

# Nuclear Legislation for Israel

Avner Cohen

## Introduction

No single national security policy in Israel enjoys as much public support as its nuclear policy, commonly known as the policy of nuclear opacity. According to the policy, Israel acknowledges *nothing* factual about its nuclear status, activities, and capabilities, neither confirming nor denying anything. Silence is golden.

This conduct generates a democratic paradox for Israel: public knowledge and the right to know are a cornerstone of liberal democracy, but in Israel, in a most democratic fashion, the public surrenders its fundamental democratic right to information. This paradox presents a variety of challenges to Israeli democracy. Due to the fabric of nuclear opacity itself, however, those challenges have hardly been discussed in Israel. Moreover, this democratic paradox manifests a deep normative feature of Israel's nuclear exceptionality. No other nuclear democracy in today's world adheres to this pattern of nuclear opacity, that is, total non-acknowledgment of its nuclear status. Nuclear opacity as a long term nuclear policy is a unique Israeli novelty.

This article focuses on one important aspect of the paradox, namely, the absence of law that governs and regulates Israel's nuclear activities. More concretely, my interest here is to explore the desirability and feasibility of nuclear legislation. The article suggests that the time has come for Israel to place its nuclear activities under the rule of law by way of legislation. To the best of my knowledge, this issue has rarely – if ever – been discussed openly in Israel.<sup>1</sup>

Dr. Avner Cohen is the author of *Israel and the Bomb* (Columbia University Press, 1998) and will be a Public Policy Scholar at the Woodrow Wilson International Center for Scholars in Washington DC this coming summer.

## Nuclear Legislation: A Comparative Overview

Israel's primary nuclear organization, the Israel Atomic Energy Commission (IAEC), was founded by a secret executive order issued by Prime Minister David Ben Gurion in 1952 and subsequently reorganized into its present governance form in 1966, but is not anchored in any act of legislation. It is possibly Israel's most secretive organization, with huge areas of responsibility at home and abroad. However, notwithstanding the existence of some internal and external systems of governmental oversight as well as other governance provisions, no piece of legislation, which by definition is public, covers any of Israel's nuclear activities. Israel's nuclear activities are grounded in a virtually legal vacuum.

A quick comparison with the nuclear experience of other nations highlights the problematic and exceptional nature of Israel's public judicial policy in this area. In the United States, the cradle of the nuclear age, the civilian leaders of the Manhattan Project were committed from the very start to the notion that after the war the super secret military project should move to new civilian hands; and that this change of governance and custodianship must be done through an act of legislation. While it was apparent that the nature of nuclear affairs required an unprecedented kind of governmental secrecy, it was also understood that this secrecy – and the new organization that would guard it – must be enacted, governed, and regulated by law.

Throughout the spring of 1946, even before fateful political decisions were made about the future of the nuclear arms race (i.e., the Baruch Plan), Congress drafted, debated, and voted on the Atomic Energy Act of 1946 (known also as the McMahon Act). The act determined how the United States federal government should set up a new “government of the atom” that would manage, control, guard, and oversee the nuclear complex. Most significantly, it determined that the nuclear complex should be managed under a new civilian authority, not under the military. It also established the terms of Congressional oversight. The act was passed by Congress and signed by President Harry Truman on August 1, 1946 (less than a year after Hiroshima), and went into effect on January 1, 1947.

One year later the United States reorganized its entire national security establishment through another landmark piece of legislation,

known as the National Security Act of 1947. That bill inter alia established the Central Intelligence Agency. These two key pieces of legislation reinforced the concept that America's most secret national security organizations are under the rule of law.

As of 2009, more than sixty years after the United States initiated the first piece of nuclear legislation, nearly every democratic state has produced its own nuclear legislation. The website of the Organisation for Economic Co-operation and Development (OECD) provides detailed analytical studies of nuclear legislations in some thirty liberal-democratic states (all are NPT signatories, including the three NPT declared weapons states: France, the UK, and the US).<sup>2</sup> The legislative differences among all these countries are significant, but underlying are some generic commonalities about how liberal democracies should manage their bargain with the atom: nuclear affairs should be handled in a transparent fashion; national nuclear activities must be governed and overseen by national laws; nuclear matters are important enough to require a national regulatory regime, and the law must govern such a regime.

On this matter Israel adopts a different posture. It stands in full contrast, even in defiance, to this contemporary democratic outlook. While the IAEC was reorganized afresh in 1966 – presumably through a set of highly classified government decisions – to this day Israel lacks a law that governs the management of its nuclear affairs, especially the IAEC. Nor is there any other public semi-legal document that regulates matters of responsibility, jurisdiction, and authority at the IAEC. The legal sphere is one example of how Israel's commitment to nuclear opacity has made its bargain with the atom an exception among democracies.

Israel's commitment to nuclear opacity has made its bargain with the atom an exception among democracies.

### **The Israeli Tradition on National Security and the Law**

The reasons for this Israeli exceptionality are many and complex; some antedate and go deeper than the issue of opacity as a national code of nuclear conduct. Their roots are grounded in an old Israeli tradition about how a state runs its secret national security organizations. For a long time the prevailing Israeli philosophy was that the secret national

security organizations should be exempt from the law. By their very nature and function these organizations reside outside the law.

Another way to express this Israeli outlook is as follows. In the most sensitive areas of national security, i.e., matters of intelligence and non-conventional weaponry, the government must act under absolute secrecy, at times even without acknowledgment. These affairs must be handled with as much legal discretion as possible, and therefore the government should be free to act in these areas without well defined legal constraints. They belong to the twilight zone of the law. This outlook typified Prime Minister Ben Gurion's basic thinking, and it explains the Israeli tradition that he founded and has been upheld by all his successors to this day: civilian organizations of national security fall under the direct ministerial responsibility of the prime minister.

The legality of these secret organizations is derived directly from the legality of the state itself, the power of the government to act. These secret organizations embody that power. This legitimacy is established constitutionally through a clause known as the government's "residual power clause," which is nowadays clause 32 in Israel's "Basic Law: The Government."<sup>3</sup> This clause endows the government with extreme legal power: it provides the government with the authority to act, on behalf of the state, in any way it finds fit, as long as that authority is not conferred by existing law on any other entity and does not challenge any Supreme Court ruling. The residual power clause is a legal loophole. Authority is granted by the Basic Law and though officially constitutional, it is not elaborated on in the law. It effectively grants legality to all governmental actions, as long as those actions are not in conflict with any other law. It is a magic legal device that precludes any legal vacuum as far as government action is concerned.<sup>4</sup> From the power of this authority and in the absence of specific legal limits, for example, the government is authorized to sign important international conventions.

The "residual power clause" creates a veil of constitutional legality for those state organizations and activities that the government would keep unacknowledged. It reflects a political philosophy that the state must maintain the freedom to run organizations that at times act domestically or overseas in the twilight zone of the law, or at times even break the law. The legitimacy of these secret organizations and

actions is derived from “reasons of state,” namely, that exclusive realm of state activities where “common” morality and law are often viewed as inapplicable.

It was the legal cover of the residual power clause that allowed Israel’s first defense minister, Prime Minister Ben Gurion, to set up Israel’s national security secret organizations, most prominently the triad that is in charge of the nation’s intelligence and nuclear affairs: Israel’s domestic intelligence service, the General Security Services (GSS); the nation’s foreign intelligence organization, the Mossad; and the state nuclear organization, the IAEC. The legality of all three civilian secret organizations was not derived from any specific law, as is the IDF, rather conferred on the government through the residual power clause. Only in the early years of the present decade did the Knesset pass the GSS law, which while as yet does not herald a conceptual breakthrough nonetheless provides important food for thought.

### **National Security Legislation: The GSS Law**

This constitutional outlook dominated Israeli thinking and practice on matters of national security for a long time, but over the last few decades it has declined. The decline was stimulated by new societal and legal ideas about the rule of law in democracy as well as by actual severe misconduct within the secret organizations, which demonstrated the need for legislation to govern the nation’s secret organizations. Most prominent among those events was the 1984 incident involving the GSS known as the “Bus 300 Affair,” which subsequently led the GSS leadership to be involved in criminal acts of concealing evidence and cover-ups in an effort to protect itself and its internal code of secrecy and loyalty. At issue was a conflict between the secret organization’s code of secrecy and the state’s rule of law.

These scandals empowered the notion that in a democracy, secret state organizations must also be governed by the rule of law. The governance of those organizations should be regulated by law; it is wrong that those organizations reside in a legal twilight zone. It took almost two decades of hard legal labor for the GSS law to be drafted, deliberated, amended, and finally legislated. In 2002 the GSS law became the law of the land on matters of domestic state security.<sup>5</sup>

For all its importance, however, the law does not deal with the sensitive subject of GSS interrogations. Nonetheless, following this legislation, there was a wide expectation that it would be a precedent for Israel's other secret organizations. The next in line should have been the Mossad law.<sup>6</sup> Professor Ze'ev Segal of Tel Aviv University and *Haaretz's* legal commentator raised the idea of a Mossad law in a number of editorials where he elaborated on some of the components required in such a law.<sup>7</sup>

But such a law is still not in sight. Following preliminary deliberations – at the Justice Ministry, the Mossad headquarters, the Knesset, and elsewhere – it became apparent that there was no political will to overcome the opposition of the old tradition to such a law. The opponents of the law argued that the Mossad must act sometimes illegally, and indeed, the very business of intelligence and espionage is inevitably based on deception and illegality. For the time being, the issue of a Mossad law is on hold, if at all on the agenda.

Unfortunately, public discussion about extending the rule of law has never reached Israel's third secret organization, the IAEC. The special status of Israel's nuclear organization within the Israeli bureaucracy and the public, an agency whose secrecy is even more sanctified than that of

The need for such legislation is twofold: symbolism (demonstrating that the rule of law reaches even the most secretive organization in the Israeli government) and practicality (better governance and oversight).

the Mossad, has made the notion of an IAEC law unthinkable. In a way, there is a paradox about drafting such a law: to draft such a law one needs to know a great deal about the organization and its mission, but such knowledge, under current opacity, is considered classified and hence unreachable. For this and other reasons, there has never been public discussion – if even interest – in drafting an IAEC law. The issue was apparently never raised for serious public debate in academia, the government, or the Knesset. Inside and outside of government, there is no constituency that could promote such a law in the media.

This is an unfortunate consequence of the culture of nuclear opacity. Despite all the talk in the Israeli press in recent years about the “rule of law,” nobody from within the Israeli legal establishment

(including its academic component) has yet proposed such a law. This is the direct result of the double nature of opacity – a consensus-based governmental policy on the one hand, and a broad-based taboo-like societal prohibition against discussing nuclear matters on the other. The current nuclear threat from Iran is likely to reinforce the public's reluctance to engage seriously in the issue.

### **Israel's Need for Nuclear Legislation**

Serious public discussion of legislation on nuclear issues should no longer be postponed. This legislation can be a kind of core legislation in its regulation of matters of authority and supervision of that authority, without necessarily going into undue detail. Following enactment of the GSS law, it is incumbent on Israel to start deliberating the merits of an IAEC law. It is time for Israel to end treating the legality of the nuclear issue as something that derives from the residual power of the government, which essentially stipulates nothing other than conferring sweeping authority on the executive authority. The nuclear issue is too important to be derived from the government's residual power; this is a sensitive domain of governmental action that requires a legal standing of its own through Knesset legislation. The need for such legislation is twofold: symbolism (demonstrating that the rule of law reaches even the most secretive organization in the Israeli government) and practicality (better governance and oversight).

It is not merely that Israel's nuclear organization and activities are currently not anchored in the law. Rather, by its very nature the nation's commitment to nuclear opacity enhances and magnifies the legal/constitutional vacuum involving the nuclear issue. This legal limbo, one of the defining features of Israel's unique bargain with the atom, highlights the non-democratic and non-normative nature of this bargain.

The GSS law of 2002 and the National Security Council Act of 2008 are examples of appropriate legislation on issues of national security in a democratic state. In contrast, Israel's commitment to nuclear opacity intensifies a situation that is legally flawed to begin with, which effectively makes the Israeli legal system incapable of adequately addressing the real implications of Israel's nuclear condition. Under opacity the Israeli legal system cannot acknowledge, let alone address,

the most important feature of the nation's nuclear reality. That feature can be stated in Israel only by reference to "foreign sources." If the basic reality is unacknowledged, it is impossible to address the legal consequences of that reality. Furthermore, one could argue that opacity deprives the country of the proper legal tools, i.e., specific laws, to address that reality. It forces us to ignore any and all of the complex legal challenges involved in the responsibility, accountability, and culpability over the nuclear complex and its products.

Consequently, opacity creates a legal reality in which the rule of law is effectively denied from governing one of the most important features of Israeli national security. A long set of legal concerns that are critical for the executive control of the nation's nuclear complex cannot be dealt with adequately because they cannot even be stated by the legal system to begin with. The point here is not merely that since the facts are classified, legal discussion should take place behind closed doors; rather, it is that opacity makes it difficult to form a legal discourse that is adequate for these unique issues. In fact, opacity creates legal uncertainty that might prove of critical importance in certain difficult situations.

### **Nuclear Law Guidelines**

While any form of IAEC law would almost – by definition – surely have great symbolic value, the practical benefits of the law would depend on its substance: how explicit and detailed the law would be. More specifically, much would depend on how clearly the law would address the IAEC mandate.

At the least, however, such legislation must address the legal status of the IAEC as the government's nuclear agency: its overall mission, authority, subordination, oversight, and so on. Such a law should also define the statutory authority of the prime minister over nuclear affairs; the working relationship between the prime minister and the IAEC; the system of executive oversight that must be in place over the nation's nuclear policies and activities; supervision principles through the Knesset; issues of safety in the IAEC facilities; and more.<sup>8</sup> The most challenging aspect of drafting such a law would be to find formulations that would balance the requirements of the Israeli government's nuclear policy with the need for regulation.



At present, the notion of an IAEC law is an anathema to the Israeli nuclear establishment. Such a law is perceived as incompatible with the policy of opacity. After all, if opacity aims to obscure and conceal reality, a law would elucidate it. The supporters of the opacity policy, in Israel and elsewhere, have a two-pronged rationale. It is grounded in a fear that a change in Israel's nuclear code of conduct would be damaging both to Israel's vital national security interests and to the cause of international and regional stability and security. Simply put, the fear is that a law would elevate the salience of Israel's doomsday weapons.

These are major and legitimate concerns that should be taken seriously, and I do not dismiss their significance. One must agree that a first priority in easing the policy of opacity is something akin to the "do no harm" ideal commonly ascribed to the Hippocratic Oath. If a move towards democratic reform in the bargain stirs international apprehensions, which is doubtful, it may well be self-defeating.

But this concern should not lead to inaction and paralysis. True, initiating a process of nuclear legislation would be a departure from the old bargain and would likely have some impact on the policy itself, but it would not necessarily bring the formal end of the current policy of opacity. An IAEC law could be drafted in varieties of formulations, with various degrees of vagueness or explicitness.

Here are three considerations relevant to the concerns of the opponents. First, legislative deliberation, by its very nature, is a slow and highly deliberate process, as many individuals and agencies are involved. It took some fifteen years from the time the state commission of inquiry headed by the former Supreme Court justice Moshe Landau submitted its report on GSS interrogations (1987) until the law was passed and enacted in 2002.

Second, there is nothing inherent in such legislation that would require a formal end to opacity. As long as the State of Israel is not politically ready to move beyond the policy of opacity, no act of legislation could do so. One can easily conceive of all sorts of variants of such legislation, some that would substantially modify opacity while others could be more compatible with the current opacity philosophy. What is so democratically important about such legislation, however, is

that it would provide a legal standing for the nuclear reality. That alone would be an advantage over the present situation.

Third, legislation on such a sensitive matter with implications for Israel's nuclear policy would likely require consultation with outside parties, but if Israel decides to take the path of nuclear legislation it would be difficult to see how any foreign power could oppose the process for political reasons. An act of domestic legislation is normally not an occasion for foreign countries to intervene, and if there are reservations they would be made discretely.

## Conclusion

The inherent tension that exists between the requirements of nuclear weapons and the norms of democratic governance emerges whenever democracy has to deal with nuclear weapons. The level of secrecy involved in nuclear weapons matters, especially in their early stages, blurs the ideals associated with democratic governance and the rule of law. There is nothing uniquely Israeli about it. But a policy of nuclear opacity, rooted in secrecy and non-acknowledgment, magnifies this essential tension much further. It not only impinges on the democratic right to know, but it creates a sort of legal vacuum that at times could even undermine the integrity of the governance process itself.

There are other factors in the Israeli nuclear situation that amplify the "theoretical" problem of opacity. First, the policy of opacity is incorporated into an organizational structure that has been designed from the start to obscure itself. Second, the democratic price of opacity is heightened by structural deficiencies of the Israeli governance system in general, and in the area of national security in particular. Third, all three organizations that constitute the infrastructure of opacity – the IAEC, MALMAB (the office of security at the Ministry of Defense), and the censor – are legally problematic because their power and authority are not firmly anchored in law.

Given Israel's constitutional makeup, compounded by its commitment to the policy of nuclear opacity, the tension between nuclear affairs and democratic governance has brought the conflict to its extreme. Opacity places the Israeli bargain at the very far end of the democracy spectrum. If we consider good democratic governance as a system in which norms of public accountability, the right to knowledge, and due process are all grounded in the rule of law and in

the transparency of government decisions, nuclear opacity is alien to these democratic ideals and clearly incompatible with the ideal of fair governance.

The proposed initiative will ease the existing tension. An IAEC law would not resolve the entire tension inherent in nuclear capability and democracy. Nor would such a law necessarily change the practice on the ground in a dramatic fashion. Still, deliberations can help advance the drafting process, and enacting an IAEC law would surely highlight that the nuclear domain in Israel is under the rule of law, and that the law reaches even Israel's most sensitive national security area.

## Notes

My gratitude goes to Professor Ze'ev Segal of Tel Aviv University, with whom I discussed some of the constitutional issues that relate to the Israeli legal scene.

- 1 This article is based on part of my forthcoming study on nuclear opacity (to be published by Columbia University Press, 2010), which includes recommendations for domestic reforms that would liberalize Israel's bargain with the atom.
- 2 Organisation for Economic Co-operation and Development, "Nuclear Legislation in OECD Countries," <http://www.nea.fr/html/law/legislation/welcome.html>.
- 3 "The Government is authorized to perform in the name of the State and subject to any law, all actions which are not legally incumbent on another authority." For the law in its present form see Israeli Knesset, Basic Law: The Government (2001), [http://www.knesset.gov.il/laws/special/eng/basic14\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic14_eng.htm). It is now clause 32 but in the original version of the law from 1968 it was clause 28, and much of the literature refers to that number. See Israeli Knesset, "Basic Law: The Government – 1968 (Original Version)," [http://www.knesset.gov.il/laws/special/eng/basic1\\_eng.htm](http://www.knesset.gov.il/laws/special/eng/basic1_eng.htm). For a brief discussion of how the Israeli constitutional system applies to the context of national security, including the residual power clause, see Yehuda Ben Meir, *Civil-Military Relations in Israel* (New York: Columbia University Press, 1995), ch. 3.
- 4 Historically, it was a response to the predicament of a legal void that the newly born Israel found itself in May 1948: in a state of war, with no legal code, and with a government that had to act. Since then, the residual power clause has become a pillar in the Israeli constitutional system.
- 5 Gideon Alon, "The GSS Law Was Approved in the Knesset by Great Majority," *Haaretz*, February 12, 2002.
- 6 Gideon Alon, "The Mossad is Next in Line," *Haaretz*, December 20, 2001.

- 7 Ze'ev Segal, "Grounding the Mossad in Law," *Haaretz*, February 22, 1998; "The Mossad under Law," *Haaretz*, September 20, 2002.
- 8 The need for constitutional clarity in this area became apparent recently when Dan Meridor was appointed in March 2009 as the minister in charge of the three secret organizations under the responsibility of the prime minister: the GSS, the Mossad, and the Atomic Energy Commission. Only the GSS is by law under the prime minister; the two others are by tradition backed up by governmental decisions and classified executive orders. Reports suggest that the appointment of Minister Meridor will not alter the existing arrangement whereby the three organizations are administratively and functionally subject to the prime minister. The minister's authority stems from the authority of the prime minister but is not grounded in any legislation or protocol. As such, the status of the authority of Minister Meridor appears problematic from a legal point of view. See Mazal Mualem, "Dan Meridor and Benny Begin are Sharing a Secretary, but Lack a Clear Job," *Haaretz*, April 23, 2009.