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THE STATE VS. THE PRESS
THE RISE OF GAG ORDERS IN ISRAEL

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Hilary and Trinity Terms

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PREFACE

A peculiar choice of “music on hold” greeted journalists who called the Israeli censorship office during the summer of 2014. Two months of intense fighting with Hamas (“Operation Protective Edge”) required daily and even hourly communication between local media and censors, supervising any military related news prior to publication. Lines were often busy, temperatures high physically and emotionally, and while waiting to appeal yet another publication ban I suddenly realized: the music I kept listening to, but never really noticed before, was surprisingly a popular anti-war song from the nineties.

“You promised peace... you promised spring... you promised to keep promises”¹, sang the band just before the officer on duty picked up the phone to discuss war casualties.

Whether it was deliberate criticism, an ironic prank or just a random choice – this anecdote illustrates Israel’s biggest challenge and source of growing tensions: liberal values, lifestyle and self-image in face of an ongoing violent conflict and military occupation with no clear solution in sight. A challenge in which government’s control over the media plays a massive role and checks and balances between security needs and freedom of the press are becoming extremely fragile.

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¹ Shmuel Hasfari, “Winter 73”, 1994

1. INTRODUCTION

The delicate dance of a “defensive democracy”

Clashes between liberal democratic values, such as the freedom of the press, and national security interests have historically caused major tensions in democracies around the globe. In recent years, these tensions have grown in many countries due to global terror concerns and the advancement of technology which undermines traditional media regulation methods. This process is especially noticeable in Israel – a country where the friction between democratic characteristics, complex national identity and security risks is intensive and frequent.

With regard to liberal democracy characteristics, Israel is a parliamentary democracy with legislative, executive and judicial branches. Although the country does not have an official written constitution, as a result of the historical disputes, a system of basic laws and Supreme Court rulings functions in practice as one and draws on the principles of civil and human rights, including the freedom of speech and the press. Israel has also been an active member of the international community, crafting and implementing norms and law, and is a party to the main covenants. The latest Freedom House report described Israel as the only “free” country in the region, ranked 70 in the world (excluding Palestinian territories)² and the latest Democracy Ranking report described it as the only “high” quality democracy in the region³.

With regard to journalism, the latest Freedom of the Press 2016 report ranked Israel as only “partially free”. Primarily due to the “growing impact of the Israel Hayom newspaper, whose owner-subsidized business model has endangered the stability of other media outlets as well as undisclosed sponsored content”⁴. The 2016 report also describes Israel’s media environment as generally “lively and pluralistic”, In spite of the fact that “media outlets are subject to Military Censorship and gag orders”⁵.

In terms of lifestyle, the UNDR Human Development Report recently ranked Israel 18th in the world (“very high”) with an adult literacy rate of 97.8%, 121.5 mobile phone subscriptions per 100 people and 71.5% Internet users⁶. Almost half (49%) of Israel’s adult population has attained tertiary education – the second highest rate among all of the OECD countries⁷. In 2010 43% of Israelis defined themselves as “secular”⁸.

² Freedom in the world (2016), Highlights from Freedom House’s annual report on political rights and civil liberties, New York: Freedom House, p. 21. Online (English): https://freedomhouse.org/sites/default/files/FH_FITW_Report_2016.pdf

³ Campbell David F. J., Paul Pözlbauer, Thorsten D. Barth and Georg Pözlbauer (2015), Key Findings of the Democracy Ranking 2015, Vienna: Democracy Ranking. Online (English): <http://democracyranking.org>

⁴ <http://www.haaretz.com/israel-news/business/.premium-1.716648>

⁵ Freedom of the Press (2016), New York: Freedom House.

Online (English): <https://freedomhouse.org/report/freedom-press/2016/israel>

⁶ UNDP Human Development Report (2015). Online (English):

http://hdr.undp.org/sites/default/files/2015_human_development_report_1.pdf

⁷ OECD (2015), “Israel”, in Education at a Glance 2015: OECD Indicators, Paris: OECD Publishing. Online (English):

http://www.keepeek.com/Digital-Asset-Management/oecd/education/education-at-a-glance-2015/israel_eag-2015-63-en#page1

⁹ Israel Central Bureau of Statistics. Online (Hebrew): <http://www.cbs.gov.il/statistical/seker-chevrati-h123.pdf>

But along with these facts and figures, that draw a picture of a fairly modern and liberal country from a western point of view, Israel has also been a violent conflict zone since the day of its inception in 1948 and a military occupying force since 1967. In the latest military confrontation between Israel and Hamas, during the summer of 2014, more than 70 Israelis and 2,000 Palestinians were killed. In September 2015 another wave of violence emerged with frequent violent incidents across the country. The latest Global Peace Index report ranked the condition as low as 148 out of 162 countries⁹. Israel's military expenditures on defence (% of GDP) is among the highest in the world¹⁰ and its citizens are required to serve in the military at the age of 18 (men usually serve for three years and women two). Many of the country's prominent leaders come from high ranking military backgrounds.

Along with security pressure and a militaristic atmosphere, Israel also deals with a continuing national identity conflict regarding its definition as a "Jewish and Democratic state" as established in the Declaration of Independence¹¹ and the basic laws¹². Endless books and papers have been written over the years about the conflict between the "democratic" nature vs. the "Jewish" nature of the country and it remains unresolved to this day. The fact that out of a population of 8 million 20.7% of the citizens within the country are Arab¹³, concludes this brief introduction to some of the main factors which affect Israel when examining its attitude toward press freedom.

The mechanisms applied in Israel when giving sometimes greater consideration to security interests over individual liberties, are often called a "defensive" or "defending" democracy¹⁴. Among the most important mechanisms of this sort are those of the Defence (Emergency) Regulations from 1945, inherited from the British Mandate legislation. It is these regulations that form the legal foundations of present day Israeli Military Censorship which is the main authority of publication control in Israel. The censorship, a unit within the Israeli Defence Force (IDF), supervises and prevents the publication of information if there is a "near certainty that genuine damage will be caused to state security" by the publication¹⁵. Understanding the complexities embedded in Mandate Period law, it also draws its authority from the Censorship Agreements signed with media representatives.

In the age of the Internet, information has been harder to control while the status of the censor has steadily declined. National security authorities – IDF (army), Israel Police, Shin Bet (secret service) and Mossad (intelligence) – have increasingly used a rising bypass route: gag orders, a method which has often been heavily criticized by Israeli journalist and law experts. Media outlets are forced to spend time and money fighting the orders in court rooms across the country, thus possibly weakening their motivation to expose national security related stories.

⁹ Global Peace Index, 2015. Online (English): <http://bit.ly/1JTA8P3>

¹⁰ The CIA Factbook. Online (English): <https://www.cia.gov/library/publications/the-world-factbook/rankorder/2034rank.html>

¹¹ "The state of Israel will be open for Jewish immigration and for the Ingathering of the Exiles; it will foster the development of the country for the benefit of all its inhabitants; it will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations" (from the Declaration of Independence)

¹² Basic Law: The Knesset and Basic Law: Human Dignity and Liberty

¹³ Not to be confused with Palestinians in the West Bank, Gaza and East Jerusalem

¹⁴ A. Pedahzur, *The Israeli Defending Democracy*, Jerusalem: Carmel, 2004

¹⁵ Meir Schnitzer and Aluf Benn vs. Chief Military Censor (1988), 42 P.D. IV 617

In this paper I would like to map out some of the restrictions applied to the Israeli media today and examine the legal framework, causes and scope of the gag orders phenomena through archives, interviews and numerical data as well as my own experience as an Israeli journalist.

This paper will not address media censorship in the Palestinian territories.

2. PRESS CENSORSHIP IN ISRAEL: AN OVERVIEW

The shaky legal status of freedom of the press

Since the State of Israel does not have an official written constitution, as a result of the ongoing historical tension between its “Jewish and Democratic” identities as mentioned above, a system of Basic Laws and Supreme Court legal precedents functions in practice as one. Together, they form the country’s core principles, including its collective perception and attitude toward freedom of the press.

The latest Freedom of the Press report by Freedom House described Israel’s legal protections for freedom of the press as “robust” and the country’s legal framework as “predominantly protective of media freedom”¹⁶. This condition can be attributed in great part to the country’s judiciary system. It has traditionally been the Israeli Supreme Court that has defended in its rulings the status of freedom of speech and the press as a fundamental principle of the state. However, Israeli legislation in itself does not include any explicit commitment to protect journalism or journalists. On the contrary: The Israeli book of law contains a rich corpus of legislation designated to limit the press. Some of these laws are derived from British Mandate Laws, which were deliberately initiated in order to oppress local Jewish and Arab press in Mandatory Palestine¹⁷. Despite several legislation attempts and public campaigns, it remains a worrying issue to this day.

The first reference to the idea of freedom of the press in official Israeli records appears in the protocols of the Provisional State Council. On May 14th 1948, just a few hours before signing the Declaration of Independence, marking the end of the British Mandate and the establishment of a Jewish state, members of the Provisional State Council gathered to discuss its content. Meir Vilner, a representative of the historical communist party (Maki), suggested they add freedom of “speech”, “gathering” and “print” to the final version of the document¹⁸. His suggestion was not accepted. It is unclear from the protocols if there was any specific objection to his proposal or just a general reluctance to accept profound changes at the last moment. Notwithstanding, a different proposal by another member to add freedom of “language” to the declaration was accepted during the same discussion. When Vilner reminded the head of the council, later Israel’s first prime minister, David Ben-Gurion, of his suggestion, Ben-Gurion replied: “This is not a constitution. There will be a separate constitution and none of us disagrees on the matter of freedom of speech, gathering and so on... I am certain that in the complete constitution those things will appear”¹⁹. This statement was never seen to fruition. A complete constitution was never approved and so the freedom of the press was never added.

¹⁶ Freedom of the Press (2016), New York: Freedom House. Online (English) : <http://bit.ly/2aqkXNY>

¹⁷ M. Negbi, *Namer shel neyar: Ha-ma'avak 'al hofesh ha-itonut be-Yisra'el* [Paper Tiger: the struggle for a press freedom in Israel]. Tel-Aviv: Sifriyat Po'alim, 1985 and P. Lahav, Governmental Regulation of the Press: Study of Israel's Press Ordinance, *Israel Law Review* 13(2), 1978, p. 230-250

¹⁸ Provisional State Council Protocols, vol. A, Pages 14 and 20

¹⁹ *ibid*, p. 20

Even though the Declaration of Independence was not accepted as an official substitute for a constitutional document, the Israeli judiciary treats it as an important guideline to the State's principles. The fact that freedom of the press was not included in this important first collective identity statement did not discourage the Supreme Court from ruling that it does seem to fit with the general spirit of the declaration – as it has been commonly understood from this paragraph: “The State of Israel... will be based on freedom, justice and peace as envisaged by the prophets of Israel; it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex; it will guarantee freedom of religion, conscience, language, education and culture; it will safeguard the Holy Places of all religions; and it will be faithful to the principles of the Charter of the United Nations.”²⁰

It was this very same paragraph that guided the High Court of Justice on its first and most quoted ruling on the issue of freedom of speech and the press – the “Kol Ha'am Case” from October 1953²¹. Five years after the establishment of Israel and the Declaration of Independence, it was the first ruling to set the basic foundations of an appropriate balance between national security and the freedom of the press. The case involved the appeal of two newspapers affiliated with the communist party to the High Court of Justice, “Kol Ha'am” (“voice of the people” in Hebrew) and its Arabic version “Al-Ittihad”, against a suspension order by the Minister of Interior. The newspapers had published an editorial which the then Minister of the Interior thought was “likely to endanger public peace” and newspaper publication was suspended for several days. The minister acted under the Press Ordinance, derived from the British Mandate, allowing him to close down any newspaper if in his opinion it might endanger the public peace (see next subchapter: press licensing). Judges Agranat, Sussman and Landau interfered with the minister's decision and ruled that he had to consider the probability that the publication was indeed a danger to the public peace and that mere tendency was insufficient for such extreme action.

The leading Judge on the case, Shimon Agranat, was educated in the United States, which, according to his biographer professor Pnina Lahav, made him: “sensitive to the importance of free speech for a viable democracy”²². In the final verdict Judge Agranat elaborated on his decision to rely on the Declaration of Independence as an indicator for the young state's principles regarding freedom of the press: “The system of laws under which the political institutions in Israel have been established and function are witness to the fact that this is indeed a state founded on democracy. Moreover, the matters set forth in the Declaration of Independence – especially as regards the basin of the state ‘on the foundations of freedom’ and the securing of freedom of conscience – mean that Israel is a freedom-loving State.”²³

In the following years, the “Kol Ha'am Case” became a major legal precedent for all questions of balance between national security and press freedom and courts mostly acknowledge it. But there was still no official legislation. In 1992 a major opportunity to

²⁰ The Declaration of the Establishment of the State of Israel, May 14, 1948; Official translation: Israel Ministry of Foreign Affairs official website. Online (English): (<http://bit.ly/RiaD18>)

²¹ Kol Ha'am Co. Ltd vs. Minister of the Interior, 7 P. D. 871. Online (English): http://elyon1.court.gov.il/files_eng/53/730/000/Z01/53000730.z01.htm

²² P. Lahav, “American Influence on Israeli Law: Freedom of Expression”, in Israel and the United States: Six Decades of US-Israeli Relations 187, Robert Freedman, ed., Westview Press, 2012, P. 35. Online (English): <http://bit.ly/1Udlbvu>

²³ Kol Ha'am Co. Ltd vs. Minister of the Interior, 7 P. D. 884. Online (English): http://elyon1.court.gov.il/files_eng/53/730/000/Z01/53000730.z01.htm

change this arose and failed again: a new Basic Law was passed in order to address the legal gap regarding human rights. The “Basic Law: Human Dignity and Liberty”. Basic Laws were originally meant to form the constitution and the Supreme Court has traditionally given them an elevated status²⁴. This new Basic Law was meant to protect several basic human rights²⁵, but the freedom of speech and press were again neglected.

Some experts believe that thanks to the courts “despite the fact that freedom of the press [in Israel] is without explicit statutory anchorage, it is indisputably one of the basic rights in Israeli law”²⁶, while others, led by professor Moshe Negbi, a professor of communication and journalism at the Hebrew University of Jerusalem and senior legal commentator for Israeli media, repeatedly warns that the “Kol Ha’am Case”, while highly important, still “does not temper or dull the double-edged sword hanging over journalism in Israel”²⁷. In his book “Paper Tiger: the Struggle for Press Freedom in Israel”²⁸, Negbi explains and demonstrates how “the Supreme Court invented freedom of the press in Israel Ex Nihilo and by doing so provided the only legal guarantee for its defence”. According to Negbi, Judge Agranat “planted” the American liberal outlook into the interpretation of the legal heritage left by the British Mandate and in that way managed to “sweeten” it. This interpretation is not always sufficient when fellow judges with a much more formalistic outlook recoil from this position.

By analyzing several rulings of the past decades, Negbi exposed the “constant erosion” of the Israeli court’s willingness to defend freedom of the press²⁹. He concludes: “The Supreme Court alone is not a sufficient insurance for the preservation of this [press] freedom. Such a guarantee could only exist by legislation initiated in the Knesset [the Israeli parliament]. First, it is essential to cancel all British Mandate laws that provide the government with unlimited power to harm publication. Secondly, freedom of press must be anchored and ensured in a written law (or the Basic Laws) so even judges with a clear formalistic approach will have to respect and enforce it. Only if these two legislative initiatives are executed, minimal infrastructure will be granted for the existence of free press in our country.”³⁰

The most recent initiative to anchor the freedom of the press in Basic Laws took place during December 2015. A bill submitted by Knesset Member and former journalist Ksenia Svetlova (The Zionist Union Party), with the support of 23 other members, was not ratified.

Colonialism and legislators are not to be exclusively blamed. The Israeli press itself played a vital role shaping this condition. Newspapers did not fight to change the British legislation when the state was established and even signed a voluntary censorship agreement with the authorities. They also have a tendency to ignore the implications of harsher enforcement on marginal press, such as Arabic publications, as long as it does not harm the mainstream.

²⁴ Introduction to “Basic Laws”, official Knesset website. Online (English):

http://www.knesset.gov.il/description/eng/eng_mimshal_yesod.htm

²⁵ Basic Law: Human Dignity and Liberty (5752 - 1992), unofficial translation by Dr. Susan Hattis Rolef, official Knesset website.

Online (English): <http://knesset.gov.il/laws/special/eng/BasicLawLiberty.pdf>

²⁶ S. Navot, S. (2007). Constitutional law of Israel. Alphen aan den Rijn: Kluwer Law International, p. 235

²⁷ Negbi, p. 20

²⁸ Negbi, p. 93

²⁹ Negbi, p. 100

³⁰ Negbi p. 109

To conclude, as a result of historical and contemporary negligence and political disputes, freedom of the press is not protected by Israeli legislation. The judicial system functions as the main watchdog for democracy's watchdog, but not necessarily in all cases due to different legal approaches within the courts. This lack of official assurance casts a shadow on the basic freedom of Israeli journalism.

Press licensing

The "Kol Ha'am Case" dealt with one of the most contentious methods of press censorship in Israel: The Press Ordinance³¹. The law, heavily regulating the press, was first introduced in 1933 by British Mandate authorities in Palestine and later adopted by The State of Israel in 1948. Some of the sections were worsened in 1945 by section 94 of the Defence (Emergency) Regulations and incorporated by Israel as well.³²

These laws require that all printed media in Israel obtain an official license from the Interior Ministry in order to operate and it details the various conditions for the license; including the editor's age, education level, language proficiency and criminal record. The Press Ordinance allows the authorities to refuse, change or cancel any license request that in the Minister's opinion, are "likely to endanger the public peace", or if they are publish, "false of The rumors that could, in the Minister's opinion, cause panic or despair"³³. Section 94 Defence (Emergency) Regulations, expands the ability to cancel a license or close down a newspaper by adding this could be done "without assigning any reason."³⁴

During the Ottoman Empire era and the beginning of the British Mandate, there was a simple registration process without any licensing requirements. In August 1929, horrifying events led to a change of policy. Violent riots, also known as the 1929 Massacres, spread throughout Palestine. 133 Jews and 116 Arabs were killed and hundreds injured. The climax took place in Hebron, where 67 Jews were killed. In his book, "Year Zero of the Arab-Israeli Conflict", Professor Hillel Cohen describes these events as the tipping point of the current Arab-Israeli conflict³⁵. Following the riots, British authorities appointed The Shaw Commission to examine the roots of the uprising. While their report "rejected the Zionist Organization's thesis that the press bore primary responsibility for the riots", they still concluded that: "Too great a liberty of expression had been allowed to the press in Palestine"³⁶. And so in 1933 The Press Ordinance was declared. As instability in the region grew, the British government declared the "Palestine (Defence) Order in Council 1937". It allowed the British High Commissioner of Palestine to set stricter regulations as needed. He did so in 1945 when The Defence (Emergency) Regulations were first introduced³⁷ including section 94 which formed the foundations for the Israeli censorship.

³¹ The Press Ordinance. Online (Hebrew): https://www.nevo.co.il/law_html/law01/p185_001.htm

³² The Defense (Emergency) Regulations. Online (English): <http://nolegalfrontiers.org/en/military-orders/ml02> (See section 94)

³³ The Press Ordinance Section 19(2)

³⁴ The Defense (Emergency) Regulations section 94

³⁵ H. Cohen & H. Watzman, *Year Zero of the Arab-Israeli Conflict 1929*, Waltham, Massachusetts: Brandeis University Press, 2015

³⁶ P. Lahav, Governmental Regulation of the Press: Study of Israel's Press Ordinance, *Israel Law Review* 13(2), 1978

³⁷ The original of announcement of The Defense (Emergency) Regulations in The Palestine Gazette. Online (English): https://www.nevo.co.il/law_html/law21/PG-e-1442-2.pdf

At first, Israeli governments refrained from using such severe measures frequently, but since the mid-1970s the phenomenon has increased³⁸. Haaretz journalist Daniel Dolev revealed that Israel's Interior Ministry has prevented the publication of at least 62 newspapers over the past decade³⁹. According to the article, the ministry "refused Haaretz's request for a full breakdown according to reason, but said that 459 newspapers had been approved for publication over the period – which means that more than 10 percent of the applications were rejected"⁴⁰. Attorney Dan Yakir of the Association for Civil Rights in Israel (ACRI), told Dolev: "It's a power unparalleled in democratic countries. There is no justification for the state being involved and maintaining a licensing regime for newspapers"⁴¹.

Most of the applications rejected between 2004 and 2013 had been submitted by Israeli Arabs. Multiple attempts were made to cancel, adapt or alter the law but none took place. In 1997 The Tzadok Committee recommended canceling some of the draconian clauses and in 2004 even the Interior Minister himself proposed to change the law (but was soon afterward fired in a period of political turbulence)⁴².

In 2015 the court ruled, in response to ACRI's petition, that the time had indeed come for this to change. They gave the new government, which had only been elected the previous month time to deal with the issue, but also emphasized "it would be appropriate if it were to happen soon"⁴³. In March 2016 Interior Minister Aryeh Deri told the court he would act to cancel the license requirement and pass on the authority to close down newspapers to the Attorney General of Israel⁴⁴. This proposal requires Knesset approval. At the time this research was being written, this has not yet taken place.

In June 2016, another major breakthrough occurred when a government bill proposing to cancel sections 94-96 of the Defence (Emergency) Regulations passed Second and Third Readings in the Knesset, following a recommendation of the ministry of justice from 2012⁴⁵. The cancellation is now pending government approval⁴⁶.

If both cancelations are passed in the near future, this will be a major breakthrough for press freedom in Israel. It will, however, still be possible to close down newspapers under the censorship laws.

³⁸ M. Negbi, Freedom of the Press in Israel: the Legal Aspect, The Jerusalem Institute for Israel Studies, Research Series No. 26, 1995, p. 7-9

³⁹ "Interior Ministry Has a Stranglehold on the Publication of Newspapers in Israel", *Haaretz*, 16.1.2016

⁴⁰ *ibid*

⁴¹ *ibid*

⁴² "Bill Proposed to Replace 'Draconian' Press Law", *Haaretz*, 7.10.2004

⁴³ "Deri will act to cancel Press Ordinance's license requirement", *Haaretz*, 10.3.2016

⁴⁴ *ibid*

⁴⁵ Ministry of Justice, official website. Online (Hebrew): <http://www.justice.gov.il/Publications/Articles/Pages/TakanotHagana.aspx>

⁴⁶ "Another farewell to the British legacy", *The Seventh Eye*, 15.6.2016

The Military Censorship

The Military Censorship is a unit within the IDF which regulates all publications in the Israeli press with regard to matters of national security. It was first introduced as part of the British Mandate Defence (Emergency) Regulations (see above) and adopted by the State of Israel in 1948. The Chief Censor is appointed by the Minister of Defence and commander in chief of the IDF. It is a military unit but it employs civilians as well and supervises national security related publications regarding all security authorities in Israel, not just the military.

Sections 86-101 of the Defence (Emergency) Regulations states: "The Censor may, by order, prohibit generally or specially the publishing of matter the publishing of which, in his opinion, would be, or be likely to be or become, prejudicial to the defence of Israel or to the public safety or to public order.... Any person who publishes any matter in contravention of an order under this regulation and the proprietor and editor of any publication in which it is published and the person who wrote, printed, drew or designed, the matter shall be guilty of an offence against these Regulations"⁴⁷.

It also rules that "The Censor may by order require... to submit to the Censor before printing or publishing any matter intended for printing or publishing"⁴⁸. And indeed, Israeli media is required to submit any materials related to national security, according to a classified list of specific topics, for prior to publication clearance – including any text, photos, videos, infographics or any other forms of publication related to the topics on the list. It is forbidden to "print or publish any statement... that any alteration, addition, or omission has been made by order of the censor in any matter submitted to him"⁴⁹. In a case of violation, the punishment could be up to five years in prison, and the censor also "may seize and detain any unlawful publication which comes into his hands" and also "printing press, instrument or apparatus"⁵⁰. In other words, close down the newspaper.

A famous case in which the censor acted on this draconian authority, was the Bus 300 Affair ("Kav 300"). In 1984, the Hadashot newspaper was shut down by the censorship for a few days after exposing a committee that had formed to investigate the killing of two captured terrorists who tried to hijack a bus.

Understanding the complexity of enforcing the draconian Mandate law, the Israeli censor also draws its authority from several agreements signed with media representatives – sweetening some of the decrees. The last of which, signed in 1996, promised the censor would not use its authority to close down newspapers and that journalists violating the regulations will not be jailed but fined or reprimanded. A joint committee of IDF representatives, the press and the public would discuss any appeals, after which the media can still turn to court.

⁴⁷ Sections 86-101 of the Defence (Emergency) Regulations. English Translation by No Legal Frontiers. Online (English): <http://nolegalfrontiers.org/en/military-orders/mil02>

⁴⁸ ibid

⁴⁹ ibid

⁵⁰ ibid

An important milestone in the history of the Israeli censorship took place in 1988. "Ha'ir" reporter Aluf Benn (now Haaretz's editor-in-chief) appealed with his editor Meir Schnitzer to the High Court of Justice, after his report concerning criticism against the head of Mossad has been banned by the censor. In a dramatic ruling, Meir Schnitzer and Aluf Benn vs. Chief Military Censor⁵¹ has limited the power of the censorship by forming an important precedent. The verdict, led by Judge Aharon Barak, restricted the censorship's authority only to cases in which there is "near certainty that genuine damage will be caused to state security"⁵².

Other methods

There are many other noteworthy contemporary official and unofficial censorship mechanisms in Israel, which this paper could not address due to length restrictions. They include inter alia: Official Secrets laws; the Shin Bet Law, classified government and Knesset meetings, prevention or delayed release of official data; off-the-record briefings and embargoes; Government Press Office regulations; Civil Service Regulations, government advertising; hunting down and punishing of whistleblowers and journalists, and, of course, like many other countries: the risk of self-censorship.

⁵¹ Meir Schnitzer and Aluf Benn vs. Chief Military Censor (1988), 42 P.D. IV 617

⁵² *ibid*

3. THE RISE OF GAG ORDERS

Definition and legal framework

A gag or gagging order (in some countries injunction, super-injunction or publication ban), is a judicial ruling prohibiting the publication of all or some details regarding a case. Unlike the methods described in the previous chapter, this method of media regulation requires the authorities to obtain court approval for each case individually, but once approved it is also the strictest method. In the last two decades, gag orders have become a popular weapon in the hands of the national security and law enforcement authorities in Israel. This chapter will examine the roots, scope and critique of this rising phenomenon.

In general, the Israeli judicial system operates under the fundamental principle of “Open Justice”. Section 3 of The Basic Law: The Judiciary (“Publicity of proceedings”), states that “A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law”⁵³. However, as this choice of wording clearly indicates, there are exceptions. Some of the main ones appear in the Courts Law [Consolidated Version] 5744-1984. According to sections 67-68, hearings can be held behind closed doors (in-camera) for the sake of defending: national security; foreign relations; morality; a minor, a helpless or people with disabilities; sex crime victims, defendants or offenders; witnesses; trade secrets; human trafficking victims; domestic violence victims or defendants; most proceedings in Family Court and in the case of interlocutory procedures. The law sets a punishment of six months imprisonment for publishing any information about any in-camera case without the approval of the court.

In 2016 the Knesset passed a controversial addition to this list, as part of a new sweeping anti-terrorism Law⁵⁴, by which trials may also be held in-camera in some cases of terror related suspicions or testimonies. In those cases, the new law states that the court, at the request of the state, may even exclude the defendants and their lawyers from the discussion regarding the request for a closed trial. Another 2016 law, sets a punishment of up to six months imprisonment for publishing the identity of soldiers or police personnel under investigation for duty-related actions – as long as they have not been officially convicted⁵⁵.

Section 70 of same law, states that the court can also forbid the publication of any detail regarding a case, even if a hearing is not held in-camera, “If it sees a need for this to protect the safety of one of the parties... or to prevent serious compromise of their privacy”⁵⁶. In another section “the court may prohibit publishing the name of a suspect who has not yet been indicted, or other details of the investigation, if it believes that this might cause the

⁵³ The Basic Law: The Judiciary, official translation. Online (English): <http://www.mfa.gov.il/MFA/MFA-Archive/1980-1989/Pages/Basic%20Law-%20The%20Judiciary.aspx>

⁵⁴ “Knesset Passes Sweeping Anti-terrorism Law”, *Haaretz*, 15.6.2016.
Online (English): <http://www.haaretz.com/israel-news/1.725225>

⁵⁵ “Knesset Advances Bill to Withhold Names of Soldiers Under Investigation”, *Haaretz*, 20.7.2016.
Online (English): <http://www.haaretz.com/israel-news/1.732154>

⁵⁶ Section 70(d) of the Courts Law [Consolidated Version] 5744-1984

suspect grave harm and that preventing that harm is preferable to the public interest in the publication”⁵⁷.

In 2012 the Knesset passed an addendum to this section, automatically prohibiting the publication of any suspect’s name for a period of 48 hours from the beginning of the investigation, during which time they can petition the court for an official gag order⁵⁸. The court may cancel this rule if, for instance, the publication of the suspect’s identity is in the public interest (if the suspect is a public figure for example) or if the investigators or the suspects themselves request so. Section 71 of the Courts Law refers to the principle of Sub Judice and sets a punishment of one year in prison for those who publish anything "in order to impact a criminal trial or on the consequences thereof". This specific section has long been known in Israel as a “dead letter law”⁵⁹.

Other exceptions to the principle of Open Justice or freedom of the press and speech which can lead to the prevention of publications by the courts in Israel are the general authority granted to the court in civil cases to give “any declaratory judgment, order or else as it sees fit in the circumstances”⁶⁰; matters of privacy and defamation; matters of privilege and immunities; the Official Secrets Act; hate speech; holocaust denial; abomination; intellectual property and in the case of government employees regulations which forbids them from giving information or interviews to the press without authorization and even in some cases just generally “criticize the government” in public⁶¹.

However, all these laws and regulations did not always meet the needs of law enforcement authorities such as the Israel Police, the IDF, the Shin Bet and the Mossad. In cases in which they wished to prevent the publication of information regarding a case that had not, as yet, reached any legal proceedings and thus could not be defined as in-camera. For instance, details of a very initial investigation or even the entire existence of a case.

The necessity for a broader, sweeping, method was of particular interest to the Israel Police, because criminal cases do not enjoy the protection of the censor which has been restricted mainly to national security issues.

Consequently, the most popular way for government authorities to prevent publications in the Israeli press regardless of the existence of in-camera proceedings or any proceedings at all, is by issuing a gag order under section 70(e) of the Courts Law.

Until 2002, this section stated: “The court may prohibit publishing the name of a suspect that has yet to be indicted, or any other identifying detail, if it may harm a lawful investigation”. In 2002, amendment 33 was introduced and the words “or any other identifying detail” were changed into “or other details of the investigation”⁶². In 2012, amendment 69⁶³ added the

⁵⁷ Section(e1)(1) of the Courts Law [Consolidated Version] 5744-1984

⁵⁸ Section 70(d1)(1) of the Courts Law [Consolidated Version] 5744-1984

⁵⁹ “A Monster by the Name of Sub Judice”, *Haaretz*, 17.7.2016.

Online (English): <http://www.haaretz.com/a-monster-by-the-name-of-sub-judice-1.64165>

⁶⁰ Section 75 of the Courts Law [Consolidated Version] 5744-1984

⁶¹ The Civil Service Regulations. Online (Hebrew): <http://www.csc.gov.il/Takshir/Pages/chap.aspx?chap=476>

⁶² Amendment 33, 2002. Online (Hebrew): http://fs.knesset.gov.il/15/law/15_lsr_300608.pdf

⁶³ Amendment 69, 2012. Online (Hebrew): http://fs.knesset.gov.il/18/law/18_lsr_301239.pdf

expiration of the gag order upon the suspect's indictment, which lead to the current version of the law: "The court may prohibit publishing the name of a suspect that has yet to be indicted, **or other details of the investigation** [emphasis added], if it may harm a lawful investigation; if the court indeed prohibited as such, the order shall expire upon the suspect's indictment, unless the court has determined otherwise".

In their policy paper "Military Censorship, gag orders and defending security secrets in the digital age"⁶⁴, Dr. Tehila Shwarz-Altschuler and Dr. Guy Lurie explain the legal background and circumstances which led to these amendments. According to their paper, when Israeli authorities requested gag orders prior to 2002, it was under the original section 70(e) of the Courts Law which emphasized the need to defend an ongoing investigation ("if it might harm a lawful investigation"). However, the frequent usage of this section in cases which were neither a part of a legal proceeding, nor regarding the protection of a specific suspect, drew legal criticism. Some claimed this might endanger the principle of Separation of Powers, some were concerned that the section has two different purposes: the protection of the suspect's interests and those of the investigation⁶⁵. Hence, amendment 33 emphasized the protection of "other details of the investigation". The punishment for an intentional violation of section 70(e) is six months' imprisonment. According to a 2012 amendment, an appeal against any gag order issued under section 70(e) may be submitted to the court by the media⁶⁶.

The continuing public criticism of the frequent and broad usage of section 70(e) by the police, led the Chief of Police in 2006 to set up a public committee to examine its gag orders policy⁶⁷. The committee was headed by retired judge who subsequently died and following many delays a new committee finally handed in its conclusions in 2009. The procedures they recommended were officially adopted only in 2012, forming the new Israel Police internal regulations for the treatment of gag orders requests on grounds of an ongoing investigation.

In 2014, a Freedom of Information request revealed these regulations⁶⁸. According to the new regulations: "The role of the gag orders is to protect the public's interest in conducting an effective investigation in cases which raise concerns that publicity might endanger the ability to pursue the truth... the purpose of gag orders is to allow the investigation unit to collect evidence, arrest suspects, prevent information leakage between witnesses and suspects, prevent coordination of testimonies and withholding of evidence..."⁶⁹.

The document then describes the process of issuing a gag order in a police investigation unit: "1) If and when the officer in charge is convinced that publication of one or more details of the investigation or the entire investigation or the existence of the investigation may impair the proper management of the investigation then he shall recommend a gag

⁶⁴ T. Shwartz-Altschuler and G. Lurie, *Tzenzura tzva'it, tzavei issur pirsum ve-hagana al sodot bithoniyim ba'-idan ha-digitali* [Military Censorship, gag orders and defending security secrets in the digital age]. Jerusalem: The Israel Democracy Institute, 2016

⁶⁵ *ibid*

⁶⁶ Section 70(c) of the Courts Law [Consolidated Version] 5744-1984

⁶⁷ "Gag Reflex?", *Haaretz*, 1.11.2009. Online (English): <http://bit.ly/2akN1W2>

⁶⁸ "Treatment of gag orders", Israel Police Investigations and Intelligence Division, procedure 30.300.185.

Online (Hebrew): http://www.police.gov.il/menifa/05.300.01.185_1.pdf

⁶⁹ *ibid*

order to his senior appointed officer, in writing or verbally, depending on the urgency of the matter... 2) A senior officer in charge is authorized to approve the request for a gag order after he has received all the information regarding the investigation as well as the necessity for publication... 3) The decision to apply for a gag order and the extent of it will be decided with consideration for the proportionality tests and the balance between the different relevant interests... 4) The decision should take into account, inter alia, the severity of the offenses, their complexity, the identity of those involved, the importance that the information about the investigation should be made public and whether or not it was published in foreign media... it should be made clear that the gag order will be granted only when there is a concern that the investigation will be damaged if publications will not be banned, and that the order will be restricted to the extent which the information in question, while examining the possibility of reducing or canceling the gag order when made possible"⁷⁰.

The procedure instructs the unit to apply first for a seven days gag order and only if the need arises to extend the order "an application should be made to the court for a period not exceeding 30 days from the first day the order was given... If the need arises to extend the order for more than 30 days it will require the approval of the Head of the Investigations division or his representative... If the extension was approved the unit will file for a period not exceeding 90 days... any extension beyond this period will require the approval of the Head of the Investigations Division each time". If the cause for the gag order expires before the period approved in the order, the officer in charge of the investigation may decide to terminate it without the court's approval. It also instructs that "the discussion regarding the extension of the gag order would generally be Ex Parte". If the media wishes to appeal after seven days they "shall transfer a request to the court and the investigative unit" but "the secret materials will be seen only by the judge".

The procedure includes a ready-made standard form for gag orders requests which already includes the legal grounds (section 70), four empty lines for the specific reasons, five "checking boxes" regarding the scope of the ban (all details of the investigation; all details that might identify the suspects; the existence of the investigation; the existence of the gag order or of the following details) and the requested duration of the order. The judges sign and stamp these ready-made forms filled in by the police. Mostly without any changes and by adding a single handwritten expression: "as requested"⁷¹.

After a gag order has been approved by a judge, the police spokesperson unit sends them to the relevant reporters, without mentioning the reasons for the request and sometimes almost with no details at all. In some circumstances of a secret investigation the police will decide to "lock" the gag order. This means the media is not informed of its existence at all and will be notified only if and when a journalist is asking about it. In this case, the original request and the extension requests are always heard Ex Parte without an opportunity to appeal and according to the regulation the order could then "be requested for an indefinite period of time"⁷². The regulations also emphasize it is prohibited to update or brief journalists

⁷⁰ ibid

⁷¹ Based on my own personal experience as a journalist, handling hundreds of gag orders, as well as interviews with law experts (see next chapter)

⁷² Section B(15) of Israel Police procedure 511.10.003

regarding information banned by a gag order. The Police is also expected to investigate any suspicion of a gag order violation. And “In the absence of exceptional considerations, a recommendation for indictments shall be made”⁷³.

History and milestones

The tension between the Israeli press and government authorities who were not satisfied with the censorship’s abilities and wished to control the media through court orders, were present throughout the state’s history – but steadily increased since the mid-1980s and peaked during the late 1990s up until today⁷⁴.

1948-1960s

The first references to the Hebrew term for gag orders (“Isur Pirsum”) in the Israeli press archives, appears in August 1948 – only a few months after the declaration of Independence. It was not yet an official gag order as we now know it, but it was an early incident of a publication ban which was not purely related to national security matters. The Editors Committee protested against what they saw as an attempt to impose political censorship through law enforcement. According to the article, police officers were sent to close down a major newspaper for a few days, after its editors violated an order not to publish any detail about a hunger strike led by political prisoners⁷⁵. A few years later, in 1953, the Attorney General referred to the growing practice of in-camera proceedings without any proper legislation. He explained in a news conference: “in civil cases as well it is permitted for judges to order so if they think the publicity is endangering the state’s security or public morality”⁷⁶. This attitude was indeed reflected in the first version of the Courts Law passed in 1957⁷⁷.

Over the following years, the term gag order began to appear in Hebrew newspapers mainly in reference to suspects’ names who remained anonymous under court orders. Some readers were starting to question the consideration leading judges to ban some of the names as opposed to others, especially when the suspects are famous and powerful⁷⁸. In 1956, this practice was challenged in court when five newspaper were sued in Jerusalem for publishing the name of Mary Frances Hagen – an American citizen charged with espionage⁷⁹. The Israeli newspapers based their reports on a New York Times article whose correspondent left the country for Cyprus in order to telegraph the news to his paper⁸⁰. According to the reports from the trial, the papers battled the accusations claiming they did not violate any specific law since, at the time, the law only explicitly defended the identity of minors. Their attorney also emphasized that “the name was published in the Israeli press only after it was widely publicized in the world, and thus invalidating the security

⁷³ Section E of Israel Police procedure 511.10.003

⁷⁴ Archival research through Israel’s historical and contemporary Hebrew newspaper archives. I studied the scope and content of publications regarding the term “gag orders” during the years 1948-2016

⁷⁵ “Newspaper editors against political censorship”, *Maariv*, 20.8.1948

⁷⁶ Press conference with Attorney General Haim Cohen, *Herut*, 20.1.1953. Online (Hebrew): <http://bit.ly/2anOFDV>

⁷⁷ Section 38 of the original version of the Courts Law 1957. Online (Hebrew): <http://bit.ly/2ao0pqa>

⁷⁸ “Why was the name omitted?” *Davar*, Readers Letters, 18.5.1958. Online (Hebrew): <http://bit.ly/2aitVCG>

⁷⁹ “Israel tries U.S. woman as spy”, *Chicago Tribune*, 6.10.1956. Online (English): <http://trib.in/2a5PGo0>

⁸⁰ “The trial against the newspapers who published the spy’s identity began”, *Davar*, 12.11.1956

importance. Moreover, after The New York Times published the name the censorship did not ban the publication... the censorship is, as well-known, in charge of the security inspection; and the court order, under which the press was brought to trial, had no legal ground"⁸¹. In June 1957, their final appeal was declined by the Supreme Court⁸². The judges ruled there was sufficient legal ground to close the court's doors under the Official Secrets Act. Judge Moshe Landau wrote, only four years after the Kol Ha'am Case: "In a democratic regime, there is great value in Open Justice. But when it is necessary for the public's interest, the court may reduce the publicity in order to enable him to do his job appropriately"⁸³. However, he added: "it is not within the authority of the court to act the role of the censorship as long as it exists in the state"⁸⁴. Later that year, while approving the first version of the Courts Law, the Knesset added the Sub Judice section.

Early evidence of the public debate around the new phenomena of gag orders on suspects' identities, especially in criminal cases, appears in the Herut newspaper in 1958. In a short report, the Minister of Police told Members of the Knesset the police had been instructed to "act more carefully" when considering such requests⁸⁵. Earlier that month, the new Chief of Police told journalists at his first news conference in Tel Aviv that he believed the press "can be trusted to avoid harmful publications" and that "gag orders should not be imposed". He promised them he would prefer a collaborative attitude⁸⁶. But these promises seem to have faded later on. At a panel held in Jerusalem in 1960, on the question "should crime be given publicity?", the police spokesperson warned that detailed reports in the press about criminal cases might "arouse" readers⁸⁷. It is also worth mentioning that during these years, the 1950s and 1960s, the judges and the press usually made an effort to explain the reasons for the bans. For example, the need to protect a police lineup or other reasons which were usually mentioned in the news reports.

During the 1960s, stories about broader gag orders began to appear in the press. It was no longer a question of suspects' identities, but other investigation details. For example, in 1964 a paper reported a "total press blackout"⁸⁸ on the investigation of a diamond factory robbery. In 1965, another newspaper reported that a "press blackout" had been imposed on the disappearance of an infant from a hospital⁸⁹. A gag order was also issued following the arrest of Adolf Eichmann to hide any detail regarding his location⁹⁰.

Another "press blackout" under a sweeping gag order took place in 1966, when two magazine editors were secretly arrested for publishing censored information regarding an alleged Israeli involvement in the assassination of Moroccan politician Mehdi Ben Barka⁹¹. The two were pardoned by the president and released following an international outrage. The Minister of Justice explained to the Knesset that they had to hide the arrest for fear it

⁸¹ *ibid*

⁸² "Davar and Maariv appeal declined", *Davar*, 2.6.1957

⁸³ *ibid*

⁸⁴ *ibid*

⁸⁵ "The minister of police answers parliamentary questions", *Herut*, 17.6.1958

⁸⁶ "Chief of Police: the police will work in collaboration with the press", *Davar*, 4.6.1958

⁸⁷ "Crime and advertisement", *Herut*, 18.5.1960

⁸⁸ "Blackout on the diamonds robbery investigation", *Herut*, 26.8.1964

⁸⁹ "Infant missing from hospital was found in his mother's house", *Maariv*, 2.3.1965

⁹⁰ A retrospective article on the Aichmann trial, *Davar*, 7.10.1966

⁹¹ "Minister of Justice justifies the gag order on the imprisonment of 'Bul' editors", *Davar*, 8.3.1967

might increase the attention to the original case. During the same event, the minister admitted that Israel had arrested other suspects under a “press blackout”, all for security-related offenses. They claimed all of them were released except for one⁹².

1970s-1980s

During the 1970s, requests for gag orders started to face some rare but existing criticism inside the court rooms. Judge Hadassa Ben-Itto, canceled a gag order issued by a lower court, writing in her verdict: “public hearings include the freedom of publication... I cannot think of any situation in which the court should initiate a gag order without a specific request from one of the parties involved”. She also addressed the announcement made by a police representative who claimed to have no objections to the publication ban, and declared: “the police is not in charge of maintaining the freedom of publication”⁹³. On the other hand, in the Knesset, MK’s were pressuring the police to control the wide coverage of criminal cases. The Knesset Internal Affairs Committee announced in 1976 that “extensive publications on police criminal investigations could undermine the investigation and hurt innocent people”⁹⁴. According to the report, the police assured the committee they had imposed gag orders and seriously treated all cases of violation. The committee instructed the police to ensure that all publications would be made only through official sources.

With or without the influence of the Knesset, during the mid-1980s there was indeed a noticeable increase in reports about criminal gag orders. In these years, after the 1983 bank stock crisis, Israel was facing an increase in violent crime⁹⁵ along with massive cuts in police budgets⁹⁶ and in 1987 the first Intifada broke out. The number of references to criminal gag orders in the press began to rise steadily and journalists were becoming concerned. A column published in 1986 in the Maariv newspaper, Gavriel Shtarsman warned: “Gag orders without grounds”⁹⁷. In his column, he wrote: “Open Justice is one of the foundations of a free society... It is impossible to issue gag orders every other day preventing publication regarding cases the whole public knows about and that there is no concern that their publication will harm the ‘safety of the defendant or any other person who is mentioned in the hearing’ [the version of the Courts Law at the time]... if the legal proceeding is not in-camera, he [the judge] does not have, with all due respect, the authority to order a publication ban for other reasons... it is graver if there are no reasons for the order or when the reasons are not according to the law”⁹⁸. The trigger for this furious column was a sweeping gag order banning any reports regarding a group of school children who were caught stealing from a military base, despite the fact the story was already widely reported on the radio before the gag order was issued later that day and although the identity of the children was already protected by law as minors.

⁹² *ibid*

⁹³ “The judge criticized a gag order”, *Davar*, 4.8.1975

⁹⁴ “The Internal Affairs Committee: wide publications about investigations might harm the investigation and innocent people”, *Davar*, 17.3.1976

⁹⁵ G. Fishman, A. Rattner and H. Turjeman, “Micro and Macro Analysis of Violence in Israel 1980-2007”, 2007

⁹⁶ Israel Police official history website. Online (Hebrew): <http://www.police.gov.il/history/fullArticleText.aspx?aid=79>

⁹⁷ “Gag orders without grounds”, *Maariv*, 4.2.1986. Online (Hebrew): <http://bit.ly/2aoLUCD>

⁹⁸ *ibid*

But this war had only just begun. A few days later a judge dismissed charges against three journalists accused of violating a sweeping gag order⁹⁹. Judge Hadassah Ahituv ruled the lower court exceeded its authority by issuing a sweeping gag order on a criminal case, since, in her opinion, the law does not support this interpretation.

Regardless of this early criticism, the numbers of partial and sweeping criminal and national security gag orders kept rising, became a major phenomenon in Israel during the late 1990s and remains so till this day.

1990s-today

Professor Moshe Negbi points to the 1997 “Manbar Affair” as a significant milestone in the history of sweeping national security related gag orders in Israel¹⁰⁰. In 1997, Nahum Manbar, an Israeli arms dealer, was secretly arrested for selling information and supplies to Iran. For about a month, his arrest was under complete blackout. The newspapers kept reporting about “the mysterious disappearance”¹⁰¹ of the famous owner of a local football team, until the gag order was finally dropped. A headline in *Maariv* announced: “The way in which people can disappear in Israel is reminiscent of dark regimes”¹⁰².

Later that same year, another high profile case drew attention to the evolving practice of gag orders in the country. Yehuda Gil, a former Mossad intelligence agent, was arrested for fabricating information, again, under a sweeping court order. The Israeli independent media watchdog journal, *The Seventh Eye*, published a column by journalist Carmit Guy about the “Gil Affair” media coverage. “It all started, as we now know, with a gag order distributed in the newspapers offices”¹⁰³, she wrote. “The gag order was issued by a judge regarding an affair connected to a Mossad pensioner... gag orders like this arrive at the newspaper almost every day, mostly in the matters of minors or major security issues. Usually, it is the innocent message that speeds up the reporters to discover what is behind it”. According to the column, the gag order was slowly nibbled away at the press and politicians and the censorship was “helpless” as well since the story was already reported all over the world. The journalist suggested the Mossad adjust itself to the digital age by appointing a spokesperson responsible for official press releases and briefings to avoid disinformation, instead of hiding what cannot be hidden anymore¹⁰⁴.

The late 1990s: Censors vs. gag orders – a retrospective by two former Chief Censors

Ever since the late 1990s, Israeli media have struggled with gag orders on a weekly, sometimes daily basis (see chapter 4). In a 1998 column by Avner Hofstein he argues that “journalists insist on finding loopholes, the police and the rest of the security authorities

⁹⁹ “Charges dropped against three journalists for violating gag orders”, *Maariv*, 13.4.1986. Online (Hebrew): <http://bit.ly/2aFsn5g>

¹⁰⁰ M. Negbi, telephone interview, 21.6.2016

¹⁰¹ “The report about the mysterious disappearance of the sponsor”, *Maariv*, 15.4.1997 and “Businessman Nahum Manbar disappeared”, *Haaretz*, 15.4.1997

¹⁰² *Maariv*, 17.4.1997

¹⁰³ “The Gil affair and all the rest”, *The Seventh Eye*, issue number 12, 1.12.1997.

Online (Hebrew): <http://www.the7eye.org.il/46043>

¹⁰⁴ *ibid*

enlarge their quotas, the court signs too easily on much too sweeping statements..."¹⁰⁵. In 1999, journalist Baruch Kra questions the legality of the Military Censor's involvement in the enforcement of the rising gag orders. He explains that since the censorship has been bound to the "near certainty test" by the Supreme Court and agreement with the press, its status has declined. Information which appeared in the past or in foreign media could rarely be regarded as "near certainty that genuine damage will be caused to state security". Thus it could not be censored, driving security authorities to the courts¹⁰⁶. According to Kra's report, two months earlier the Attorney General of Israel called a special meeting on the issue and demanded that the Chief Censor should cease from authorizing court-banned information. "The censor was surprised... he knew the Supreme Court ruling well... he also knew the limited power the censorship still had depends on its independence", but ended up "accepting their request"¹⁰⁷. Kra quoted the military correspondent for Maariv, Yoav Limor, as saying: "The Military Censorship has become the executive arm of the legal system in security affairs. The security authorities are unable to cope properly with secrets and find solutions that are far from democratic"¹⁰⁸.

From then on, national security gag orders became a major bone of contention between the censorship and the State's Attorney's Office. It perpetuated two years later in an official procedure, when a new Chief Censor came on board and following an appeal by the newspapers Haaretz and Yedioth Ahronoth. The new procedure stated that any gag order would now be issued in coordination between the Attorney General, the censor and all relevant national security authorities. The censor would be in charge of all contact with the press regarding the case, but would not be able to address any question related to court-banned information and would inform the reporters as such. Should the censorship think the gag order is unjustified, they were to explain their opinion to the security authority who requested it in the first place¹⁰⁹. In other words, the censorship was now officially subordinated to the gag orders and was no longer able to express its professional opinion on national security if a gag order has been issued.

Brigadier General (Rt) Adv. Rachel Dolev, former Chief Censor (2000-2004), recalls those days clearly. In a phone interview, she described the circumstances¹¹⁰: "When I assumed the position in 2000, the censorship barely existed. These were the late 90s and the peace process was developing and the press seldom interacted with the censorship. There was no censorship. Suddenly, the Second Intifada began, soldiers were kidnapped in Lebanon, Elhanan Tannenbaum was abducted, and there was a lynching in Ramallah. The gag order gives you such a blow and tells you 'Guys, toe the line'. After a year or two the media did follow and the censorship became stronger and there was less of a need for gag orders. But back then, when they kidnapped Tannenbaum, I agreed with the Shin Bet attorney who requested the gag order. It was a life-threatening situation. In the case of a life-threatening situation nothing else matters. During this period the enforceability of censorship was very

¹⁰⁵ "Not holy orders", *The Seventh Eye*, issue number 17, 1.11.1998. Online (Hebrew): <http://www.the7eye.org.il/22229>

¹⁰⁶ "There is no separation of powers", *The Seventh Eye*, issue number 18, 1.1.1999.

Online (Hebrew): <http://www.the7eye.org.il/22157>

¹⁰⁷ *ibid*

¹⁰⁸ *ibid*

¹⁰⁹ "New procedures regarding gag orders", *Haaretz*, 25.6.2001. Online (Hebrew): <http://www.haaretz.co.il/misc/1.712398>

¹¹⁰ R. Dolev, telephone interview, 24.5.2016

weak. It was difficult to enforce the authority of censorship and I had to re-educate the media. So when they [the Shin Bet] told me they want to issue gag orders, at first I did not necessarily resist. There were one or two cases, like Tannenbaum, when I myself recommended a gag order. Later on, we needed to regulate this, following the appeal to the Supreme Court, so Edna Arbel [then State Prosecutor] and I formulated a procedure that defined the relationship between gag orders and the censorship. According to this procedure, the Shin Bet could go and ask for a gag order but after seven days they would gradually begin to remove it and if secrecy is still needed it will be in the censorship's authority to enforce it".

Dolev does not see the legal system as an obstacle: "I think there is a place for gag orders in the case of a life-threatening event. When someone is kidnapped by Hezbollah, is this the right time to deal with the priority of the censorship? It can be a tool used by the censor. I did not feel disrespected. Sometimes they did try to undermine us, I won't tell you that everything was perfect... We argued day and night. Everyone wants to take a larger share and each body wants to have more power. So OK, there were conflicts, but we are dealing here with two procedures that in some cases overlap and in other cases do not. For example, when there's a kidnapping case and it is probable that a military operation will take place, then what, do you start saying 'no gag orders'?"

She admits the number of gag orders is probably high: "It is true that the Shin Bet and the police are too easy on the trigger. There is no doubt about it. And the State's Attorney's Office always goes along with them... and the judges as well... 100% of the requests are approved. Because, if there was an abduction, and the Shin Bet's representative appears in court and asks for a gag order, show me one single judge who will not grant it. It is also clear that this will be made Ex Parte. Let's say that there is a police manhunt and they gather evidence and they arrest the suspects, then would they let someone be a party and hear the evidence? The media? This is why we need to return to court and re-examine the circumstances".

Dolev's successor in office – Brigadier General (Rt) Sima Vaknin-Gil, former Chief Censor (2005-2015) and current CEO of the Israeli Ministry of Strategic Affairs – was in-charge of the censorship in a different era. The gag orders procedure was already in place, the Second Intifada was facing Tahdiya¹¹¹ and the Internet was undoubtedly here to stay - accelerating Israel's already intense news cycle. In a phone interview¹¹² she explained her perspective: "They started this procedure because there was a feeling that the censorship's enforceability is weakening. In the late 90s there were many security concerns and many arguments between the censorship and the State's Attorney's Office as well. So, they issued a procedure which ruled the censorship cannot express its professional opinion in case of a gag order. They didn't want two contradicting statements coming from two state authorities. Personally, I think it was a mistake. They took away the status the censorship had been given by law. When we agree with each other there is no problem and we can explain the gag orders easily, but when there is no agreement and you just tell the media 'sorry, this is

¹¹¹ Temporary lull (Arabic)

¹¹² S.Vaknin-Gil, telephone interview, 18.6.2016

the gag order and that's it', it undermines the status of the censorship which is an important tool in a democracy".

Vaknin-Gil agrees with Dolev that "It is indeed easy to issue gag orders. If the authorities go to court and ask for a national security related gag order, they succeeded". She emphasizes "usually it's not overused. So it's a bit like the chicken and the egg: they do not overuse it, so they get it when they need it. On the other hand, regarding criminal gag orders and regarding orders that were longer than usual, the courts were pretty easy on the security forces".

She understands why her predecessor felt the gag orders were sometimes useful: "The gag orders at the beginning of the Second Intifada were helpful because of the security threats. Sometimes it was very convenient to have a gag order in hand". However, she thinks that "as a concept, it is wrong to use the gag order as an excuse. This is my opinion. At the end of the day, it is not only up to me but it is up to the judges as well". She believes the advantages of the censorship system are clear: "A gag order is static, but as a censor, I know what has been published and what hasn't been and what is relevant at this point regarding the security threat. Things are evolving. This is most typical in cases of terror investigations. What was highly classified, after two minutes is not relevant any more. So, there were cases when I said: 'Let me manage that better'. For example, in the case of the abduction of the three boys on the West Bank we worked as two barely coordinated bodies. I was coordinating with the IDF and in a dialogue with the press. Afterwards, I discovered that a gag order had been issued, parallel, by the police. There was also the incident of the Ethiopian guy who crossed the border. But I admit: that case was easier to handle with a gag order. In my opinion this is not a bypassing mechanism, since both, the censorship and gag orders, have legal grounds. But the section of the Courts Law was massively extended. Therefore, it is not a bypass, but you can say that it completes, replaces or extends but do not contradict each other. There are no gag orders with absolutely no grounds. In a whole decade I had only two cases when I fought against a gag order – and I won. I told them 'Guys, in such a matter I will be against you' and after I said that, the gag order was not issued. I did it because this erodes the status of the gag order system. And we do need it in other cases. I remind you, I am primarily responsible for national security and not for freedom of speech. So, when such an important mechanism as a gag order is being damaged, it has far-reaching implications. However, those were just two cases in 10 years".

Just before she left the censorship, following a decade in office, Vaknin-Gil recommended a substantive reform¹¹³. In an 88-page proposal published in a Military journal¹¹⁴, she suggests, among other things, to separate the censorship from the military and establish a civilian agency which will provide "guidance" for the press while strengthening enforceability by legislation. "I have suggested this reform because we need to look forward", she explained, "one cannot remain in the past when everything around is changing".

¹¹³ "Israel's secret-keeper seeks censorship reform", *Reuters*, 30.7.2015.

Online (English): <http://www.reuters.com/article/us-israel-censorship-idUSKCN0Q41E220150730>

¹¹⁴ An online version of the original essay (Hebrew): <http://www.the7eye.org.il/wp-content/uploads/2015/08/1714.pdf>

At the time Vaknin-Gil led the Israeli censorship, things did indeed change. During that digitally evolving decade the more gag orders became harder to enforce, particularly online, the more they became sweeping and draconian. Not only due to national security concerns: while the censorship and the State Attorney tried to find the appropriate balance – the Israel Police kept their foot on the gas pedal with criminal gag orders. In 2007 the Zeiler Inquiry Committee, appointed to investigate a police murder scandal¹¹⁵, led to the resignation of the Chief of Police. Haaretz newspaper reminded its readers that another aspect of the scandal had been neglected by the committee: gag orders¹¹⁶. According to the article, for four years no one had even thought that a gag order should be requested until a reporter requested answers. “Every week courts around the country issue more and more gag orders at the request of the police”, said the report.

In 2008 another extreme case under gagging order outraged the press: The Prime Minister of Israel at the time, Ehud Olmert, was being investigated under a “press blackout”. Haaretz’s legal commentator Ze’ev Segal wrote: “...the court’s decision to continue the sweeping gag order on a case concerning the Prime Minister seems unreasonable”¹¹⁷. In 2009 Sagi Cohen from the same newspaper wrote: “It’s hard to believe how easy it is to issue gag orders. The police requests and the court approves... Open Justice is harmed? Who cares, let us investigate quietly”¹¹⁸. In the same year, the Israel Police was getting ready to finally publish its recommendations on new gagging orders regulations (see above – legal framework chapter).



Kamm-Blau Affair

In 2010, the gagging pendulum swung towards national security once again, in one of the most famous gag order cases in Israel’s history, the Anat Kamm-Uri Blau affair¹¹⁹. Anat Kamm was a young journalist who leaked documents she had obtained during her military service to Haaretz’s reporter Uri Blau. The leaked documents revealed how the “IDF approved assassination plans in the West Bank even when it would probably have been possible to arrest the wanted men – in contradiction to the State’s statement to the High Court”¹²⁰.

¹¹⁵ “Top Israeli Police Official Resigns in Scandal”, *New York Times*, 18.2.2007.
 Online (English): <http://www.nytimes.com/2007/02/18/world/middleeast/18cnd-israel.html? r=0>
¹¹⁶ “How police failures were covered-up under the protection of gag orders”, *Haaretz*, 25.5.2006.
 Online (Hebrew): <http://www.haaretz.co.il/misc/1.1107619>
¹¹⁷ “The continuation of the gag order – unreasonable”, *Haaretz*, 6.5.2008.
 Online (Hebrew): <http://www.haaretz.co.il/misc/1.1322680>
¹¹⁸ “The effortlessness in which the police issues gag orders”, *Haaretz*, 30.10.2009
¹¹⁹ “TIMELINE: The Anat Kamm affair”, +972, 29.10.2011.
 Online (English): <http://972mag.com/timeline-the-anat-kamm-affair/26542/>
¹²⁰ “License to Kill”, *Haaretz*, 27.11.2008. Online (English): <http://www.haaretz.com/license-to-kill-1.258378>

Following the publication approved by the censorship, an investigation began to find Blau's source. She was then put under house arrest in December 2009 with a complete "blackout" gagging order. She was under house arrest for months, while the Israeli media was not permitted to report the case or even the mere existence of the gag order itself. In April, reports began to appear abroad. Yediot decided to translate an article originally published in the Daily Beast by Judith Miller, and in an exceptional move blacked out sentences in the article (see image, P. 25: Yediot, 6.4.2009).

The headline announced: "Israel's censorship scandal"¹²¹, although officially it was a court gag order and not the censor's orders, and the subtitle was: "A 23-year-old journalist is under house arrest for exposing government corruption, and an Israeli court has gagged the media"¹²².

Only on April 8th 2010 did the court lift the ban. Newspapers were again filled with criticism against the practice of gagging and the undermining of the censorship's authority and the appropriate checks and balances.

"Prisoner X"

Despite massive criticism and the world's attention, this embarrassing affair did not prevent a very similar scandal only three years later: "Prisoner X". The mysterious prisoner, who hanged himself in an Israeli prison on December 2010 was Ben Zygiel – an Australian Jewish man who joined the Mossad and later was secretly incarcerated in the most secure cell in Israel¹²³. The story was banned for publication under a sweeping gag order and was finally revealed only in February 2013 following Trevor Bormann's ABC investigative report¹²⁴. Haaretz appealed to remove the ban two years earlier, but was firmly rejected, says Haaretz's Attorney Tali Lieblich from Lieblich-Moser, who has been representing various media outlets in Israel in major gag order cases since the 1990s¹²⁵: "In the case of 'Prisoner X', two years before the story was revealed I approached the judge with an appeal from Haaretz", she says. "The Shin Bet firmly claimed it was a highly sensitive matter of 'state security' which will cause collateral damage worldwide and I was refused. Later the story was published in Australia, but surprisingly they still kept the gag order for 24 more hours... the idea that in Israel people did not see the headline on ABC's website was ridiculous. They fail to understand the Internet".

The day the story broke on ABC, I was Haaretz's Head of the News Department. Senior correspondent and columnist Amir Oren, who followed the case closely and even briefly hinted it existed in an op-ed from 2010¹²⁶, informed us that ABC were about to broadcast.

¹²¹ The original publication: "Israel's Censorship Scandal", *Daily Beast*, 3.4.2010.

Online (English): <http://www.thedailybeast.com/articles/2010/04/03/israels-free-press-crackdown.html>

¹²² *ibid*

¹²³ "Mystery Over 'Prisoner X' Revealed", *Haaretz*, 13.2.2013. Online (English): <http://www.haaretz.com/israel-news/australian-tv-report-security-prisoner-who-killed-self-in-2010-was-ben-zygiel-a-mossad-agent.premium-1.503233>

¹²⁴ The original publication: "Prisoner X - The Australian Connection", *ABC*, 12.2.2013.

Online (English): <http://www.abc.net.au/foreign/content/2013/s3688787.htm>

¹²⁵ T. Lieblich, telephone interview, 7.7.2016

¹²⁶ "Particularly sensitive cases involve prisoners who are incarcerated for classified reasons, such as those involving security matters, and whose deaths are not made public". From: "The Mystery of Jail Suicides", *Haaretz*, 27.12.2010. Online (English): <http://www.haaretz.com/the-mystery-of-jail-suicides-1.333109>

Knowing the censorship would not ban a live broadcast on ABC, we prepared our own version based on the ABC's investigative report and waited for it to air. We were not the only ones. Walla! news site published its own version as well, so we thought it will only be a matter of minutes before the authorities released the entire story. However, the censors on duty called furiously demanding that we take the story offline regardless of the foreign reports that meanwhile had spread all over the world. The censors argued that our lawyer had a gag order, but she wasn't available at the time so the article was online for a while before the final decision was made to take it offline. The Attorney General sent Haaretz an official letter informing us he was about to open a criminal investigation for the alleged violation of a gag order, but then decided not to due to his policy to "reduce criminal investigations against the press as much as possible"¹²⁷. At the same time, he warned us this will not prevent him from investigating Haaretz in the future. The Prime Minister's Office suddenly called in the historical Editors Committee for an urgent meeting regarding the case. Our editor-in-chief Aluf Benn did not attend and Haaretz published an article under the headline "The Prime Minister's Office is urgently summoning the Editors Committee to ask for cooperation in preventing the publication of a very embarrassing case regarding a national authority"¹²⁸. This article remained online instead of the previous one.

At the interview held almost four years later, I heard the Censor Vaknin-Gil's point of view of the events for the first time: "When we knew ABC was about to publish, we understood we needed to cancel the gag order. But it was late and it took 24 hours with the entire bureaucracy until the judge finally signed the cancellation form the next day. During that time, Haaretz made a whole scandal. We lost the narrative because the bureaucracy was too slow"¹²⁹. From her perspective, the prolonging gag orders in the affairs of Anat Kamm and "Prisoner X" were damaging Israel's image: "The mere existence of censorship in a democracy could undermine the country's democratic image. Because the Israeli censorship sees itself as a protector of security while causing minimal damage to the freedom of speech, I insisted on using minimal strength. Thus, even when I agreed to gag orders, I insisted on minimizing them when no longer needed. In the cases of Anat Kamm or Ben Zygier, where gag orders were longer than needed, it was the censor who was blamed by the media, because people cannot tell the difference. I was more concerned at the time with the implications on Israel's image in the world than the censorship's. Foreign media used the same term, "to censor", so people said 'the censorship in Israel is abusing freedom of speech' and it was a problem for Israel's image"¹³⁰.

Other major gag orders worth mentioning between that time and when I left the news desk in mid-2015, were the "very famous singer"¹³¹ case which was, as Lieblich explains, "such a joke that we didn't even appeal because everyone already knew exactly who he was"¹³²; the secret false arrest of Arab minors during the investigation of Shelly Dadon's murder – a case

¹²⁷ The A.G. letter to Haaretz, *The Seventh Eye*, 22.2.2013. Online (Hebrew): <http://www.the7eye.org.il/46006>

¹²⁸ "Prime Minister's Office urgently summoning the Editors Committee to ask for cooperation in preventing the publication of a very embarrassing case regarding a national authority", *Haaretz*, 12.2.2013.

Online (Hebrew): <http://www.haaretz.co.il/news/politics/1.1927962>

¹²⁹ S.Vaknin-Gil, telephone interview, 18.6.2016

¹³⁰ *ibid*

¹³¹ "Sex, drugs, underage girls and the 'very, very famous' Israeli pop singer", *Haaretz*, 18.11.2013.

Online (English): <http://www.haaretz.com/blogs/routine-emergencies/premium-1.558717>

¹³² T. Lieblich, telephone interview, 7.7.2016

which required many legal efforts to uncover¹³³; the story about a noncombat soldier who opened fire during an incident in which two Palestinians were killed – but the army banned the publication of his unit's name¹³⁴; a double sweeping gag order incident during the kidnapping of three young boys in the West Bank, preventing publications regarding their mistreated call to the police emergency line and later information regarding evidence that could have indicated that they were already dead¹³⁵; banned surveillance videos from a checkpoint shooting case¹³⁶ and a 10 months' legal battle against a sweeping gag order on the disappearance of two Israelis in Gaza¹³⁷.

Other milestones during these years include the Israel Press Council's failed initiative to help represent media outlets in gag orders appeal processes¹³⁸ and a 2010 bill presented in the Knesset designed to significantly reduce the amount of gag orders which has failed as well¹³⁹.

Causes and criticism

Most researchers and journalists mention two main causes for the rise of gag orders in Israel. One is the decline in the status of the censorship and the other is the Internet revolution¹⁴⁰. Criticism is usually pointed toward the judges accused of acting as "rubber stamps". Attorney Tali Lieblich describes the processes¹⁴¹: "The reason the number of gag orders increased is that it is so easy to get them. The security ethos here is so strong that if you come to a judge and say: 'we have a terror related case', the judge agrees to it immediately. There are also judges who are known to be the 'security hawks' and police like to apply to them... The judges are supposed to represent the need for balance, but in 99% of the cases they do not do it and sign [the gag order] without a serious investigation... during the first stage, a policeman usually comes to court, usually a Magistrate Court (lower court), and the judge automatically grants the gag order as requested by the police. In the second stage, the journalists ask to remove the order and then a judge needs to balance the principles of an open hearing, the public's right to know and freedom of speech with the demands of the authorities. There is a lot of responsibility resting on the media which needs to initiate these second stage appeals... Assuming that the law is not going to be changed, judges must understand that their investigation is the key for a democratic state".

¹³³ "Six Israeli Arabs Released Without Charge in Probe of Woman's Murder", *Haaretz*, 17.6.2014.

Online (English): <http://www.haaretz.com/israel-news/premium-1.599382>

¹³⁴ "Haaretz Reveals: Non-combat IDF Soldier Opened Fire at Deadly Nakba Day Protest", *Haaretz*, 28.5.2014.

Online (English): <http://www.haaretz.com/israel-news/premium-1.595881>

¹³⁵ "Israel Lifts Gag Order on Kidnapped Teen's SOS Call", *Haaretz*, 1.7.2014.

Online (English): <http://www.haaretz.com/israel-news/1.602442>

¹³⁶ "Two Palestinian Siblings Shot Dead After Attempted Knife Attack at West Bank", *Haaretz*, 27.4.2016.

Online (English): <http://www.haaretz.com/israel-news/1.716623>

¹³⁷ "Two Israelis Missing After Disappearing Into Gaza", *Haaretz*, 9.7.2015.

Online (English): <http://www.haaretz.com/israel-news/1.663653>

¹³⁸ "A Plethora of Gag Orders", *Haaretz*, 28.10.2009.

Online (English): <http://www.haaretz.com/a-plethora-of-gag-orders-1.5254>

¹³⁹ "New Bill Could Limit Police Powers to Gag Press in Israel", *Haaretz*, 26.5.2010.

Online (English): <http://www.haaretz.com/israel-news/new-bill-could-limit-police-powers-to-gag-press-in-israel-1.292414>

¹⁴⁰ T. Shwartz-Altshuler and G. Lurie, *Tzenzura tzva'it, tzavei issur pirsum ve-hagana al sodot bithonyim ba-'idan ha-digitali* [Military Censorship, gag orders and defending security secrets in the digital age]. Jerusalem: The Israel Democracy Institute, 2016

¹⁴¹ T. Lieblich, telephone interview, 7.7.2016

It's not only the judge's responsibility however, she also points to the police: "There's an impression that the police has its own private investigations. I mean, it seems as if they say: 'I want to investigate quietly for my own reasons so I would like to get a gag order'. Israeli government officials feel as if something is entrusted in their hands and they do not want to share it with the public. There is no understanding on the part of many officials that they are there for the public... Sometimes the police just want to control the narrative and the timing of the publication. For example, in the case of Rose Pizem, the whole country knew that an investigation was taking place and the police refused to remove the gag order. Suddenly, when they felt like it, they held a news conference. The Police District commander went to the hairdresser, combed his hair and dressed nicely and was interviewed when the gag order was still valid. Usually, they make public statements around the time when the TV news programs are aired".

Professor Negbi largely agrees¹⁴²: "The percentage of approvals for gag order requests is very high. Judges usually automatically follow the request forms and the public's right to know is not represented in the proceedings. Not out of bad intentions, but out of a lack of awareness of judges who are under a lot of pressure. Sometimes, judges need to handle dozens of cases a day. So, if no one opposes the request for a gag order, rarely do the judges themselves raise any questions. There is a need for judges with an initiative spirit and most of them are not like that. As a result, the gag orders have become an easier and more effective alternative to the Military Censorship. Since the Supreme Court limited the censorship, the censors make rather reasonable decisions. Consequently, national security authorities prefer the judges. It could be any judge from anywhere in Israel, and they flatter them by sharing secrets, something an average Israeli loves the most, and explains to them why it is so important, and in the end they always receive a gag order".

Lieblich also finds the censorship to be a more reasonable mechanism in the circumstances: "Should the Military Censorship procedure be preferred over the gag orders? There is a debate as to whether the censorship is really concerned about the freedom of speech. I think it's the lesser evil. When you're dealing with a censorship procedure, there is at least a group of people who know the field and understand the responsibility to maintain balance. In case of gag orders we deal with dozens of courts all over the country, from north to the south, and in many cases judges do not deal with the gag orders on a daily basis and do not understand the issue deeply enough".

With regard to the digital age, she thinks of it as an advantage: "In the digital era it is maybe easier for me in court because I argue that they are 'shutting the stable door after the horse has bolted'. The Internet is full with references. It is true that there are judges who say 'I do not care what was written on Facebook', but the point is that you need to push the police and give them clear deadlines. Not within 90 or 30 days as it used to be, but rather, within two or three days. For example, there are cases when we ask and the police just backs off. But it will not happen if we do not press them. Sometimes, I can understand that on the first day of the investigation you need to keep the secrecy for 24 or 48 hours and I really say to the journalists: 'Wait, it's useless now'. But afterwards it is possible to partially remove the

¹⁴² M. Negbi, telephone interview, 21.6.2016

gag order. The decision to go for a court hearing after seven days did not help in the era of the Internet, because a week is now a joke in terms of media”.

Negbi also points to the press itself: “The press does not fight this sufficiently. We saw how Israeli media celebrated the persecution of Uri Blau. They did not understand that this was a landmark decline in the status of journalists and that tomorrow it could happen to them as well. They did not understand that. If someone abuses competing media outlets, then they are happy about it, because it stigmatizes the competition as if it’s not concerned with security and not patriotic enough”.

4. HOW MANY IS MANY? THE SEARCH FOR DATA

For decades voices within Israel's media, academia and political arenas criticized the "rising" phenomenon of gag orders, but none of these sources, including a report made by the state itself¹⁴³, contained all the exact official numbers.

In 2004, *The Seventh Eye* estimated that between 2000-2001, the annual rate of gag orders was a little more than 60 per year and climbed during 2002 to about 80 and 110 during 2003¹⁴⁴. These numbers are based on data collected manually from newspapers who kept the gag orders in binders (excluding "locked" orders which are not even sent to the media – see legal framework chapter). In 2006, Haaretz reporter Asaf Carmel quoted a police spokesperson as saying that "there are 'only' 100 gag orders a year"¹⁴⁵. Attorney Tali Lieblich heard in recent years an estimate that was twice as big: "I have been working in this field since the nineties and I think the number of gag orders has obviously increased... I heard police officials say that they believe that there are 'just' 200 gag orders per year. That's a lot. It's an average of more than one every other day"¹⁴⁶.

On the other hand, former Chief Censor Sima Vaknin-Gil is certain that unlike criminal related gag orders, national security ones are actually declining: "when I entered the position, the Shin Bet and I agreed I will give a comprehensive censorial response, which will be flexible and evolving according to reality, and will always be coordinated. On their end, they started lowering the number of gag orders. Along with a more peaceful atmosphere, from 2004 to 2005 we got almost 30% less gag orders and by 2006 we got again around 50% less, so eventually it has stabilized with only 10-20 national security gag orders a year – each and every one of them fully supported by the censor. Why? Because when they saw we backed them up, or in other cases when they take my advice and do not insist on a gag order, they started to consult us before issuing them. Just like the procedure required anyway. In addition, they gradually canceled them when possible. In other words, it is not as bad as the media thinks"¹⁴⁷.

In 2009, journalist Sagi Cohen wrote: "The subjective feeling is that the number of gag orders issued by the police is steadily climbing... unfortunately, there is no way of knowing if these subjective feelings have a factual basis. The court spokesperson explained that because sometimes even the mere order is under a gag order, the data cannot be in the system. On the one hand, makes sense. On the other, Kafka could not have said it better"¹⁴⁸.

For the purpose of this paper, I applied under the Israeli Freedom of Information Act to four different authorities and requested all of their available data regarding the scope of gag orders in Israel during the last decade: how many requests were issued, by which organizations, how many approved or denied and on what grounds. The authorities

¹⁴³ "Gag orders – a comparative review", Adv. Gilad Nave, The Knesset Research and Information Center, 13.10.2013.

Online (Hebrew): <http://main.knesset.gov.il/Activity/Info/LegalDepartmentSurveys/Survey131013.pdf>

¹⁴⁴ "Divine Providence", *The Seventh Eye*, 1.5.2004. Online (Hebrew): <http://www.the7eye.org.il/30062>

¹⁴⁵ "Who do gag orders serve?", *Walla (Haaretz)*, 25.5.2006. Online (Hebrew): <http://b.walla.co.il/item/912642>

¹⁴⁶ T. Lieblich, telephone interview, 7.7.2016

¹⁴⁷ S.Vaknin-Gil, telephone interview, 18.6.2016

¹⁴⁸ "The effortlessness in which the police issues gag orders", *Haaretz*, 30.10.2009

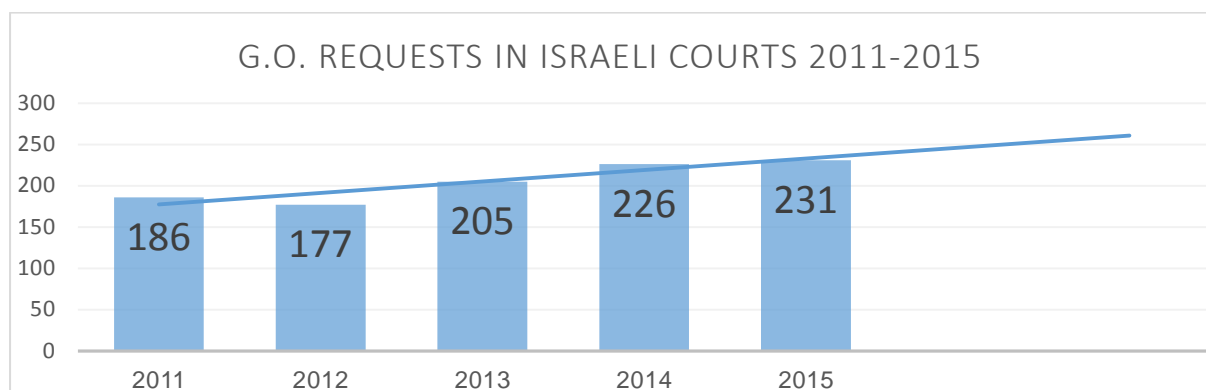
selected were: The Ministry of Justice and State Attorney, Administration of Courts, The Israel Police and the IDF. The Shin Bet and Mossad are excluded from Freedom of Information Act on grounds of secrecy, but I hoped the data from the Administration of Courts might reflect the whole scope since all of the gag orders must be approved by judges. After several months all of the authorities replied.

1. The Ministry of Justice and State Attorney¹⁴⁹

No data was received. The Justice Ministry answered on behalf of the State Attorney: "The State's Attorney's Office does not conduct a separate registration or documentation of gag orders requests, thus we cannot provide you the requested information... nonetheless, we would wish to emphasize the State Attorney does not request many gag orders yearly since mostly these kind of orders are given already in the early stages of the investigations (by the Israel Police) before they reach the State Attorney... Furthermore, in many cases gag orders are given automatically due to specific circumstances (for example - when the suspect is a minor) and not due to the initiative of the law enforcement authorities".

2. Administration of Courts¹⁵⁰

Partial data was received. The Administration of Courts representative explained: that "the information requested in section 2 [how many requests were eventually approved] does not have statistical expression in the computing systems of the judicial branch, thus we cannot provide it. Since 2007, the computing systems have been changed... thus, we cannot provide the information for 2005-2010... collecting the information from each case will require unreasonable resource allocation".



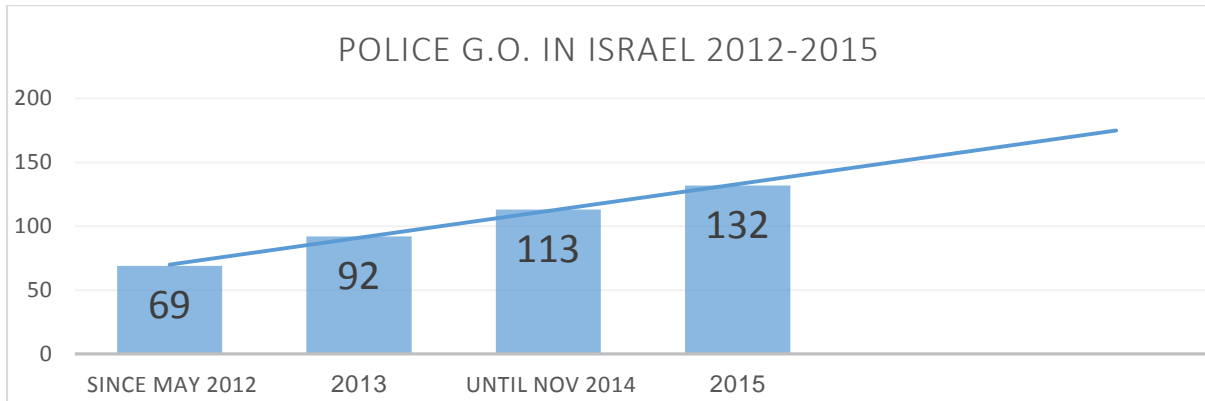
Source: Administration of Courts

¹⁴⁹ The Ministry of Justice and State Attorney, "In reply to your Freedom of Information Request", Letter to Noa Landau, case 79, 4.5.2016

¹⁵⁰ Administration of Courts, "In reply to your Freedom of Information Request", Letter to Noa Landau, case 67/2016, 5.5.2016

3. The Israel Police¹⁵¹

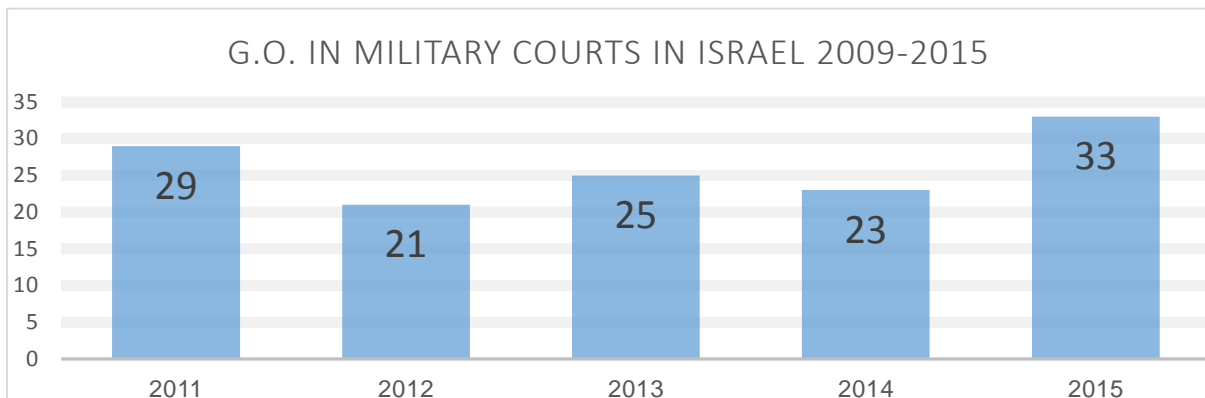
Partial data was received. The police representative explained that the new gag orders regulations from 2009 (see above – legal framework chapter) were only implemented in 2012. Thus, they can only provide data onwards. They did not explain why data was missing from a period of two months in late 2014.



Source: Israel Police

4. The IDF¹⁵²

Partial data was received. An IDF spokesperson explained that the military courts and court-martials do not have one central system from which to draw data from. However, a special effort was made to collect detailed information from 2015.



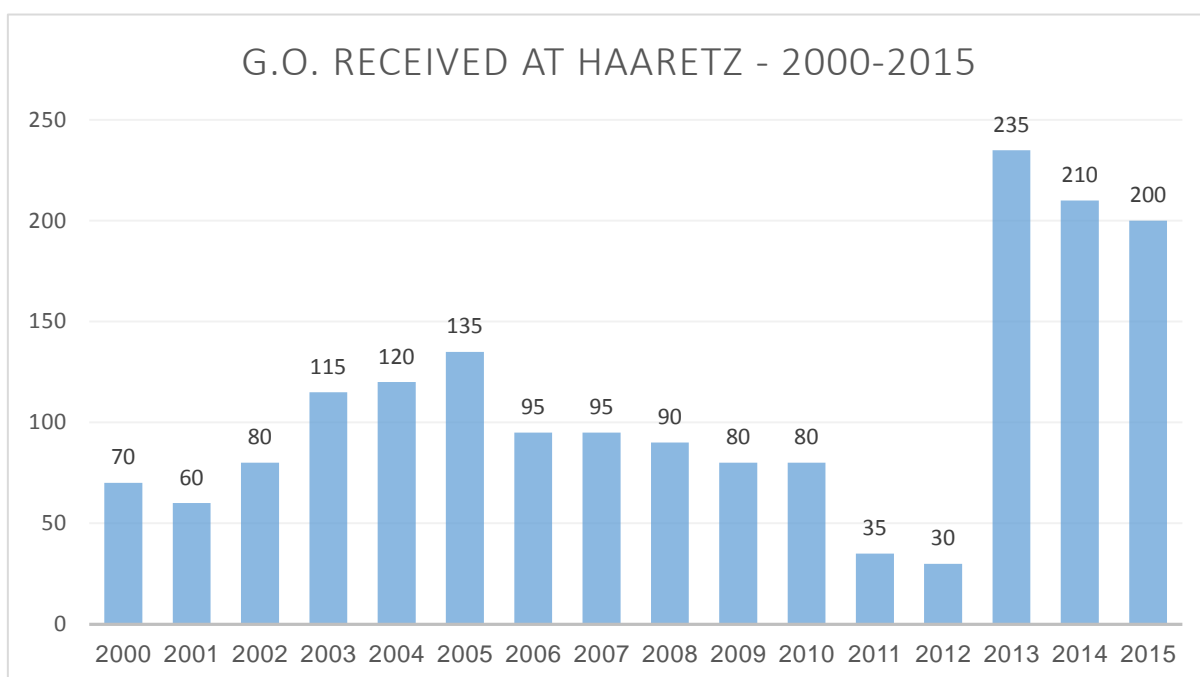
Source: IDF

¹⁵¹ Israel Police, "Freedom of Information request 4156 for information regarding gag orders issued by the Israel Police in the years 2005-2015", Letter to Noa Landau, case 4156, 8.5.2016

¹⁵² IDF Spokesperson, "Your request from IDF Spokesperson under The Freedom of Information Act regarding gag orders issued by the IDF", Letter to Noa Landau, 7.7.2016

5. Haaretz

To complete the picture, I have analyzed all documentation of gag orders received in Haaretz's news desk during the years 2000-2015. The orders were documented and categorized in a digital file. To assess the accuracy of the data I compared it to my own emails from 2012-2015, a period in which I received a copy of each order and kept them in a designated folder. The numbers mostly matched, except for the years 2011 and 2012. Due to lack of information regarding the true accuracy of the data I rounded off the numbers so they express a general assessment.



Source: Haaretz

5. CONCLUSIONS

Clashes between liberal democratic values, such as the freedom of the press, and national security interests have historically caused tensions in democracies around the globe. In recent years, these tensions have grown in many countries due to global terror concerns and the advancement of technology which undermines traditional media regulation methods. This process is especially noticeable in Israel – a country where the friction between democratic characteristics and security risks is intensive and frequent.

The mechanisms applied in Israel when giving greater consideration to security interests, are often called a "defensive" democracy. Among the most important mechanisms of this sort are those of the Defence (Emergency) Regulations from 1945, inherited from the British Mandate legislation. It is these regulations that form the legal foundations of present day Israeli press censorship. The Military Censorship, a unit within the Israeli army, regulates all publications in the Israeli press with regard to matters of national security.

In the age of the Internet, information has been harder to control while the status of the Military Censorship has steadily declined due to restrictive Supreme Court rulings. Therefore, national security authorities in the country – such as the IDF (army), Shin Bet (secret service) and Mossad (intelligence) – have increasingly used a bypass route to prevent publications: gag orders. The necessity for this broader, sometimes sweeping, method was of particular interest to the Israel Police as well since criminal cases which are unrelated to national security issues do not enjoy the protection of the censorship.

A gag or gagging order (in some countries injunction, super-injunction or publication ban) is a judicial ruling prohibiting the publication of all or some details regarding a case. This method of media regulation requires the authorities to obtain court approval for each case. In general, the Israeli judicial system operates under the principle of "Open Justice" that allows the media to cover most court cases. However, the law describes some exceptions, including the legal foundations for gagging orders: section 70(e) of the Courts Law.

This section has morphed through the years to meet the needs of law enforcement authorities, shifting from its original purpose to protect the identity of suspects to the protection of "other details of the investigation". It allows authorities to prevent publications regarding a case that had not, as yet, reached any legal proceedings. For instance, details of a very initial investigation or even the entire existence of a case.

The tension between the Israeli press and government authorities who were not satisfied with the censorship's abilities and wished to control the media through court orders, was present throughout the state's history – but steadily increased since the mid-1980s and peaked during the late 1990s up until today. The Hebrew term for gag order ('Isur Pirsum') began to appear in the 1950s mainly in reference to suspects who remained anonymous. During the 1960s, stories about broader gag orders began to appear in the press and during the 1970s requests for gag orders started to face some rare but existing criticism inside the court rooms. On the other hand, in the Knesset, MK's were pressuring the police to control the wide coverage of criminal cases. During the mid-1980s there was a noticeable increase in

reports about criminal gag orders. In these years Israel was facing an increase in violent crime and in 1987 the first Intifada broke out. The number of references to gag orders in the press began to rise steadily and journalists were concerned. Regardless of the criticism, the numbers of partial and sweeping gag orders kept rising, and became a major phenomenon in Israel during the late 1990s, and remains so till this day.

For decades, voices within Israel criticized this “rising” phenomenon. But none of these sources, including official state reports, contained the exact numbers. A Freedom of Information request for the purpose of this paper revealed, for the first time, the number of gag orders in Israel has approximately tripled over the past 15 years and number of total requests rose by 20% in five years – yet no state authority is in charge of monitoring and collecting the exact data from all relevant sources in order to allow appropriate policymaking.

Following the rise of gag orders, for both national security and criminal related cases, new procedures have emerged. In the case of a national security related matter, the censor was officially subordinated to the gag orders so it could no longer express its professional opinion when such orders were issued. This decision former Chief Censor (2000-2004) Brigadier General (Rt) Adv. Rachel Dolev saw as necessary in the case of “a life-threatening event” since at the time “it was difficult to enforce the authority of the censorship”. However, former Chief Censor (2005-2015) Brigadier General (Rt) Sima Vaknin-Gil vocally opposes it since “they took away the status the censorship had been given by law” and “is an important tool in a democracy”. In the case of criminal matters, the Israel Police recently adopted new internal regulations that are supervised by the police itself.

Most researchers and journalists mention two main causes for the rise of gag orders in Israel. One is the decline in the status of the censorship and the other is the Internet revolution. Criticism is usually pointed toward the judges accused of acting as “rubber stamps”. According to Attorney Tali Lieblich, “the reason the number of gag orders increased is that it is so easy to get them”. Professor Moshe Negbi largely agrees: “Judges usually automatically follow the request forms”. But Negbi also points to the press itself: “The press does not fight this sufficiently”.

Additionally, as a result of historical and contemporary negligence and political disputes, freedom of the press is not protected by Israeli legislation. The judicial system functions as the main watchdog for democracy’s watchdog, but not necessarily in all cases due to different legal approaches within the courts. This lack of official assurance casts a shadow on the basic freedom of Israeli journalism.

Summary of conclusions

- National security authorities in Israel have been increasingly using a system of gag orders and super-injunctions ('Isur Pirsum') to bypass the declining censorship system and control the media coverage of national security issues and criminal cases.
- The number of gag orders in Israel has approximately tripled over the past 15 years, according to combined data revealed in this research.
- The number of total requests rose by 20% in five years, according to official courts data revealed in this research.
- Yet no state authority is in charge of monitoring and collecting the exact data from all relevant sources in order to allow appropriate policymaking.
- Judges in lower courts easily sign the requests, Ex Parte, and do not question the authorities sufficiently. Thus, the press is almost solely responsible for initiating the appeals in courts all across the country, a time and money consuming process that might harm their motivation to do so.
- Gag orders are still used in some cases to bypass censorship.
- A contentious regulation subordinates the censorship to gag orders, preventing the censors from expressing their professional opinion entrusted to them by the law.
- Gag orders are easily violated online and not enforceable abroad, while state authorities are too slow to react. This is especially true in cases where the orders are sweeping.

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