\090\021\v43&fileName=20021090.V43&type=4>

² On 30 April 2020 the Knesset Foreign Affairs and Defense Committee's Subcommittee for Intelligence and Secret Services voted to approve a governmental decision authorizing the Shin Bet to continue the program for another week. Adalah sent a letter to the Knesset Committee Chairman, the AG and others on the same day protesting that the government's extension of the program and the sub committee's approval of it directly contradicts the 26 April Supreme Court ruling. Letter on file with Adalah.

³ HCI 2141/20, Adalah and the Joint List v. The Prime Minister, et. al.

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Emergency Regulations concerning this matter, and that pursuant to the Basic Law – The Government (2001),⁴ these measures required Knesset legislation.

The Court subsequently issued a temporary injunction on 19 March 2020, specifying that if a parliamentary oversight committee was not established to monitor these practices by 24 March, the whole program would have to stop. Following this ruling, the Knesset Foreign Affairs and Defense Committee's Subcommittee for Intelligence and Secret Services confirmed a governmental resolution and approved the program's continuance based on the General Security Services (GSS) Law - 2002.⁵

Adalah and the Joint List then filed an amended petition on 5 April 2020 arguing that the Shin Bet's powers, pursuant to the GSS Law, cannot extend to citizens' health-related issues, and that the tracking measures against citizens clearly fall outside the scope of its authority, which is limited to security threats. The state argued that Article 7(b)(6) of the GSS Law allows the government to designate the Shin Bet to intervene in any area of national security, including civilian issues such as the spread of the coronavirus. Specifically, this article provides that the Shin Bet's functions include: "activities in any other area determined by the Government, with the approval of the Knesset Service Affairs Committee, which is designed to safeguard and promote State interests vital to the national security of the State."⁶ Adalah opposed this broad interpretation of the provision and contended that:

- (a) Article 7(b)(6) should be interpreted to mean that the government may ask the Shin Bet to deal with matters that are not enumerated but that concern strict security only, and the coronavirus is not such an issue; and
- (b) This provision is vague and overbroad and contradicts the principle of rule of law, which provides that any act of the executive branch should rely on a clear, specific law, especially when this law may violate fundamental rights. Article 7(b)(6) does not fulfil these criteria, thus, it is required that the Knesset issue special legislation providing direct authorization for such a program, while also respecting the constitutional rights of citizens.

Regarding the first argument, the Court stated that the spread of the coronavirus pandemic was an immediate threat to the public, and could be included in the spectrum of "national security", a term deemed broader than that of "state security". The Court continued that "appropriate

⁴ The Basic Law: The Government (2001), available in English at: https://www.knesset.gov.il/laws/special/eng/basic14_eng.htm

⁵ See The General Security Service (GSS) Law (2002), available in English at: https://knesset.gov.il/review/data/eng/law/kns15_GSS_eng.pdf

⁶ Ibid.

circumstances may also include serious and immediate threats that do not originate actively from hostilities against the State and its institutions.”⁷ However, the justices also stressed that as the Shin Bet’s operations expand further from the core of security, in its strict meaning, such an expansion of powers must be limited and operated “under strict and temporary restraint and supervision”.⁸ The Court further explained that there are tests and factors that must be taken into consideration in assessing whether a security intervention that limits other constitutional rights is justified: one is the seriousness of the danger that the threat poses for civilians, and the other is the immediacy of the danger, which pushes institutions to act beyond their usual limits for lack of an effective alternative. Under these tests, two additional considerations must also be taken into account: the nature of the threat and the timeframe of the intervention. The Court emphasized that the further the nature of threat is from core issues of security, the greater the burden the government has to prove that the threat is immediate and serious, and that it is not a threat that can be handled by civilian authorities or by the police. However, the Court also noted that the threat does not have to rise to the level of an “existential threat”. In examining the time factor, the Court explained that the government cannot use these measures for indefinite time, and that they can only be used if the threat continues to be immediate and where there are no alternative means to deal with it.

Based on these tests, the Court concluded that in the early days of the coronavirus threat, the Shin Bet surveillance program was consistent with the constitutional framework, and therefore the government could designate the Shin Bet to undertake the program, as an instrument to fight the spread of the virus. However, although the Court found that both criteria were met in the early days of the coronavirus pandemic, in light of the “unique and exceptional circumstances created, and in particular given the timetable created by the rapid spread of the coronavirus, which did not allow primary legislation to be legislated for the Shin Bet in the crisis”, it nevertheless accepted Adalah’s second argument. The Court ruled that:

“there is no escaping the conclusion that to the extent necessary to continue the Shin Bet’s involvement in curbing the epidemic, even beyond the expiration of the certification decision on 30 April 2020, the Government must anchor the basis of such involvement in primary legislation in order to enable the participation of Knesset members from all the factions in [the discussion on] this important issue.”⁹

⁷ Para. 24 of the Court’s decision.

⁸ Ibid.

⁹ Ibid., para. 33

The Court's 26 April judgment is a major milestone in defining and restricting the scope of the Shin Bet's activity. This decision marks the first time that the Court provided an interpretation of the meaning of "national security" in Article 7 of the GSS Law, defining the mission and functions of the Shin Bet. Moreover, the Supreme Court affirmed Adalah's position that not only is the security agency subject to law and its activity must meet a fair balance with fundamental rights ensured by the Basic Laws, but also that this balance needs to be determined by the Knesset through primary legislation, and be a result of a democratic process.

Nonetheless, it is alarming to see that despite the Court's decision to restrict the scope of the Shin Bet's activity, it accepted that, under certain circumstances, the Shin Bet still has authority to interfere in civilian issues including those of related to public health, as part of the interpretation of its activities under Article 7 (b)(6). Moreover, it is of grave concern that although the court recognized that the Shin Bet's surveillance program is a breach of constitutional rights of citizens, the justices did not fully ban or prevent the government in the future from giving authority to a secret security service agency to handle issues of a civilian nature and cause such violations, but rather instructed the government to set forth a legislative process in order for the Knesset to approve a "lawful" path for the program.

Why this case is important

This case is of paramount importance due to the Court's ruling in defining and restricting the scope of the Shin Bet's activity, particularly in its relationship vis-à-vis citizens. The Shin Bet is a secret agency, under the authority of the Prime Minister's Office.

The Shin Bet's activity remained largely undefined and was expanded and reshaped over the years, especially after the 1967 Six Day War.¹⁰ Its powers were incidentally framed in laws such as the Secret Monitoring Law (1979),¹¹ the Emergency Powers (Detention) Law (1979),¹² the Crime Register of Military Justice Offenders (1981), and the Protection of Privacy Law (1981).¹³ The agency gained notoriety in the 1980s following public criticism of the Nafsu case¹⁴ and the Bus 300 Affair,¹⁵

¹⁰ After the 1967 War, the GSS was assigned responsibility for counterterrorism and counterespionage "in the areas of Judea, Samaria [the West Bank] and the Gaza Strip". It also included various aspects of Israeli airline and airport security abroad, security of diplomatic missions abroad, and cooperation in military operations.

¹¹ See: https://knesset.gov.il/review/data/eng/law/kns9_monitoring_eng.pdf

¹² See: https://www.btselem.org/sites/default/files/1979_emergency_powers_law_detention.pdf

¹³ See: <https://www.gov.il/BlobFolder/legalinfo/legislation/en/ProtectionofPrivacyLaw57411981unofficialtranslatio.pdf>

¹⁴ CA 124/87, *Lieutenant Izat Nafsu v. Chief Military Advocate*, 24 May 1987, available in English at: <https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Nafsu%20v.%20Chief%20Military%20Advocate.pdf>

¹⁵ Discussing the Bus #300 case: <https://www.latimes.com/archives/la-xpm-1996-07-27-mn-28415-story.html>)

however, these events did not bring with them any form of judicial scrutiny. The growing exposure of the Shin Bet to the public demanded that comprehensive legislation be enacted to regulate its activity.

The turning point leading up to the enactment of the GSS Law (2002) was the Israeli Supreme Court's judgment in the famous 1999 Torture case.¹⁶ In this case, human rights organizations, led by the Public Committee Against Torture in Israel, filed a petition to the court against the torture practices used by the Shin Bet during interrogations of security suspects, overwhelmingly Palestinians from the 1967 Occupied Territories. This case marked the first instance in which the court intervened in Shin Bet operations – under enormous international pressure – and ruled that the agency had no authority to employ violent, tortuous interrogation methods.¹⁷ The justices did not embrace the international law principle of an absolute prohibition of torture to develop their reasoning, but rather highlighted that “there is no statute that grants GSS investigators special interrogating powers,” and for this reason the use of torture during interrogations was outside the boundaries of law. While the Court refused to decide how to strike the balance between security concerns and the physical integrity of interrogees, the Court ruled that the Knesset was the place where the debate had to occur.¹⁸

As a consequence, legislation that was strongly recommended since the Landau Commission,¹⁹ an echo that was often recalled in the 1999 Court decision, was finally promulgated in the GSS Law in 2002. This law was perceived in Israel as a major revolution, as it defined for the first time, the functions, powers and supervisory mechanisms of the agency. However, this legal framework did not provide an effective means of judicial review.

A key provision of the law, Article 7 (a) defines the Shin Bet's mission as: “the protection of State security and the order and institutions of the democratic regime against threats of terrorism, sabotage, subversion, espionage and disclosure of State secrets, and the Service shall also act to safeguard and promote other State interests vital for national State security, all as prescribed by the Government and subject to every law.” The Shin Bet interpreted this provision widely, and through

¹⁶ HCI 5100/94, *Public Committee Against Torture in Israel v. The State of Israel*, 6 September 1999, available in English at: https://versa.cardozo.yu.edu/sites/default/files/upload/opinions/Public%20Committee%20Against%20Torture%20in%20Israel%20v.%20Government%20of%20Israel%281%29_0.pdf

¹⁷ *Ibid.*, para. 32: “All these limitations on an interrogation, which flow from the requirement that an interrogation be fair and reasonable, is the law with respect to a regular police interrogation. The power to interrogate granted to the GSS investigator is the same power the law bestows upon the ordinary police investigator. The restrictions upon the police investigations are equally applicable to GSS investigations.”

¹⁸ *Ibid.* para. 39

¹⁹ Commission of Inquiry into the Methods of Investigation of the General Security Service Regarding Hostile Terrorist Activity, *Report, Part One* (1987), available in English at: http://www.hamoked.org/files/2012/115020_eng.pdf

it, the Shin Bet intervened in domains of civilian life, mainly of Palestinians, that fell far beyond its security competence.

For example, in 2004, Adalah petitioned the Supreme Court demanding that the GSS be prohibited from intervening in the appointment of teachers, principals and inspectors to the Arab Education Division of the Education Ministry.²⁰ The petition contended that the GSS had maintained structural control over the Arab education system since the military regime period (1948-1966), entailing a grave violation of the rights of equality and dignity, and freedom of employment of Arab educators and students' right to education. Adalah further argued that this intervention lied far outside its authority. While the Attorney General first advocated that the GSS had a duty to investigate applicants, and it later announced the cancellation of this intervention before the Supreme Court.²¹

In 2007, Adalah sent a letter to AG Menachem Mazuz demanding the initiation of a criminal investigation into the Shin Bet's interference into the issue of political and legal documents published by Arab NGOs and academics in Israel.²² The "Arab Vision Documents" set forth a proposed constitutional structure of the State of Israel, as a bilingual, democratic state, a state for all its citizens.²³ This exercise was part of the legitimate right of Palestinian citizens of Israel to imagine their future vision for the state and their status within it. Soon after the publication of the documents, Yuval Diskin, the head of the Shin Bet, alerted the Prime Minister of "a dangerous radicalization of the Arabs in Israel."²⁴ In a letter to the AG, Diskin also maintained that the Shin Bet's intervention was justified in light of its mandate to thwart the subversive activity of entities seeking to harm the character of the State of Israel as a Jewish and democratic state, even if their activity is conducted through legal means.²⁵ The AG, who is today a Supreme Court justice, responded that Diskin's letter "was prepared in coordination with the AG and with his consent," therefore endorsing

²⁰ H.C. 8193/04, *Union of Parents of Arab Students in Israel, et al. v. The Ministry of Education, et al.* available in Hebrew at: <https://www.adalah.org/uploads/oldfiles/admin/Downloads/SPics/8016370.pdf> English Press release: <https://www.adalah.org/en/content/view/6319>

²¹ See: <https://www.adalah.org/en/content/view/6400> Announcement to before the Supreme Court available in Hebrew at: <https://www.adalah.org/uploads/oldfiles/admin/Downloads/SPics/9576207.pdf>

²² Letter available in Hebrew at:

https://www.adalah.org/uploads/uploads/Adalah_letter_to_Mazuz_220307.pdf

²³ The Democratic Constitution (2007), available in English at:

https://www.adalah.org/uploads/oldfiles/Public/files/democratic_constitution-english.pdf

The Future Vision of the Palestinian Arabs in Israel (2006):

<https://www.adalah.org/uploads/oldfiles/newsletter/eng/dec06/tasawor-mostaqbali.pdf>

The Haifa Declaration (2007): <https://www.adalah.org/uploads/oldfiles/newsletter/eng/may07/haifa.pdf>

²⁴ News report on the meeting available in Hebrew at:

<https://www.makorrishon.co.il/nrg/online/1/ART1/555/618.html>

²⁵ Letter available in Hebrew at:

https://www.adalah.org/uploads/uploads/Diskin_letter_to_Mazuz_260407.pdf

a very broad interpretation of Article 7 of the GSS Law, that does not limit the agency's activities to security issues alone.²⁶

In February 2020, Adalah again sought to expose and block Shin Bet interference in the Arab education system,²⁷ after learning that the Director General of the Education Ministry met with two Shin Bet agents to discuss the participation of Arab school children in youth movements and the blocking of "extremist" teachers. Notwithstanding the AG's declarations made in the context of the 2004 case - to cancel the GSS position of the deputy director of the Arab Education Division and not to create any similar positions in the Education Ministry in the future - the Shin Bet is clearly still interfering in the Arab educational system in violation of the law.

In conclusion, the Court's decision in the Shin Bet coronavirus cellphone surveillance case is of great importance due to its narrow interpretation of Article 7 of the GSS Law. Since 2002, the Shin Bet has justified its interference in issues of civilian nature for Palestinians, including education, freedom of speech, opinion and assembly, pursuant to this provision. The restrictions imposed by this judgment reaffirm the rule of law and circumscribe the Shin Bet's authority.

Nevertheless, Adalah cannot but express concern that the Supreme Court left the door open for the Shin Bet's further involvement in civilian matters. As history has proven, the Shin Bet has often intervened in civilian issues, particularly regarding Palestinians, whose individual, cultural and political lives have been a constant target of surveillance and repression.

²⁶ Letter available in Hebrew at:
https://www.adalah.org/uploads/uploads/Mazuz_Letter_to_Adalah_200507.pdf

²⁷ See: <https://www.adalah.org/en/content/view/9912>