The Attorney-General vs. Himself

In her article "How the Government's Attorney Became Its General" (Azure 4, Summer 1998), Evelyn Gordon correctly notes that the institution of the attorney-general has amassed more than its fair share of power. Certain scholars, such as Eli Salzburger, even maintain that the development of the institution of the attorney-general and its acquisition of power have created a de facto fourth branch of government, one not subject to proper supervision.

The institution of the attorney-general, as it stands today in Israel, however, has an additional major problem that was only touched upon by Gordon. I refer to the contradictory demands created by the differing roles of the attorney-general.

The attorney-general normally fulfills three functions: (i) *enforcing* the criminal code, such as the decision of whether to indict, according to which section of the law, etc.; (ii) serving as legal *counsel* to the government; and (iii) *representing* the government in the courts.

From these roles ensue numerous conflicts of interest. First, there is a conflict between enforcing the law and serving as counsel. On occasion, the attorney-general finds himself confronting the government, as if he were a watchdog protecting the rule of law. His loyalty to and enforcement of the law, however, places him in opposition to broader considerations that the government must take into account. These, in turn, fundamentally harm the relationship of trust that must reign between the attorney-general and the government.

Second, there is a conflict between enforcing the law and representing the government. Take the case when the Knesset decides not to lift the immunity of one of its members, in opposition to the position expressed by the attorney-general. When public appellants file an appeal against a decision of the Knesset on procedural or

substantive grounds, can it really be expected that the defense provided by the attorney-general for the actions of the Knesset be vigorous?

Third, the role of counsel and representative can conflict—especially if there is a contradiction between the advice given before an action is taken and the treatment of the subject after the fact. For example, if the attorney-general rendered an opinion that a certain appointment is not legal, how will he argue in defense of this action when it is attacked in court?

Fourth, there can be conflict even within the attorney-general's representative function. Sometimes, the attorney-general is called to the bench to represent different authorities who have opposing interests on a certain topic—such as a legal dispute between two government ministries.

These tensions are detrimental both to the attorney-general's fulfillment of his duties, and to the governmental bodies that rely upon his services. It is therefore necessary, in my opinion, to divide the roles of the attorney-general among at least two different agencies, whatever the budgetary consequences. Such a change would provide an essential service for the rule of law and proper administration in Israel.

Dan Turjeman
Beit She'an

Hayek as Conservative

In his review of the Hebrew edition of Friedrich Hayek's *The Road to Serfdom* (Azure 5, Autumn 1998), Yehoshua Porath argues that conservatives do wrong to claim Hayek as one of them, a defender of conservative values. Hayek, argues Porath, was a modern liberal, which means a revolutionary against the paternalistic, etatist economic tradition of Europe's *ancien régime*. Porath is taking one side of an old debate: Whether modern liberalism should be viewed as a break with the past, owing little or nothing to the heritage of previous epochs, or at least partially a restoration of values once broadly acknowledged but held in abeyance during Europe's *ancien régime*. Friedrich Hayek took the other side.

Porath's discussion of Hayek's place in modern Western intellectual tradition does not reach further back than the mercantilist, preliberal policy that Adam Smith opposed. Hayek's own historical perpective was broader. He viewed economic, social and political institutions as the product of long historical evolution, in which successful institutions gradually displaced dysfunctional ones. Since market relations and individual liberty evolved in antiquity, Hayek's historical perspective, in common with educated humanists from the Renaissance forward, was

long indeed, explicitly rooted in Greek and Roman philosophy.

This evolutionary perspective made Hayek skeptical of revolutionary attempts to change everything in society in the name of a "theory of everything" such as Marxism. He thought that societies tampered with long-proven institutions such as the market and traditional liberties at their peril. The temperament of Hayek's central works of political philosophy, such as *Law, Legislation and Liberty* and *The Constitution of Liberty*, is unmistakably conservative. Hayek took the respect for tradition that Burke based on sentiment and put it on a solid foundation of philosophy and historiography. Contrary to Porath's argument, Hayek epitomizes the liberal who believes that the liberties he defends have their roots in ancient tradition.

Yitzhak Klein
Ma'aleh Adumim

The Missing Judaism

In his editorial "Dusting Off the Jewish Bookshelf" (Azure 4, Summer 1998), David Hazony argues that the return to the Jewish bookshelf heralds the growth of the observant and traditional in Israel at the expense of what he sees as a negligible and shrinking group—the secular. In making this questionable claim, Hazony lumps together everyone he favors—conservatives, the observant, Zionists, and the Right—into a single coherent unit, in opposition to all those who are the targets of his criticism—liberals, the secular, post-Zionists, and the "extreme Left." The necessary conclusion: That polarization is an inherent part of Israeli society, and that the liberal outlook in Israel represents a vanishing world.

Hazony describes how "at long last" a not inconsiderable part of the secular Left "has begun groping its way back"—since it is blind—"to the rejected heritage of its grandparents." This effort requires turning one's back on the secular culture in Israel, in which "culture-cobblers" deny the Jewish roots of the Zionist Left "in favor of a rabid ultra-secularism." Hazony, in short, sees that, upon discovering the Jewish bookshelf, secular Israelis emerge from darkness to light, in the process adopting a quasi-religious and thoroughly "conservative" path.

This distinction dovetails with Hazony's belief about the two "real" camps concealed in Israeli society. The labor movement, according to Hazony, is not a consistent worldview that has endured for decades, but rather is split into two opposing camps. The first is the Zionist-Jewish camp, in which the Ben-Gurion labor

movement is lumped with those who today browse the Jewish bookshelf; the second are the post-Zionists, the not-really-Jewish camp of the rest of the Left, who turn their back on both the Jewish bookshelf and Zionism, in favor of "rabid secularism."

The religious-secular issue in society is analyzed in the same simplistic terms. Accepting the findings of the Guttman Institute—the source for the claim that "there is no basis for the rhetoric that polarizes Israeli society into the religious and the secular"—Hazony rejects the accepted dichotomy of Israeli society into twenty percent religious and eighty percent secular. Rather than accepting these findings with fidelity to the source, as a continuum between the religious, the traditional and the secular, Hazony reverses their meaning: "then the real 80-20 split is in favor of those who want their children and their country to be not 'secular,' but Jewish." That is to say, in place of one erroneous dichotomous picture, Hazony presents the reverse image, which is no less faulty.

Hazony's spurious distinctions lead him to argue that there are two opposing social alternatives: One, a sort of path of repentance, to Zionism and to Judaism, to emotion, faith, and conservatism; and the other—to remain a post-Zionist secularist, a cold and alienated existence detached from heritage. According to this equation, the secular are to some degree anti-Israeli, as he implies in the opening sentence of the editorial: "When it comes to Judaism, Israel is a staunchly conservative country."

By presenting these groups in stereotypical fashion, Hazony offers a distorted simplification of Israeli reality. As opposed to Hazony's first contrast between alienated secularism and conservative religiosity, there are a great number of organizations whose intellectual basis is secular: Gesher, Shorashim, Melitz Institute, and the Oranim Seminary. These organizations regard Judaism as an important cultural source, and maintain a dialogue with the sources of Judaism and with the religious public, without forsaking a secular worldview.

Moreover, there are many individuals who cross the boundary lines that the editorial seeks to delineate: Secular leftist Zionists (such as Amnon Rubinstein and Mordehai Bar-On) and post-Zionists who have reclaimed the Jewish bookshelf (such as Amnon Raz-Krakotzkin and Daniel Boyarin), and anti-Zionist and anti-conservative intellectuals who are Jewish in their own way (such as Franz Rosenzweig, Pierre Vidal-Naquet and George Steiner).

Accordingly, Hazony's conclusion about the inevitable dichotomy in Israeli society is dubious. Not only does this division simplify and miss the

mark, but it poses dangers to Israeli culture and society. The Manichean vision, which views society and culture as divided between two contrasting camps, may help fuel a more extreme and dangerous internal conflict.

The leading category missing from the social reality portrayed by Hazony in his editorial is secular Judaism, which is not (necessarily) committed to the halacha or to conservatism, but nonetheless feels affinity to the sources of Judaism and draws cultural inspiration from them. This important group in Israeli society is not about to be absorbed by the "forces of light," i.e., right-wing religious conservatism, but is a viable group on its own. A proper understanding of Israeli society and culture must relate to this fact and take it into account.

In conclusion, Hazony's essay harms the very causes that it seeks to further. It leads the secular reader to be hostile toward both the conservative agenda and the phenomenon of a return to the Jewish bookshelf.

Tal Gan-Or, Hillel Werman
Jerusalem

Dark Side of Disobedience

I thoroughly enjoyed Yoram Hazony's fascinating article, "The Jewish Origins of the Western Disobedience Tradition" (Azure 4, Summer 1998). However, Hazony's central thesis—that the most exalted principle of Western civilization is "disobedience" to injustice, and that this concept was invented and developed by the Jewish people—raises numerous questions.

First, Hazony seems to confound two different types of "disobedience": That resulting from objective non-acquiescence to injustice (such as Abraham arguing with God over the fate of Sodom); and disobedience ensuing from the effort not to be "personally" hurt (Jochebed and Miriam attempting to save Moses, and even Martin Luther King, Jr., fighting on behalf of his black brethren).

In the "personal" instance, it is hard to determine whether disobedience results from a preference for justice or from self-interest (in most cases, a combination of the two is the cause). This is the case in the extreme example cited by Hazony, in which the "people kill the tax collector of the king." This is a *reductio ad absurdum*, because it is clear that the emissary cannot be blamed for the situation and therefore should not be executed—hardly "disobedience for the sake of justice."

Second, the article does not sufficiently clarify which "laws" should be violated. The author presents the laws of Spain, Babylonia and Rome, where the legislator is external and foreign (or the British law in

pre-Revolutionary America). In such instances, it is doubtful whether the "law" is at all obligatory, even when it is just. In democracy, by contrast (in most instances), the subject shares in enacting the law. Moreover, what about what might be called the "law" of the rabbi in a yeshiva? It seems to me that Hazony's essay avoids this issue, mentioning only the well-known instances of questioning divine justice. (And on this score, there is, inexplicably, no discussion of Job.)

Third, the essay sorely lacks a comparison between the "primitive peoples" (before Abraham), those dwelling along the Euphrates and in Egypt, on the one hand, and the contemporary Jewish case, on the other. As for the former, Hazony claims that to strengthen the ruler and prevent any disobedience, the ruler became a super-ruler, if not a deity himself. Surely, if someone disobeys a human being, then he would be punished less severely than if he did not comply with the edicts of a divinity. But what did the Jew, according to Hazony, do? After gathering sufficient courage for "disobedience," he advanced the argument that "no man is above justice." So the Jew preferred compliance: He elevated the legislator (the rabbi, the sage) to the level of representative of the laws of God. The identification of this legislator with justice led to "obedience to justice."

Fourth, the analysis of the case of Socrates once again confuses the issue of justice and personal injury. Socrates thought that an injustice had been done to him, but he was not willing to flee. What would Socrates have advised (another) Socrates to do in a similar instance? Would he recommend drinking the hemlock or fleeing? Similarly, let us imagine that I had a proposal for a drastic change in the economic structure of the kibbutz. Should I offer my proposal to, say, farmers in China, Russia or the Czech Republic but not to my own kibbutz, since I would personally profit greatly from the suggested change?

Fifth, the reader is led to wonder if Hazony's support for "disobedience" to injustice is universal. What does he think about a Palestinian who protests against someone who dispossessed him from his land? Or the Israeli Arab who will raise arguments parallel to those of Martin Luther King? This question in particular raises doubts about Hazony's entire approach. Simply put, the main problem with civil disobedience is the lack of human consensus on the concept of "justice." It is not coincidental that the article opens with the hanging of the Nazis, about whom every normal (objective) person will easily form an opinion. If all of us would agree to a definition of "injustice" (assuming that there are no personal motives involved), then

the theory of "disobedience" would be good, just and necessary. But only in a few instances, such as the crimes of the Nazis, is there sweeping agreement. Obedience in the case of Kafr Kasem was already more complicated, with more uncertainty and doubts, so that a "black flag" marked the obligation of "disobedience" to the command.

How, however, are we to relate to many gray-area cases, which are of greatest interest in the real world, to determine if one should rebel against the law: Pollard, Vanunu, the Lehi member who assassinated a representative of the United Nations, a terrorist (or freedom fighter)? Should individual conscience be the guide? What about the evacuation of settlements in the West Bank? Is it permitted (and obligatory) to shoot a soldier-emissary who comes to evacuate (like the tax collector of the Solomonic era)? Each of us sees justice and injustice through his own glasses: The one who drives on the Sabbath—and the one who throws rocks in response, the one who buries an IDF soldier beyond the cemetery wall because his mother did not convert in accordance with the halacha, the case of a levirate marriage, the marriage of a *kohen* and a divorcée, the laws of kashrut and family purity, homosexuality, and so on and so forth. Is it at all possible to talk about "justice" vis-à-vis obedience, when there is no shared basis for the definition of "justice"? What about the crazed criminal who decides, after twenty-eight tickets were issued against him for moving violations (unjustly, in his estimation), to drive and be disobedient, thereby killing the poor emissary (the policeman) who was about to arrest him?

It almost sounds banal to call for disobedience to Nazi law, or to every demand to commit a "crime against humanity." In real life, we deal with far more complex situations; during my reserve duty as an officer, for example, I refused to kill someone who I knew was not guilty, even though I knew that he was among the enemy.

When almost all instances in real life are completely different from the Nazi example, the danger arising from disobedience is liable to be much greater than the danger arising from obedience. Furthermore, a certain "disobedience to the call of the conscience" ought to be cultivated—especially in the case of madmen, who are certain that their justice is absolute, exclusive, and perfect—such as Yigal Amir.

Accordingly, Hazony's article seems like a work in progress to me. Its starting point, in which the very idea of "Jewish disobedience" is presented as the height of progress, is suited to its period. In the "one-dimensional" primitive world, in which the will of the ruler is absolute

and final, a pinprick of disobedience bursts the balloon; the prophets, moreover, introduce a new element into the complicated equation of the resolution of societal problems.

But of what significance is this for our times? When is this relevant? How is it possible to maintain a modern society in which the individuals are dependent upon each other's actions? Does every law lend itself to disobedience? What about the laws of the Tora? Was it for this reason that Hazony insisted on speaking only in the most general terms?

The thesis of "disobedience" and the preference of conscience may be interpreted for the benefit of the interested party. Following Hazony's argument, those rebelling against racism and taxes, those evading the observance of the commandments and those who run down policemen, Robin Hood and the "motorcycle bank robber," freedom fighters and the woman who murders her abusive husband, are all liable to find themselves under the same umbrella.

Amir Helmann
Kibbutz Afikim

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