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Israel Studies, Volume 3, Number 2, Fall1998, pp. 30-46 (Article)

Published by Indiana University Press

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STATES AND GOVERNMENTAL LAWYERING: EPISTEMOLOGY OF PARTIAL AUTONOMY

THE STUDY OF ATTORNEYS GENERAL and public prosecutors as political institutions has long been neglected. It is the judicial elite, courts, and legal culture which have been the main focus for scholarly attention. Attorneys general and public prosecutors have had a notable effect on the work of judiciaries; they have been an important pillar in the co-optation of the administration, the judiciary, and the legislature, and they have significantly participated in the generation of legal norms.[1] Yet, they have been largely absent from the intellectual efforts to comprehend and conceptualize law and politics. Attorneys general and public prosecutors have either been contextualized in a narrow historical descriptive manner or formalized in an orthodox positivist fashion. Approaching them not as administrative positions, but as politico-legal phenomena in the context of state power—to be explored not only as integral parts of the state, but as self-propelling structures—should enable a better comprehension of state mechanisms in the generation of legal fabrics.

Attorneys general and public prosecutors are political power foci, and yet they are supposed to limit and impose the "rule of law" on political power foci. They have two sources of power and weakness: their affiliation to the legal community, which interprets legal texts and praxis, and, more importantly, their role as agents of the state, albeit with a certain degree of autonomy. Very few public and judicial institutions present the same paradoxical existence. They are regulative agents of the executive, they are constitutive agents of the state producing legal reasoning and practices, and they may also contribute to dispute resolution. Do they operate in contradiction to and against the structural interests of the ruling elite? Do they

fight the crimes of the elite, and do they challenge hegemonic ideologies? What is the essence of their contribution to the generation of legal practices and public policy? Our purpose is to grapple with these issues as they appear in Western democracies and in Israel. We have studied the experience of those countries in order to conceptualize the essence of law as politics. These issues deal with a central dilemma; that is, the politico-legal meaning of partial autonomy of attorneys general and public prosecutors for the formation and exertion of law as political power

The emergence of the regulative state in the mid-nineteenth century and the utilitarian needs of states to challenge the possibility of delegitimization or demolition have reinforced the rise of "law" as a mythical ordering principle of political order. *Inter alia,* attorneys general and public prosecutors have become vital elements in that fabric. These legal agents have been used to legalize the state and its failures and to mystify its existence. They have reproduced dominant ideologies as legal configurations within which the meaning of right, authority, crime, and punishment are constructed. This has been done by using techniques of advice, regulation, investigation, and accusation.[2] In doing so, and as we shall show later, public accountability of these legal agents in different democracies has been invariably restricted. This remoteness from public scrutiny, and the limited judicial review imposed on such institutions have been atypical of any other civilian administrative body in democracies. It has granted attorneys general and public prosecutors a certain freedom of discretion in the respective functions of legal guidance and prosecution.

Governmental lawyers, however, have consciously maneuvered themselves to evade the prosecution of heads of states and the elite for their crimes. Moreover, governmental lawyers have chosen to be maneuvered by other politicians into a position where their relative passivity and self-inflicted adaptability to governmental propensities have ensured their relative autonomy.

It is hardly conceivable how the institutions of attorney general and public prosecutor can be comprehended within the archaic liberal framework of separation of powers. On one hand, we have seen that these institutions are not independent from the branch of government which nominates the attorneys (often this is the executive); on the other hand, to justify their legitimacy as a separate branch of government, attorneys general and public prosecutors should demonstrate a unique and significant contribution to the prevailing political setting of "separation of powers." But this is not the case. The co-optation of attorneys general and public prosecutors to the main power foci of the state is rather evident. Even in

West European countries such as Austria, France, Italy, and Portugal, where public prosecution is relatively autonomous in comparison to public prosecution in Canada, England, Israel, and the United States, success in fighting elite crimes is very limited.

Since medieval ages, the establishment of the offices of the attorney general and public prosecutor has essentially been aimed at supplying the ruler with legal knowledge and argumentation, self-defined as "professional and apolitical," for purposes of empowering state rule. The more bureaucratic a state becomes—the more it has legalized its systems—the more it has relied on governmental lawyers. Their engagement has actually been to particularize and textualize state acts and decisions in a way that legalize them. By these means, attorneys general and public prosecutors have generated the conventional myth of state legitimacy.[3]

In many European countries, the prosecution office is entitled "public office" or "office of public affairs." In some legal settings—primarily systems of common law—the prosecution may actually mold the meaning of the term "public interest." Apparently, the organ of accusation and investigation is responsible for generating what is articulated as a "public order,"[4] but the accessibility of various public segments to senior positions in those institutions has been rather limited. Procedures of nominations and elections to these institutions are not identical in different countries. Senior governmental lawyers, however, are almost invariably affiliated to the ruling groups in any democratic society. It does not necessarily make governmental lawyers unwilling or incapable of pursuing human rights causes; however, it restricts their functions to the sphere of epistemological conventions, which are rather narrowly reproduced by ruling groups, and do not transcend the daily insufficiencies of majoritarian politics in liberal and nonliberal regimes.

Governmental lawyers are not completely passive agents of the political establishment, even in such countries as the United States and Canada, where the federal attorney general and public prosecutor is the minister of justice. Rather, they have constitutive effects within legal narration. Their high professional and symbolic position within the legal community is with some effect. It empowers governmental lawyers to channel the quantity of legal prosecutions by the state; frame the centrality of courts as institutions of dispute resolution; construct the normative boundaries between the unethical and the illegal, and between negligence and criminal *mens rea*; and import various conceptions into criminal law that articulate different outlooks of punishment. Often, attorneys general and public prosecutors are assigned to unique projects such as special investigations of heads of states,

or of drug and alcoholism abuse. In common-law oriented legal systems, the scope of discretion given to them is wider in deciding whether to submit criminal charges, but invariably they have the ability to influence.

Moreover, the attorney general constantly deals with legal interpretations and public policy-making. Her/His legal advice creates an opinion that guides the entire administration. In several countries, e.g., England and Israel, attorneys general have instructed not only the executive, but the entire political system, including the legislature. Their legal opinions have had special weight, because the institution of their office has personified the "state" and stands at the top of the public law hierarchy. In Austria, for example, governmental lawyers have a habit of conferring about important questions "in law" with private lawyers and university professors.[5] But, generally, the institution of attorney general possesses the myth of being national, and hence as being more sensitive to the *raison d'état* than private attorneys.

When the attorney general is asked to give a legal opinion, he/she renders professional knowledge that the political administration needs in order to legalize its actions. Through this procedure, the ruling elite procures better regulation of political affairs. The issue of coordination between different political units has been prominent in federal regimes where the provinces have had their own legal needs, legal practices, and expectations. The national government is in a need of centralization and harmonization of its legal system; otherwise, its ability to control the mechanisms of accusation and punishment and control public affairs is threatened. Attorneys general and public prosecutors are responsible for the achievement of such a "political order" through their regulation of public legal services. In the age of the administrative state, with legalization a driving force, the function of regulation has been crucial, and the political importance of governmental lawyers has become clear. The power to regulate is also the power to constitute. Legal interpretations create legal norms that, in turn, shape politico-legal practices. Thus, governmental lawyers form public policy.

The capability of attorneys general and public prosecutors to modify legal practices and shape public policies is rooted in their relations with the judiciary, including the scope of judicial review imposed on their discretion. Attorneys general and public prosecutors are administrative officers, but they are also heads of the public legal services. They are national figures who represent the state in crucial domestic and international legal disputes. Their effectiveness is necessary to the state for controlling public affairs. In some democracies, relations between the branches of accusation and legal

advice and the judiciary have been more intimate, while, in others, they have been more remote. Senior governmental lawyers have also had an influence on judicial nominations (as in the United States), although they themselves are subject to judicial review.

If judicial review of government lawyers is strict and intervening, it might lessen their effectiveness; if no judicial review exists, their autonomy may increase to a level that jeopardizes the power of other state organs. Moreover, such judicial review is required for framing the myth of the "rule of law," according to which administrative officers are subjected to periodic oversight. Typically, administrative and constitutional courts have recognized the special position of attorneys general and public prosecutors in the politico-legal sphere. Hence, judicial intervention in their decisions and actions has been very rare, and is generally only pursued under very specific legal causes, such as *ultra vires*; that is, when a grave mistake has been made in point of law, taking into account completely irrelevant and extraneous considerations, or omitting to take into account relevant considerations.[6] Thus, democracies have been characterized by quite effective governmental lawyers who are subjected at need to inspection by another legal elite—the judges. The judicial elite has somewhat confined the autonomy of the attorney general and public prosecutor. The political competition between judiciaries and governmental lawyers has been pursued within the same sphere of state power and legal narration. As we shall see, changes in state structure, internal-elite conflicts, and alterations in the values of the dominant political culture can shape the modes of cooperation and friction between those institutions.

Thus, when liberal political culture has prevailed, governmental lawyers have articulated and generated it within their legal argumentation, which has been integrated in the legal text. Public expectations that have conceived litigation as the best tactic to resolve disputes have been directed also toward attorneys general and public prosecutors. In turn, their autonomy may be even narrower than ever before, and the institutional pressures imposed on them by the ruling elite may become even greater. This is because politicians in liberal settings are inclined to divert responsibilities by transforming into the legal language of litigation the political challenges and requirements for political decisions that face them. Attorneys general and public prosecutors may then become convenient targets for the kind of political manipulation that breeds political pressures on governmental lawyers.[7] Moreover, governmental lawyers accumulate power that is perceived to be dangerous to politicians, who may try to minimize

the perceived threat by instituting greater political supervision over the offices of the attorney general and public prosecutor.

It would be untrue to say that governmental lawyers never pursue human rights and civil rights on principle. The essence of law, however, is contingent upon the dominant culture, the social accessibility of different social groups to the institutions of attorney general and public prosecutor, and the practical interactions of these institutions with other state and international organs. Global trends of pluralism, a "free" market, and the gradual dismantling of the state may, in fact, enlarge the autonomy of attorneys general and public prosecutors and make them more enthusiastic advocates of human and civil rights. Such a prognosis is multifarious, notwithstanding. In areas of West Europe, for example, it might change the *modus operandi* of governmental lawyers for the better; i.e., for the benefit of individual and communal rights. It may, however, function otherwise in a way that encourages anti-humanitarian approaches in law and politics. As long as there exist an elite and the governed, as long as legal advice and punishment are used as means to legalize the stronger, to separate and to particularize challenges to hegemony, the subject of attorneys general and public prosecutors is crucial for the understanding of political settings.

The Israeli situation is rather unique, but, to the same degree, also largely comparable. The basic structure of the attorney general institution in Israel is political. Similar to the North American model, there has not been an institutionalized separation between the Minister of Justice, the Attorney General, and the General Solicitor (who is the Public Prosecutor); however, three separate people function in these positions. This functional separation is more similar to the English model. In the next section, we shall present and analyze the experience of the Israeli political regime, in the theoretical frame that we have above suggested and in comparative perspective.

AUTONOMY AND DEPENDENCY: THE ISRAELI ATTORNEY GENERAL AND THE POLITICAL SETTING

The Israeli institution of Attorney General (which includes also the office of the General Solicitor) is central to the experience of Israeli ethnocracy. In contrast to Western democracies (including England), it has never been clearly defined in legislation. Until 1997, no Knesset law embodied the authority of the Attorney General and the General Solicitor. This has signifi-

cantly contributed to the absence of a public review of the office of Attorney General. The exceptions to this lack of public scrutiny have been judicial review—in rare cases even a judicial intervention—and press coverage, which is often unable to challenge the legal expertise of the governmental lawyers.

The establishment of the office of Attorney General was due to a partisan consideration of Prime Minister David Ben-Gurion, who instituted it in order to weaken the control of the Progressive Party in the Ministry of Justice. Ben-Gurion nominated for this job an activist in the then dominant political party Mapai, Jacob Shimshon Shapiro, a vigorous politician, a successful and outspoken lawyer, a close friend of Ben-Gurion, and an expert in English criminal law. Shapiro was considered very determined and loyal to his party, and consequently he was perceived as the perfect person to balance and even overcome the influence of Pinchas Rosen, the Minister of Justice. These personal characteristics, and the political dominance of Mapai, assisted Shapiro in creating a quasi-autonomous office of the Attorney General and the General Solicitor within the Ministry of Justice, and under the formal supervision of Rosen.[8]

Senior governmental lawyers have gradually been empowered as state agents in Israel. Since the 1950s, the Attorney General has been involved in crucial political and security affairs. Chaim Cohen, the Attorney General between 1950–1960, and later a justice in the Supreme Court, was especially active in making the institution prominent in Israel's public life. Cohen was a very close legal advisor to David Ben-Gurion, the Premier, and assisted in making the office of the Attorney General more involved in investigating matters of political corruption, including investigations of the suspected corruption of senior politicians in the legislative and executive branches. The praxis of increased engagement in political affairs also incited political pressures from the political establishment to narrow the potential autonomy of the Attorney General.

Legal formalization in the 1960s followed the political construction of the office of Attorney General. The lack of clear and comprehensive legal verbalization that regulated the status of the institution, and the ambiguity about the division of authority within the Ministry of Justice, led to a bitter controversy between the then Minister of Justice, Dov Yosef, and the then Attorney General, Gideon Hausner. The former was an ambitious minister who aspired to more political control over the Attorney General's office; the latter, who resisted this inclination was proved to be competent in the prosecution of Adolph Eichmann, thus gaining a certain public support. As a compromise that was aimed at preventing a governmental crisis and the

resignation of Hausner, the responsibility of resolving the conflict between these two personalities was diverted to a legal body: headed by Simon Agranat, a Supreme Court justice, a committee of three jurists was established.[9]

In 1962, a constitutive document was drafted—the Agranat Commission Report—which defined the Attorney General as one with a "judicial mind" and "administrative responsibility."[10] In accordance with the British model, the committee decided (what had been already a fact) that, in principle, the functions of the Attorney General and the General Solicitor (i.e., the public prosecutor) should be concentrated in one administrative body—the Ministry of Justice. The Attorney General, who was nominated by the government was placed under the Minister, and the General Solicitor, who was nominated by the Minister, was subordinate to the Attorney General. Hence, the office of the Attorney General was formally recognized as a political institution, and was formed to be a state agent under direct political and partisan supervision.

The Agranat Commission devoted a great deal of effort to formalize the responsibilities of the Attorney General. It decided that the incumbent should consult with the Minister of Justice on a permanent basis and with the government from time to time, especially in issues of national security and foreign affairs. These administrative responsibilities were not to overshadow the jurisdiction of the Attorney General to make decisions at his/her own discretion, even against the opinion of government or the Minister.[11] Yet, the committee almost ignored the possibilities of political pressures on senior governmental lawyers who have been appointed by the government and political ministers; political pressures that had been evident since the 1950s. Thus, the committee disregarded the fact that, without any established procedures and criteria for nomination of the Attorney General and the General Prosecutor, and without any legally defined procedures for the dismissal of these senior governmental lawyers, the professional autonomy of their offices was significantly narrowed. On one hand, the Agranat Commission Report acknowledged the authority of the Minister of Justice to dismiss or limit the authority of the Attorney General (and also the General Solicitor). On the other hand, it did not form any public apparatus to prevent their making arbitrary political decisions.

The formal powers of the Attorney General reflect the regulative value that has been conferred upon it by the ruling elite. Especially since the 1980s, it has become an even more central institution due to the increasing popularity of litigation as a political tactic.

The formal powers of the Attorney General are immense, and they are

now entrenched in more than 140 Knesset laws, and in practice.[12] Generally, the Attorney General's office has had formal responsibilities in four areas:

1. As legal advisor to the government, as well as for the entire political establishment, including the Knesset.
2. As the representative of the state in all civil and criminal cases in which one of the state's branches is involved. In cases of principal importance, primarily in the High Court of Justice, the Attorney General or the General Solicitor will appear in court in person.
3. The enforcement of criminal laws, including, *inter alia*, the authority to submit charges, to halt proceedings, and to ask for the removal of parliamentary immunity. According to the *Basic Law: The Government* (as altered and legislated in 1992), the Attorney General has the discretion to ask for the initiation of criminal proceedings against the Prime Minister.
4. To define the term, "public interest."[13] Thus, the Attorney General might decide not to initiate criminal proceedings if he/she claims that such an "interest" is missing. This term "public interest" grants the Attorney General a wide discretionary range in deciding upon the level of criminality in a specific action or misconduct. It is a political construct that has been easily manipulated for socio-political reasons.

These formal responsibilities of the Attorney General have evolved and been empowered by the Supreme Court in a gradual process of rulings since 1957. The Court has ruled that the Attorney General is the prime legal authority in the public legal service. In 1993, it ruled that the Attorney General's legal advice not only guides the government and the public services, as constituted by the Agranat Committee Report, but that this legal advice should be binding on the executive.[14] In that respect, the Court has strengthened the institution of Attorney General beyond the Agranat Commission of 1962.

This trend has been articulated in the rulings of the Supreme Court in the Bar-On affair. The General Solicitor, Ms. Edna Arbel, and the Attorney General, Mr. Eliyakim Rubinstein, decided to reject the police opinion submitted following a systematic criminal investigation. They recommended instead not to initiate criminal charges against Prime Minister Benjamin Netanyahu and Minister of Justice Tzahi Ha'Negbi, who had been suspected by the police of being part of a conspiracy to nominate the private attorney, Mr. Roni Bar-On, as the Attorney General for illegal and partisan motives. The dependency of the Israeli Attorney General on the government had made any other decision on Rubinstein's part inconceivable. The Supreme Court has ruled, in accordance to its rulings in the past, that, in

principle, the Attorney General's discretion is subjected to judicial review. But the majority opinion did not find that Arbel and Rubinstein operated unreasonably or in such an extreme way in making their decision not to indict the Prime Minister and the Minister of Justice. Had the Court found justification of incorrect procedure, however, it would have had the power to abrogate their decision and enforce the initiation of criminal proceedings against the Premier and his Minister.[15]

The heads of the public legal service were apprehensive that criminal charges in the Bar-On affair would not result in convictions in court and thus would damage their status and the institutional position of the office of the Attorney General. The Supreme Court has always respected that motive and has endeavored to empower the public status of the governmental lawyers. Therefore, while the Court anonymously criticized Netanyahu and Ha'Negbi for their moral failures, the majority opinion did not find sufficient grounds to overrule the decision made by Arbel and Rubinstein. Moreover, the Court textualized the typical distinction in criminal law between "lack of public interest" and "the absence of evidence" as possible grounds for decisions not to initiate criminal charges. If the latter is used as an argument for the Attorney General's decision—as was the case—the Court will only very rarely intervene in the discretion of governmental lawyers.[16]

The course of Supreme Court rulings up to 1997 concerning the legal status of the Attorney General has been compounded, notwithstanding. Governmental lawyers have been perceived as agents of the Supreme Court ("officers of the court") in articulating and generating the type of legal discourse in which the Court has been interested; but, organs of the state also compete among themselves for power resources and influence.

Israeli society has experienced, especially since the 1980s, processes of liberalism, and it has been characterized by bourgeois tendencies to accumulate private property. This process has been particularly significant among secular Ashkenazi Jews. Accordingly, a somewhat false belief in litigation has become more prevalent, a rhetoric of individual rights has been more broadly proclaimed, and the rate of public appeals to the Supreme Court has sharply increased. In the 1950s, the annual number of appeals to the High Court was around 80; in the 1960s and 1970s this number increased to about 300 per year; and during the 1980s there was a sharp rise to about 800 a year. By the first half of the 1990s, a linear increase to about 2,000 appeals a year had occurred. These numbers demonstrate that litigation, and law in general, have come to be perceived as a major means to accomplish individual rights in the economic and political sphere.

In the same period of time, the Jewish-Israeli society has experienced fragmentation and polarization, which has been expressed by eruptions of violence and terrorism. This situation has incited more controversy about the content and scope of the rules of the political game. Thus, questions as to the limits of participation of extreme political parties in elections, the scope of freedom of expression, gender equality, equality in the burden of military conscription, the scope of parliamentary immunity, political corruption, and the legality and legitimacy of control over the territories have been raised.

The state has become more fragmented as well. The animosity among and between political parties and political personalities has become evident in political intolerance. Social, cultural, and national groups (e.g., ultra-orthodox, Sephardi Jews, and Israeli-Palestinians) that, in the 50s, were defined as "peripheral," have become "central," and have created a situation where they have dictated the rules of the political game. In the context of the absence of any major political force that generates certainty, law has been mythologized as the supreme criterion for political order. Liberals have perceived it as a means of fostering social change, while conservatives have conceived it as a last resort for maintaining the *status quo*. All this has created more institutional competition between two pillars of the legal profession—the Supreme Court and the Attorney General—over the hegemonic position in the politico-legal field.

Hence, the Supreme Court has emphasized in its rulings the special importance of the Attorney General as the binding legal authority for the administration. At the same time, it has framed additional legal grounds for judicial intervention in decisions made by the General Solicitor or the Attorney General. From the 1950s to the 1980s, the Supreme Court had referred to unlawfulness as the only reason for judicial intervention. In the 1958s to the 1990s, however, it ruled that irrelevant considerations, unreasonableness in using discretion, and evasion of the need for equality are all reasons for judicial intervention.[17]

A dual course of judicial review—empowerment and supervision—has both constituted and reflected the increasing public status of the Attorney General. Since 1969, the office of the Attorney General has been characterized by a constant effort to impose its discipline over governmental bodies by issuing "guidance instructions." This effort, which was started by Attorney General Meir Shamgar (later Chief Justice), has been aimed at imposing the Attorney General's legal opinions more efficiently. Since 1994, this disciplinary effort has been enlarged to also include the General Solicitor's guidelines, a project that was started by General Solicitor Dorit Beinish

(now a justice in the Supreme Court). Moreover, since the end of the 1970s, Attorneys General have permanently participated in governmental sessions, thus giving more legal prestige and legitimacy to governmental decisions.

Formally, the Attorney General has been much more than a mere legal adviser or general prosecutor. The office has accumulated quasi-judicial, quasi-legislative, and administrative powers, which have composed its relative autonomy in the sphere of political power. The Attorney General could have coded norms and transformed those into legal practices in the political sphere. Yet, the Attorney General has failed to become a major institution that pursued issues of civil and human rights in several crucial dimensions—primarily those of national security.

The institution is stratified and constructed in the context of social, economic, cultural, and national rifts. All Attorneys General, and most General Solicitors, have been Jewish, male, Ashkenazim who have reflected the aspirations, fears, interests, and cultural characteristics of the upper echelons of Jewish-Israeli society. This has strengthened not only the inclination of governmental lawyers to be submissive to government interests in areas defined as national security, but it has also overemphasized the centralized character of the Attorney General and its remoteness from the communal and customary legal facets of Israel.

Dependency upon the hegemonic political culture has been evident. The office of Attorney General has been more effectively involved in issues concerning electoral procedures, mayors' actions in municipalities, illegal actions of Members of Knesset (MKs), and activities of ultra-orthodox politicians. It has been notably less effective in issues concerning national security or those that have been defined by the elite as national security, and especially in dealing with secret service operations and torture of Palestinian suspects. When suspicion of criminal offenses in non-security issues has been raised, the Attorney General has been inclined to investigate politicians and initiate criminal procedures. The Attorney General has thus tended to operate more against politicians who were not part of the ruling elite: mayors in municipalities, secondary politicians, and members of political parties unpopular among the secular Jewish public.

This has been due to possible severe criticism that might have been raised against the office of the Attorney General, and not because of the content of the suspected offenses. However, in non-security matters, the Attorney General has maintained a certain level of institutional and personal autonomy. In the 1970s, for example, criminal investigations and accusations against members and protagonists of the ruling elite, the Labor

Party, contributed to the demise of Labor's political dominance and to the rise of Likud to power. In the 1990s, the Attorney General has been rather active in initiating criminal procedures against politicians in non-security issues, primarily against those not affiliated with the ruling elite at the time criminal charges were submitted to court.

The situation has been different regarding national security issues. Here, the level of the Attorney General's autonomy has been narrower. The effect of security-oriented myths in Israeli-Jewish culture has been evident. The ruling elite has used the symbols of national security to legalize its operations. Attorneys General themselves have been reluctant to criticize the government in these matters; often, they have been captive of the same militaristic discourse. In addition, any opposition to the establishment in such cases could have resulted in their dismissal from office. Israeli control of the territories occupied during the 1967 War and clashes between Palestinians and Jews have intensified the problem. The Attorney General has had to face the permanent phenomena of Jewish and Palestinian violence and Israeli operations outside the scope of law. In such cases Attorneys General have been hesitant to initiate criminal charges against members of the ruling elite.

An exchange of fields of activities has come about; while the political elite have been willing to accept partial legal autonomy of the Attorney General in some fields of public life (e.g., electoral procedures, municipal politics), they have resisted the exercise of such autonomy in the field of national security. The Bus 300 affair in 1984–86 is a good example to demonstrate the severe limits imposed on the Attorney General's autonomy in matters of national security. When the Attorney General, Izhaq Zamir attempted to pursue a criminal investigation and possible charges against the General Security Service's (GSS) high command, he was forced to resign. His successor, Yossef Harish, justified the government's position in favor of the pardons given by President Haim Hertzog to the suspects identified during the investigation conducted by the police.[18]

While not all General Solicitors and Attorneys General have been willing to blindly legalize tortures of Palestinians by the security authorities, they have been compelled to do it, accepting the incompetence and unwillingness of the Supreme Court to intervene in this issue. Governmental lawyers have consistently defended questionable practices by the security authorities, effectively rendering the state immune from any civil or criminal procedures. The Landau Committee Report (1987) regarding the methods of investigating Palestinian suspects by the GSS has exposed a *modus operandi* that includes torturing suspects in unreasonable ways.[19] The Landau

Committee, and the Attorneys General, Yossef Harish and Michael Ben-Yair, did not succeed in developing legal guidelines concerning torture that would be humanist and enforceable. The office of the Attorney General has inclined to be submissive when facing the security authorities on issues concerning the combative efforts against Palestinians. Moreover, the office of the Attorney General has proposed a draft bill exempting the "state" from any responsibility for any type of injuries caused to Palestinians by Israeli Security forces in the territories during the Intifada, anywhere, and for whatever reason.[20]

CONCLUSION

We began with a theoretical framework that invited debate. In contradiction to the binary distinction between law and politics, we presented law as politics and argued that governmental lawyers—i.e., attorneys general and public prosecutors—are agents of the state. The political power of the state, including its control over agents such as governmental lawyers, is at the center of our debate. Yet, the state is not one cohesive unit, and its legal agents do not operate in harmony within a cohesive set of rules. Attorneys general and public prosecutors are targets for state control due to the need to establish legality for its actions and discretionary powers. With the emergence of the need for legal knowledge as a permanent component in the modern regulative state and the prevalence of legal myths, governmental use of lawyers for purposes of political manipulation has increased.

Liberalism and its products of adjudication and litigation have augmented the importance of governmental lawyers. Statutory law has been perceived as the best normative framework for the resolution of socio-political conflicts, and the legal profession has been elevated dramatically in its social position. Law has not been solely a political power, but it has also been a political language that reflects the central location of law in social epistemology and political behavior. This legal language has transformed socio-political rivalries into legal litigation, which has not challenged the state, but rather has erroneously aspired to use the state, and primarily the judiciary, as a means for dispute resolution. This has been the heyday of governmental lawyers, who have delivered the state position in courts, personified the state before the citizens, and enabled the judiciary to generate the discourse of individual rights. Governmental lawyers have also enjoyed at least partial institutional autonomy, which has been both granted by the state and generated via the framing of legal texts. Such autonomy has

not been in constant conflict with state power; rather, it has been subjected to state power, as well as subordinated to the hegemonic culture. Governmental lawyers have been able to textualize and detextualize state actions as long as they do not delegitimized the state.

Specific historical contingencies might assist us in defining the historical evolution of various models of governmental lawyering. The Office of the Israeli Attorney General has been institutionalized in a gradual process of legal formalization by the government, the judiciary, and the legislature. In a centralized ethnocratic regime, it has reached a high degree of public visibility and permanent engagement in governmental affairs. The procedures for nomination of the Attorney General and General Solicitor have been completely under governmental and political control. In addition, the Attorney General's office has not been publicly accountable. From that perspective. the situation of the Attorney General in Israel has been more problematic than in many other democratic countries, such as England, Germany, and even the United States, where the level of public transparency and accountability of senior governmental lawyers is greater. The lack of separation between the Israeli Attorney General and the Israeli General Solicitor, and between those two positions and the Minister of Justice, is in contradiction to the institutional arrangements in most European countries. In that respect, the Israeli predicament is even more problematic, because the Attorney General has been more significantly exposed to governmental pressures in the combat against political crimes.

The "liberal moments" in Israel (i.e., the climax of the liberal mood) in the beginning of the 1990s have not altered these conditions. The Attorney General has become an even more central institution in the field of litigation and dispute resolution. As the number of petitions to the Supreme Court has increased exponentially, the prominence of the Attorney General (and the General Solicitor) has increased. The office of the Attorney General has become the main state agent to compete with the Supreme Court over the dominant position in the politico-legal sphere. Its level of autonomy, however, has been chiefly confined; the configuration of dependency has not been uni-dimensional. The administration and the Attorney General, both as state agents, have had transformational relationships. In non-security issues, the Attorney General has enjoyed partial autonomy, even in fighting political crimes. In a few cases, the Attorney General has even disagreed in court with the opinion of the government and the Prime Minister. Yet, the targets of criminal accusation have often been politicians outside the sphere of the ruling elite who have been remote from the socio-political characters of the Attorney General himself.

The Supreme Court has articulated and assisted in framing that partial autonomy by ruling that the office of the Attorney General is the premier body in the public legal service and its legal advice for the executive should be complied with by the entire administration. That confined autonomy, however—articulated and generated through legal language and within the state's control—has not existed in issues defined by the elite as crucial matters of national security.

Notes

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1. See, e.g., Nancy V. Baker, *Conflicting Loyalties* (Lawrence, Kansas, 1992); Cornell W. Clayton, *The Politics of Justice* (New York, NY, 1992); John Llewelyn Jones Edwards, *The Law Officers of the Crown* (London, 1964); John Llewelyn Jones Edwards, *The Attorney General, Politics, and Public Interest* (London, 1984).

2. Cornell W. Clayton (ed), *Government Lawyers* (Lawrence, Kansas, 1995); Luther A. Huston, Arthur S. Miller, Samuel Krislov and Robert G. Dixon, *Roles of the Attorney General of the United States* (Washington, DC, 1968). For the study of the administrative state, see David Nachmias and David Rosenbloom, *Bureaucratic Government* (New York, NY, 1980). For a more general theoretical analysis, see Michel Foucault in Colin Gordon (ed), *Power and Knowledge* (New York, NY, 1980).

3. For a more detailed review of the comparative situation in different models of governmental lawyering, see, Gad Barzilai and David Nachmias, *The Attorney General: Authority and Responsibility* (Jerusalem, 1997) [Hebrew]; Edwards, *The Attorney General, Politics, and the Public Interest.*

4. See, for example, the Spanish law, *Organic Statute of the State Attorney General's Office* (Madrid, 1981); for the German case, *The Federal Public Prosecutor's Authority,* published by the Public Prosecutor at the German Federal Court of Justice (1.1.1996); *Le Citoyen, La Democratie, Les Institutions* (Paris, Centre D'Information Civique, 1996) [French].

5. Barzilai and Nachmias, *Attorney General: Authority and Responsibility.*

6. Edwards, *The Attorney General, Politics, and the Public Interest,* pp. 29–36.

7. For a good review of this problem, see Eli Salzberger, "Separation of Powers Doctrine and the Functions of the Israeli Attorney General," *Plilim*, 5(2) (1996) 149–71 [Hebrew].

8. Yoel Gutman, *The Attorney General vs. The Government* (Jerusalem, 1981) 46–54 [Hebrew]; Barzilai and Nachmias, *Attorney General: Authority and Responsibility*.

9. For a detailed analysis, see, Pnina Lahav, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century* (Berkeley, CA, 1997) 165–72.

10. *The Report of the Jurists Committee regarding the Authorities of the Attorney General* (Jerusalem, 1962) [Hebrew].

11. *Ibid*.

12. Barzilai and Nachmias, *Attorney General: Authority and Responsibility* .

13. Ruth Gavison, "The Attorney General: A Critical Examination of New Trends," *Plilim*, 5(2) (1996) 27–120 [Hebrew]; Izhaq Zamir, "The Rule of Law in Israel," *Ha'Praklit*, 37(1) (1987) 61–74 [Hebrew].

14. HCJ 3094/93 *The Movement for the Quality of Government in Israel vs. The Israeli Government*, *Piskey Din*, 47(5), 404. Also see, HCJ 1842/93 *Pinchasi vs. The Knesset*, *Piskey Din*, 49(1), 166; HCJ 4267/93 *Amitai vs. Rabin and Pinchasi*, *Piskey Din*, 47(5), 144; HCJ 6009/94 *Shafran vs. The General Military Prosecutor*, *Piskey Din*, 48(5), 375.

15. HCJ 2534/97, 2535/97, 5241/97, *Yahav* et al. *vs. The IPP* et al. (decided in 15 June 1997).

16. *Ibid*.

17. See, HCJ 156/56 *Shor vs. The State of Israel*, *Piskey Din*, 11, 285; HCJ 665/79 *Vienograd vs. The State of Israel*, *Piskey Din*, 34(2), 634; HCJ 322/88 *Sheftal vs. The Attorney General, Piskey Din*, 43(4), 356; HCJ 935/89 *Ganor vs. The Attorney General*, *Piskey Din*, 44(2), 485.

18. Pnina Lahav, "A Barrel without Hoops: The Impact of Counter-Terrorism on Israel's Legal Culture," *Cardozo Law Review,* 10 (1993) 529–59.

19. *Landau Committee: Report on the Methods of Investigations in the General Security Service (1987)* [Hebrew]; Mordechai Kremnitzer, "The Landau Commission Report—Was the Security Service Subordinate to the Law or the Law to the 'Needs' of the Security Service?" *Israel Law Review,* 23 (1989) 216.

20. See, "A memorandum of the Ministry of Justice" (3/20/1997) prepared by the Deputy of the Attorney General, Mr. Yehoshua Shofman.