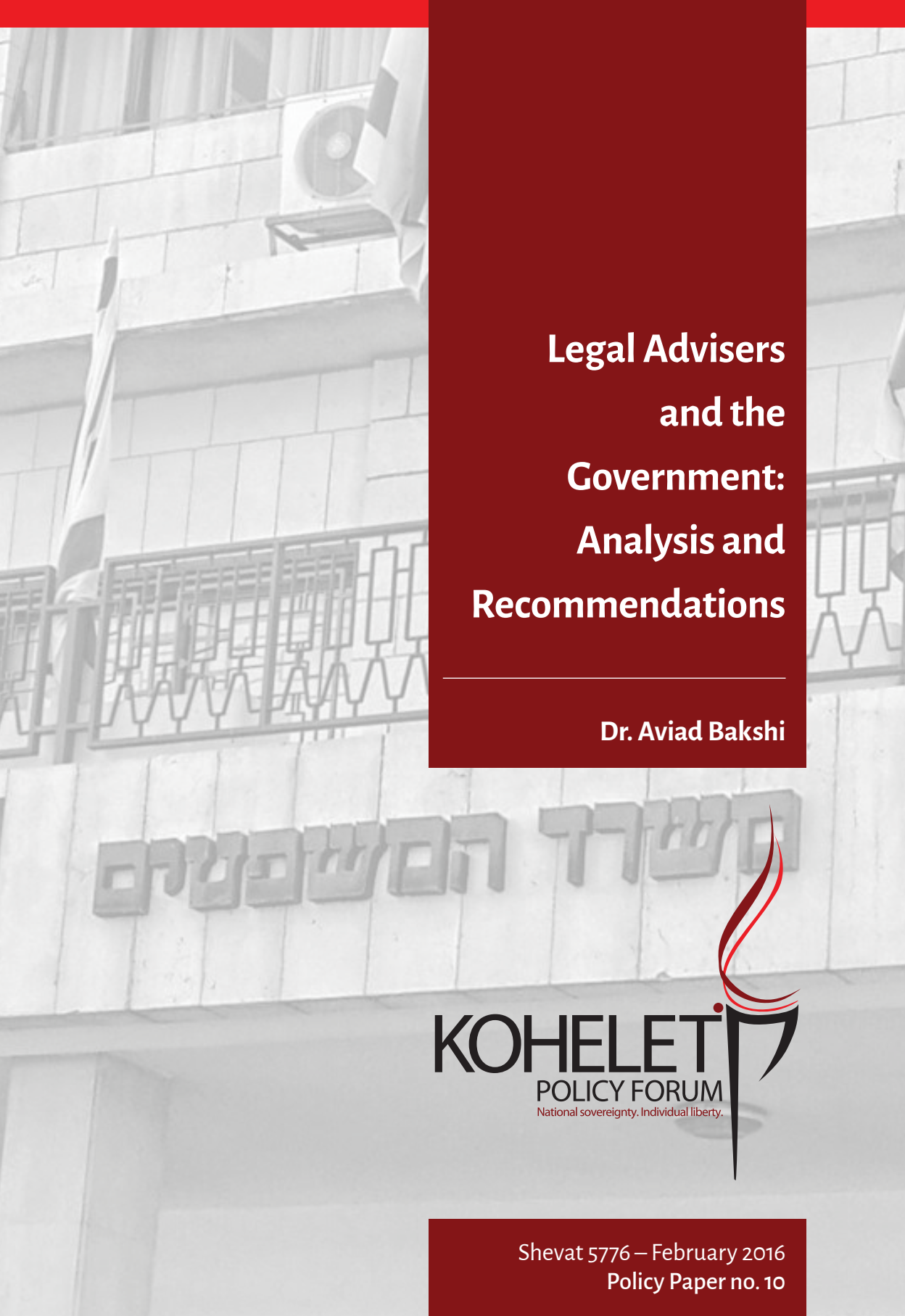

Legal Advisers and the Government: Analysis and Recommendations

Dr. Aviad Bakshi

KOHELET POLICY FORUM
National sovereignty. Individual liberty.

Shevat 5776 – February 2016
Policy Paper no. 10

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Abstract

The Attorney General of Israel (AGI) holds exceptional powers in comparison to the government ministers in two main fields: counseling, where the legal opinion of the AGI is seen as binding on the government; and representation, where the AGI sees himself* authorized to impose his opinion on the government and present it before the court on behalf of the government, even if this opinion is opposed to the actual opinion of the government. This paper draws a comparison between the AGI role as a legal advisor on non-criminal matters in Israel and legal advisers in the United States, Canada, Britain, and Germany, where an equivalent to the exceptional powers held by the AGI does not exist. The fact that the AGI is not a political appointee, as opposed to the practice in the rest of the examined countries, as well as the unusual subordination of legal advisers from other government ministries to the AGI, further intensifies the gap between Israel and the examined countries with regards to the way government agencies relate to their legal affairs.

The normative part of the research argues that government subordination to its legal advisers severely undermines governance and the fundamental principle of democracy—the rule of majority through its elected officials—and contradicts the basic principle holding that defendants have a right to proper representation in court. Furthermore, it is argued that the exceptional powers of the AGI impede government accountability. This is because the AGI is not accountable for the ministers' failures to accomplish the objectives of their offices, while the ministers may relieve themselves, as a result of the AGI intervention, of both the responsibility of achieving the objectives of their offices and the responsibility of keeping the law.

Therefore, the study concludes that there is a need for fundamental reform to define the roles of the AGI concerning non-criminal matters. First, while legal advice to the government should remain in terms of advice, the government should be authorized to decide how to act in all areas, including the way it is represented in court. Second, the government and its ministers should be allowed to seek private legal advice and representation when it is deemed appropriate. As is customary in the countries examined, enforcement of the rule of law on the government should be done by the courts, and not by its legal advisers.

In addition to these two main conclusions, the study recommends considering that the legal advisers of the various ministries would not be subordinated to the AGI, that the legal opinions of the advisers would be made confidential, and that the institutions providing legal counsel and representation to the government would be separated from each other.

The conclusions of this study are in line with the conclusions of the Agranat and Shamgar Commissions that dealt with the issue at hand, and with the practice in the countries examined.

*For convenience, the masculine pronoun has been used throughout this paper to refer both to men and women equally.

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Introduction

In this paper we would like to demonstrate that the position of power held by the AGI is unusual in comparison to what is accepted in other countries, and argue that it is not appropriate.

> "The job of the Attorney General is immeasurably more important than the job of a Supreme Court Justice. As a Justice you are one in a group of eleven… and you are in a position of reviewing and analyzing, not decision-making. As Attorney General you stand alone, and not as one who analyzes but one who calls the shots… I recall that during my tenure as the Attorney General I was referred to as the "CEO of the State" by the media. When I stepped down from the position of the Attorney General and began serving as a Supreme Court Justice, it was a huge downfall."[1]

This quote by Aharon Barak, who formerly served as both AGI and as President of the Supreme Court of Israel, reflects the position of the extraordinary power that is currently held by the AGI. In this paper we would like to demonstrate that the position of power held by the AGI is unusual in comparison to what is accepted in other countries, and argue that it is not appropriate. This research draws on the writings of other scholars, in particular, the outstanding papers by Yoav Dotan[2], Ruth Gavison,[3] and Eitan Levontin, who discussed the issue at hand, *inter alia*, in his doctoral dissertation.[4] In this research we continue exploring the debate and focus on developing recommendations for adoption of operational measures.

The debate focuses on two of the central roles of the AGI—provision of legal advice to the government and representation of the State of Israel in the state courts. This policy paper does not address the duties of the AGI as the Prosecutor General or the official appointed to represent "public interest" in proceedings in which the state is not involved from the outset.

This policy paper does not address the duties of the AGI as the Prosecutor General or the official appointed to represent "public interest" in proceedings in which the state is not involved from the outset, but only in his capacity as a representative of the position of the state in courts and as a provider of legal advice.

The study finds that in terms of legal advice the AGI is no longer simply an adviser, but has the authority to issue binding instructions to the government to change its policy. In terms of representation of the state, it will be shown that, although the AGI is supposed to represent the state, and advocate the state's positions in court, currently the AGI can, and, as some argue, is even obliged to lay out his position before the court, even if it contradicts the government's position and undermines it.[5] Moreover, the court has ruled that without the approval of the AGI the government cannot seek any contrary external representation or advice that will serve its actual position in matters before the court.

Our aim is to examine whether the approach practiced in Israel today is appropriate, and to study its basic concepts and its wide-ranging implications. In order to provide a broader perspective, we compare the position of the AGI to the positions of the corresponding officials in prominent western countries: the United States, Britain, Canada, and Germany. The study finds that the AGI enjoys exceptional powers and excessive independence with respect to the political leadership in comparison to what is accepted in the examined countries.

Following the comparative survey, we provide a normative discussion on the position of the AGI. We argue that the approach practiced in Israel impairs the system of checks and balances essential for democracy, violating both the principles of government governance and the separation of powers that underlie the concept of democracy.

The structure of this policy research is as follows: In Part A the study questions are mapped; in Part B the situation in the examined countries is surveyed using the study questions framework; in Part C the situation in Israel is introduced using the same framework; in Part D a normative discussion of the findings is presented; in Part E the conclusions are drawn.

A. Mapping the study questions

In comparing the duties of the AGI and the duties of the officials in corresponding positions in the different countries, we focus on a few principal questions that are divided into several sub-questions. The questions we study reflect the extent of the power held by the AGI with respect to the government, as part of the AGI's authority to provide legal advice and representation. **First**, we examine the functions of the officials holding corresponding positions in each country, noting that there are different definitions for the position in each country, and in some countries there is no single position incorporating all of the duties of the AGI. **Second**, in order to measure their level of independence, we determine whether these positions are political, or alternatively, to what extent are the position holders subordinate to the political leaders. **Third**, in order to estimate the extent of their power or leverage, if any, over the government, we investigate whether the provision of legal advice and representation are the exclusive duties of the said officials. **Fourth**, we explore whether the corresponding officials are "advisers" in a simple sense of the word—essentially, we examine whether they can impose their opinion on the government, whether they are committed to providing confidential advice, and whether they are committed to providing advice exclusively to the government, and not to external parties. These sub-questions are meant to explore whether the essence of the relationship between the position holders and the government is one of providing service to the government or independent criticism, regardless of the position of the government. **Finally**, in order to determine whether it is customary to decentralize the advice and representation powers, we examine whether there exits, in the different countries examined, a separation between the government legal advisors and the authority to actually represent the government, and its interests. The results of such an examination will help us determine whether it is customary to prevent conflicts of interest by separating those powers and authorities, or to improve efficiency by consolidating them. (This is a separate question from the issue of separating the role of the AGI as a Prosecutor General, from the rest of his roles — we do not discuss this question in this paper).

Following is the focused and detailed list of questions:

1. **The question of the position holders**

   1.1. Who are the relevant position holders, and do their jobs have political characteristics? [6]

   1.2. What method is used for appointing officials?

   1.3. Can the government remove the position holder from office, and is doing so a realistic option?

2. The question of representation[7]

2.1. Can the representative oppose the position of the government agency he represents and independently determine the position that will be presented on its behalf in the court, even if it contradicts the position of the government?

2.2. Can the government use external representation?

3. The question of legal advice

3.1 Is the position of the legal advisory body binding? If so, on whom?

3.2 What is the extent of the advice, and who can initiate it?

3.3 Can the government apply for external advice?

3.4 Can the AGI provide legal advice to private parties with regard to government actions?

3.5 Is the content of the legal advice provided to the state made public or does it remain confidential?

4. Is there separation between legal advice and legal representation, how is it done, and is it absolute?

B. Comparative Research

B.1. The question of the position holders

In the **United States** the official holding the corresponding powers to those of the AGI is the Attorney General (AG). He implements these powers through the Solicitor General (SG) and the Office of Legal Counsel (OLC).

The nature of the AG role is explicitly political. He serves as the cabinet member who heads the US Department of Justice. As is true for all cabinet members, the AG has administrative (ministerial) responsibility for his department, and the entire Department of Justice is subordinate to the AG. The AG holds all legal and administrative powers in the department and can delegate those powers to any other officials in the department, as he sees fit. He does not necessarily have to be a legal expert.[8] The primary duties of the AG that are relevant to this research paper are the provision of legal advice to the president and his representation in court.[9] With the passage of time, as shown below, these duties have been delegated to other officials subordinate to the AG. The AG nomination is made by the president and confirmed by the Senate.[10] The president also has the power to dismiss the AG, without the need for the Senate approval.

The SG is the official who has been delegated the authority to represent the state before the Supreme Court, as well as the authority to decide whether to appeal to the federal courts on behalf of the government. Similarly to the AG, the SG is appointed by the president and confirmed by the Senate, and the president has the authority to dismiss him.[11] But unlike the AG, the SG must be learned in the law. [12] The SG fulfills his duties in professional subordination to the AG, who can also assume the former's duties as he sees fit.

In the lower federal courts, representation of the government is delegated to the district attorneys for the federal judicial districts, who are called US Attorneys. They are also appointed by the president and, like the AG and the SG, serve at his pleasure, with their dismissal being totally subject to his discretion.[13] The professional aspect is essential to these positions, although they still maintain their political nature, as reflected by the methods of appointment and dismissal, and even more so – by maintaining the absolute subordination of the office of the SG, as well as the offices of the United States Attorneys for each federal district office to the AG.[14]

In the US the authority to provide legal advice and represent the government are concentrated in the hands of the AG, who fills an explicitly political position. These authorities were separated and delegated to various professional agencies, while still maintaining their subordination to political leadership.

The OLC is the legal advisory body of the US government. The OLC office is headed by the Assistant Attorney General (AAG). The AAG is also appointed by the president and confirmed by the Senate, and the president is authorized to dismiss him without having the approval of the Senate.[15] The function of the OLC is to provide, pursuant to the AG's delegation, legal advice for the president and executive agencies.[16]

To sum up, in the US the authority to provide legal advice and represent the government are concentrated in the hands of the AG, who fills an explicitly political position. These authorities were separated and delegated to various professional agencies, while still maintaining their subordination to political leadership.

In **Britain,** the Attorney General (AG) is a minister of the Crown and sits in one or other House of Parliament.[17] The Solicitor General (SG), who is also a minister of the Crown and a member of the Parliament, is the AG's deputy and is subordinate to him. The Prime Minister has the authority to appoint and dismiss the AG and the SG, known as the Law Officers. Both of the positions have a clearly political nature. The Law Officers Act, which came into force in 1997, enables the SG to exercise any of the functions of the AG, while still maintaining the subordinate role of the former.[18]

The Law Officers have multiple responsibilities. In our survey, two of their roles relevant to this research paper are discussed: First, they are the chief legal advisers to government; second, they oversee major litigation proceedings held before domestic and international courts and EU tribunals.[19]

In **Canada,** similarly to the situation in the United States and Britain, the Attorney General (AG) is a minister and cabinet member. He is appointed by the Governor General on the recommendation of the Prime Minister, and it is customary that the Governor General adopts the Prime Minister's recommendation.[20] The Governor General also possesses the authority to dismiss the AG. The Prime Minister may request the AG to resign, and in the case of refusal, may recommend to the Governor General the dismissal of the AG. In these situations as well, the Governor General, in effect, adopts the Prime Minister's recommendation.[21]

The Canadian law states that the AG is in charge of rendering legal advice to the government and of its representation in the courts.[22] In practice, the AG is not thoroughly involved in advising and representation on a personal level, and the Deputy Minister performs these duties. The Deputy Minister is a legal expert, although the government is authorized to appoint and dismiss him.[23] This way the government, in essence, controls the appointments and dismissals of its legal adviser and representative and the official exercising these authorities.

In **Germany,** there is no single agency concentrating the authority to provide legal advice and to represent the government. Each ministry independently employs lawyers who take care of its legal affairs, relating to both legal advice and representation, and each ministry has the discretion to decide on the structure of its legal department. There is no law or procedure in Germany that determines the way of appointing the lawyers in legal departments, although they are usually employed as civil servants; thus the general law regarding the appointment and dismissal of civil servants is relevant for them as well. [24]

The entity responsible for providing legal advice and representation to the government is the Ministry of Justice, headed by the Minister of Justice, who fills an obviously political role.[25] The Ministry of Justice is divided into seven Directorates-General five of which are competent in specific areas of law: Judicial System; Civil Law; Criminal Law; Commercial & Economic Law; Constitutional & Administrative Law and International & European Law.[26] The Head of Directorate-General is usually a civil servant who is a political appointee appointed by the minister, and the minister reserves the authority to discharge him at any time.[27]

B.2. The question of representation

In the **United States,** as discussed above, the cabinet officer bearing the representation authority is the AG, who delegated this authority to the SG. As previously stated, subordination of the SG to the AG allows for political supervision of the SG.[28] Even those scholars who emphasize SG independence are far from characterizing him as an independent authority. Firstly, the independence is based on custom and is not statutory or case law based.[29] Additionally, this custom is not based on the rationale of separation of powers, but on the principles of convenience and efficient division of labor.[30] Finally, it bears noting that the AG grants the SG independence out of a desire to preserve an independent reputation in service to the president.[31]

Moreover, even though it is not common,[32] in cases when the president or the AG chose to intervene in the SG's function, subordination of the latter was absolute. Drew Days, who served as the SG between the years 1993-1996, published an article where he elaborated on various cases of disagreements between the SG and the AG or the president. In all of those cases, the decision power was reserved to the AG and above him to the president. This is illustrated by the following two examples:

In the first case, the disagreement arose between Days and then-AG Janet Reno. The dispute revolved around the question of whether to contest the appeal of the party opposing the state, as Days believed, or to agree to the holding of the appeal, appear before the court and wholeheartedly support the ruling reached in the previous proceeding, as the AG believed. Days writes there were sincere attempts to reach an agreement; however, when those failed, it was clear that the last word was reserved to the AG.[33]

The second case occurred during the term of President George H. W. Bush. The matter of the case was the provision of government funding by the State of Mississipi to historically black colleges and universities (HBCUs). In the early stage of the litigation, the SG argued that Mississipi cannot be legally obliged to provide such funding; however, after President Bush met some of the colleges and universities' presidents, he requested that the SG overturn the position of the government in favor of the funding, and indeed that was the case.[34]

When it comes to the representation of the president of the US, the SG is subordinate to the political leadership, both the AG and the president, and they may dictate the position he would represent on behalf of the government in the court.

In conclusion, the following is a quote by Days where he describes himself being interviewed by President Clinton for the position of the SG. When asked by Clinton about the nature of their future relationship, this is what Days responded:

> "I responded, 'Mr. President, it is very simple. You are in the Constitution and the Solicitor General is not.' That statement certainly let the President know that I would defer to his authority."[35]

Thus, when it comes to the representation of the president of the US, the SG is subordinate to the political leadership, both the AG and the president, and they may dictate the position he would represent on behalf of the government in the court.

The government departments and agencies are represented by the SG, and they are not allowed to seek external representation.[36] However, if the SG refuses to represent the official opinion of the agency, the agency can appeal to the AG or the president, who have the last word. In a sense, the relationship between the agency heads and the SG is no different than the relationship between the various agency heads in the US administration and the Office of Management and Budget (OMB). Ostensibly, the Office of Management and Budget is in charge of the government budgets, although if the Director refuses to allocate budgets to a particular department or agency, the head of that department or agency can appeal to the President, who have the supreme authority to order the Director of OMB to make the budget transfer.

In **Britain**, unlike the US, the representation system is based on outsourcing. At the upper level of the representative system hierarchy is the Treasury Solicitor's Department (TSol),[37] which is supervised by the AG. This department is responsible for administering lists of lawyers who may represent the state, called "panels." The members of the panel are not civil servants but private attorneys.

In Britain, government ministries seeking representation must use the private attorneys who are the members of the panel, although they can choose any attorney from the list. Thus, naturally, a ministry usually chooses a lawyer who is sympathetic to its factual position.

There are four panels of counsel—three in London and a single regional panel. The London panels are structured in three tiers, according to the level of expertise of the panel member. The application is a competitive process, and one can periodically reapply to become a member of the panel or ascend to a more prestigious panel. Attorneys sitting on the panel receive an hourly pay. The department is not obliged to provide work for the members of the panel, although it strives to do so.[38]

In Britain, government ministries seeking representation must use the private attorneys who are the members of the panel,[39] although they can choose any attorney from the list. Thus, naturally, a ministry usually chooses a lawyer who is sympathetic to its factual position. This practice eliminates dealing with the issue of decision-making power in cases of dispute between the representative and the represented. Additionally, the lawyer chosen to represent a ministry in a particular case will likely refrain from unfaithful representation, as it will impede his chances to receive additional work in the future.

In **Canada,** the official in charge of representation of the state is the Assistant Deputy Attorney General, who reports to the AG. By convention, the AG enjoys independence when it comes to criminal prosecution; however, in regards to civil representation, he shares in the government accountability and if he wishes to contest the position of the government, he must first resign.[40] If the government requests external representation, it is within the discretion of the head of the relevant department in the Ministry of Justice, subject to consultation with the head of the relevant ministry.[41]

In **Germany,** representation of the ministries is performed by the internal legal departments of the ministries. The attorneys of each ministry are completely subordinate to the minister, and cannot act in contradiction to his opinions and positions. Additionally, there is no restriction on a ministry when it comes to seeking private external representation.[42] The entire federal government is represented by the relevant department in the Ministry of Justice, in subordination to the Minister of Justice.[43]

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B.3. The question of legal advice

As stated above, in the **United States**, the OLC is charged with providing legal advice to the administration. The office responsibilities are divided into three different areas:

a. Advising the president – the office provides opinions in response to requests from the president, and also conducts the legal and format editing of the president's proposed orders and proclamations.[44]

b. Advising the government agencies – the OLC also provides advice in response to requests from the various government agencies and offices. Those requests typically involve highly important and complex legal questions and constitution-related issues.[45]

c. Resolution of conflict between government entities – in 1979 President Carter signed an executive order stating that in case of a legal dispute arousal between government entities that they are unable to settle on their own, it is recommended they appeal to the AG. Moreover, the order stated that prior to proceeding in any court, in case of a dispute between particular government bodies they shall submit the dispute to the AG, except where there is specific statutory vesting of responsibility for resolution elsewhere. [46] This authority was delegated to the OLC office by the AG.[47]

The OLC legal opinion is not binding on the president, and his authority to make determinations that are contrary to them is not contested.[48] In literature, there are examples of cases when presidents, after hearing the legal advice of the AG and other attorneys, wrote contradicting legal opinions and stated that their opinions should guide the AG in implementing the law. [49] For example, President Carter acted in opposition to the position of the OLC with regard to the legitimacy of subsidizing officials in religious schools in light of the concept of separating church and state, despite the support of the OLC opinion by Griffin Bell, the serving AG at the time. To note, President Carter appointed Bell to the AG position out of desire to grant a more independent reputation to the Department of Justice. In view of this, it is worthwhile to note the following excerpt from the letter that Bell wrote to the president following the incident:

> "While no one likes to be overruled, I respect your authority to do so, for you, as President, are the one who is ultimately responsible under the Constitution, and to the people, for the actions of this government."[50]

With regard to the other government agencies, there is a distinction between the cases of appeals concerning disagreements between the agencies, and the cases of independent requests by the agencies seeking a legal opinion. When it comes to disputes between government agencies, as mentioned, the agencies must first lay their case before the OLC, prior to appealing to court.[51] In this aspect, the OLC exercises great power with respect to the government departments or agencies; however, it cannot impose its opinion in the event that they prefer to settle their dispute in contradiction of its opinion. Moreover, it should be remembered that the matter at hand is a disagreement of opinion between government entities, therefore, whether the decision is to the benefit of one or another of them, the position of the OLC does not additionally contradict the position of the government. In addition, the OLC emphasizes that prior to providing an opinion that will settle the dispute, it will oblige each party to submit an independent legal opinion regarding the issue. This is due to the standpoint of the OLC, according to which it is obliged to provide a thorough review that takes into account the positions of various agencies. [52]

With regard to an independent request by a government department or agency to the OLC, it should be remembered that the OLC has no exclusivity over provision of legal opinions—all government departments are permitted to hire attorneys upon their discretion—and those are subordinate to the relevant cabinet officer.[53] Moreover, the OLC does not initiate issuing legal opinions but only responds to requests addressed to it by a department.[54] Although, when a department appeals to the OLC, it usually respects the latter's opinion and sees itself obliged by it.[55]

Nevertheless, for many years there has been a disagreement among legal experts on the question of whether the position of the OLC is binding on government officers.[56] In general, there are three opinions on the matter. The first argues that the legal opinion of the OLC should be considered as binding, unless determined otherwise by the AG or the court. Another opinion holds that the position of the OLC is simply a form of advice that is meant to assist department heads to determine their position in a legal matter. The third opinion is an interim opinion holding that it is best to consider the opinion of the OLC (and the AG) as instructing the agencies how to act, although there is no obligation to adopt it.[57] Anyhow, this discussion is largely theoretical, as the OLC is aware of the possibility that the agencies will deviate from its opinion[58] and has developed a regulation whereby it requests that the agencies make a commitment (a non-legal obligation) to respect the opinion as a condition to its issuance.

Moreover, the OLC has developed mechanisms which limit the scope of its influence. First, the office responds only to questions about the future and does not examine actions that have already been taken.[59] Second, the office only responds to questions with concrete implications and not to mere general questions. It avoids providing a general review of the case, or providing a broad or abstract legal opinion. As shown below, the OLC avoids providing opinions in response to questions that are best taken up in court.[60] It is important to reiterate that the president, by any judgment, is not subordinate to the opinion of the OLC. Thus, if there is a certain subordination of the agencies to the OLC, they are free to appeal to the president , who may void the OLC opinion in favor of his own.

OLC opinions are confidential, due to the professional lawyer-client relationship principle.[61] Therefore, the OLC will refrain from providing a copy of the request to another government office without the permission of the office which made the inquiry.[62] Additionally, the OLC is not authorized to provide legal advice to private parties, and can only provide its legal opinion in response to requests from government agencies.[63]

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In **Britain,** each government ministry has a separate legal counsel department. Attorneys in these departments are appointed by the special civil servant recruitment system, the Government Legal Service (GLS),[64] and often move from one office to another. Even though each ministry employs its own legal advisers, in some instances ministries are obliged to refer to the Law Officers (the SG and the AG) in order to obtain their opinion. These instances are defined as follows by the ministerial code of Britain:

> "2.10 The Law Officers must be consulted in good time before the Government is committed to critical decisions involving legal considerations."[65]

The Law Officers are assisted by a small legal department comprising about fifteen civil and criminal lawyers, loaned for limited periods of time from the legal offices of various government departments.[66] The Law Officers are advisers to the government; therefore they may not respond to requests from private parties.[67]

By the mid-nineteen century there developed a practice whereby the advice rendered to the government by its various departments is confidential. By this convention, not only the content of the communication is confidential, but so is the very question that the government took the pains to consult the Law Officers. In addition, the legal opinion is sealed not only from the public, but also from the parliament. With time, this convention has been enshrined in legislation, and currently is stated in the UK Ministerial Code:

> "2.13 The fact that the Law Officers have advised or have not advised and the content of their advice must not be disclosed outside Government without their authority."[68]

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In 1865, the Prime Minister who served at that time explained the rationale behind this tradition. According to him, the reason that the legal opinions are not presented before the House of Parliament is the desire to ensure that they are sincere and exhaustive; if the Law Officers knew their opinion would be published, there is concern they would be overly cautious in expressing their judgment. [69] This explanation sheds light on the perception of the function of the Law Officers in Britain. According to this view, the state needs lawyers who provide comprehensive and sometimes critical judgments, as an inherent interest of the government that wants to make certain that it operates within the law and does not want to find itself susceptible to lawsuits. **Nevertheless, this is not the case of an external watchdog that restrains the government or supposedly guards the "public interest" against it.**

It should be noted that the Law Officers have the authority to deviate from convention and publish their opinions. However, given the fact that they are part of the government, they probably would not want to sabotage their associates by publishing opinions contradicting the position of the government, and by doing so extending the damage to themselves— except in the most extreme cases.

Are the legal opinions of the Law Officers in Britain binding on the government? In terms of formal law, there is no statutory provision or case law binding the government to act in accordance with the counsel of the Law Officers. In terms of actual practice it is difficult to answer this question positively or negatively, given the fact that the lawyer-client privilege is adhered to religiously.[70] In our view, the significance of a possible obligation to an adviser's counsel is not at all clear if no one, except the adviser and the advisee, knows its content, and the adviser himself is a political appointee nominated by the advisee. It is difficult to imagine a situation whereby the advisers could enforce this obligation on the condition of confidentiality even if it is anchored in law.[71] In his 1969 article, Elwyn Jones, who served as the British AG between 1964-1970, stated the following, to illustrate the perception of the relationship between the legal opinion and the personal responsibility:

> "There is a further protection to the Law Officers in that there is a convention of the House of Commons that a Minister who faces criticism must defend his policy or action himself without attempting to hide behind the law officers' opinion. This means that the Minister who is advised by the law officers that he cannot do something simply has to say 'I just can not do this.' He is not allowed to say, 'I cannot do it because the Attorney-General tells me that I cannot.'"[72]

A minister who is required to explain before the Parliament his act or oversight, would have to use his own reasonings; the argument that the Law Officers told him that this was unacceptable, forbidden or impossible would not be admissible. The above quotation shows that the government ministers have the responsibility—and are thus also given the authority—to decide whether to act in accordance with, or contrary to the advice received from the Law Officers.

One way or another, British law sources do not impose an obligation on the government to adopt the opinions of its legal advisers.

In **Canada,** counsel authority is given to the Deputy AG; however, in practice counsel is provided by the legal services units responsible for specific legal fields in the Department of Justice.[73] The Department of Justice will, at times, "loan" its lawyers to the various departments in order to offer exclusive legal advice, although those "loaned" lawyers are subordinate to the AG. Moreover, while there is a possibility of recruiting external legal counsel, such recruitment requires the authorization of the AG or a person acting on his behalf.[74]

The legal advice given by lawyers in the legal service units is not binding on the government or the relevant government department.[75] Nonetheless, there are academic schools of thought in Canada suggesting that in case the government does not accept the AG opinion, he must appeal against it.[76] However, this is merely a theoretical suggestion, because it means that the AG must resign, and if he does not, it is likely that the Prime Minister would dismiss him. Moreover, such suggestion has never been made by a serving AG or those who served in the past. Presumably, in such case, the parties would try to convince each other,[77] and if they cannot, the AG would withdraw his position against the position of the government and the ministers, who have the ultimate power of decision.[78]

Similarly to the situation in Britain, the advice of legal counsel in Canada is not published, based on the lawyer-client privilege convention. The government — and not the AG — decides whether to publish the opinion.[79] The Department of Justice refrains from giving any advice, opinion, or even legal information to private parties, out of concern that it may be considered as legal counsel provided to an external party.[80]

Similarly to the situation in Britain, the advice of legal counsel in Canada is not published, based on the lawyer-client privilege convention. The government — and not the AG — decides whether to publish the opinion. The Department of Justice refrains from giving any advice, opinion, or even legal information to private parties, out of concern that it may be considered as legal counsel provided to an external party.

In **Germany,** legal advice to ministries is provided by the internal legal departments of those ministries, while the federal government receives advice from the Legal Counsel Department in the Ministry of Justice, which is also in charge of drafting legislation. Moreover, every bill proposed by a government ministry is subjected to legal scrutiny by the Constitution, Administrative Law and International Law divisions of the Ministry of Justice; to ensure compatibility of prospective legislation with the constitution and the international law and to advise the ministry accordingly.[81]

There is no provision that prevents a relevant minister from seeking external legal advice, as long as it is not a confidential matter and there is no political opposition from other ministers.[82] In terms of the obligation to act in accordance with the legal advice, there is no difference between the opinion of the legal adviser and any other civil servant. The legal advisers are subordinate to the minister heading the relevant ministry, and not to the Ministry of Justice or the Chancellor.[83] The Ministry of Justice may not provide advice to any other entity except the government, and its counsel serves the government alone.[84]

B.4. The question of institutional separation between representation and legal advice

In the **United States,** as shown above, both the advice and representation authorities are given to the AG. In the past, the OLC had functioned as a part of the SG office; however, in 1993 it was statutorily separated.[85] The administrative separation between the two offices is associated with the fundamental principle that the two authorities should remain separated out of caution. The OLC office memorandum states the following:

> "As a prudential matter, OLC generally avoids opining on questions likely to arise in pending or imminent litigation involving the United States as a party..."[86]

What is the source of this caution? It seems possible to trace its roots through the writings of Homer Cummings, who served as the AG between 1933-1939, writing on the advisability of expressing criticism on recently passed bills[87] Cummings explains that expressing reservations at this stage would become problematic when the AG would be obligated, *ex officio,* to defend the statute before the Supreme Court. Moreover, Cummings notes a tactical problem that will arise even when the adviser's position supports the statute, due to the fact that the government litigant would be prematurely exposed to the legal argument of the government.[88] Therefore, one must avoid a situation whereby the official representing the government in legal proceedings is the same official who advises the government and provides an objective opinion upon the constitutionality of its actions beforehand.

Another reason for the division of powers that is cited in literature, this time from the OLC perspective, stems from the understanding that the legal analysis prior to taking an action is not on a par with legal arguments designed to defend an action that had already been taken.[89] Since on one hand the OLC is not interested in losing the reputation of precision and meticulousness in counseling, and on the other — is not interested in getting into conflict with the SG, the OLC does not provide advice and does not deal with matters that are subject to a legal proceeding, or when there is a good probability they will result in a legal proceeding. Besides the departmentalization created by Congress, the OLC itself had created internal cautionary procedures to ensure that the areas of counsel and of representation do not collide.

In **Britain**, as mentioned, there is a complete separation between the provision of legal counsel, which is performed within the legal departments by the department employees in a government ministry, and representation, which is performed by private attorneys who are members of the panels specifically designed for this purpose.[90]

In **Germany,** there is no separation between legal counsel and representation, and both are exercised by the internal legal counsel departments within each government ministry.[91]

In **Canada,** even though the legal advice and representation functions are separated according to specialization of different departments, we have not found particular mechanisms designed to create significant separation and prevention of possibility of overlapping between the departments.

C. The situation in Israel

C.1. The question of position holders

In Israel the official in charge of government representation and provision of legal advice is the Attorney General (AGI). In the past it was customary that the government had the authority to dismiss the AGI if so it wished. The method of appointment was determined in accordance with the Civil Service Law (Appointments) 5719-1959 and with the government provision that was published pursuant to Article 5 of the Law on 30.6.1960.[92] According to these provisions, the government had complete autonomy in appointing the AGI upon the recommendation of the Minister of Justice. However, the Shamgar Commission[93] that was established following the Bar-On Hebron affair[94] recommended that the method of appointment of the AGI be changed.[95] The government adopted the *Shamgar report's* conclusions on the matter, and established the following method of appointment: [96]

a. There shall be formed a permanent selection committee that shall screen suitable candidates, one of which shall be appointed to the position by the government.[97] The term of each committee shall be four years.

b. The chairman shall be a retired justice of the Supreme Court who shall be appointed by the President (Chief Justice) of the Supreme Court upon the approval of the Minister of Justice,[98] and the other members shall be: a retired Minister of Justice or retired Attorney General appointed by the government; a Knesset Member elected by the Constitution, Law and Justice Committee of the Knesset; a scholar elected by a forum comprising deans of law schools; an attorney elected by the Israel Bar Association.

c. The AGI term duration shall be six years, with no extension, irrespective of the term of the government.

d. The government may remove the AGI from his position due to specific reasons that are detailed in the report. These reasons include, in addition to personal circumstances of the AGI, disagreements between the AGI and the government that prevent efficient cooperation. In such an event the selection committee shall convene to discuss the subject and shall submit its opinion to the government, in writing. However, the opinion of the committee is not binding, and the government may decide to remove the AGI contrary to the recommendation of the committee. The AGI shall have the right to a hearing before the government and before the committee.

The AGI determined in his directive[99] that the legal advisers to the various ministries are subordinate to him professionally, even though they are administratively subordinate to their ministries.

C.2. The question of representation

The authority of the AGI to represent the state before the High Court of Justice is not anchored in any law. The authority of the AGI to represent it in civil proceedings is determined in Article 4 of the Civil Procedure Amendment (State as a Litigant), 5718-1958, but the law does not specify what the authority includes and does not define the relationship between the AGI and the government:

> "4. In any proceeding involving the state, it will be represented by the AGI or his representative."

Different researchers[100] mistakenly view this article as authorizing the AGI to represent the state before the High Court of Justice, but Article 10 of the same law determines explicitly that the law does not apply "to the matters in the Supreme Court sitting as the High Court of Justice."[101]

In the early years of the State of Israel, with regard to non-criminal matters, the AGI had to represent the government according to its position. One can learn about this from the reflections of Haim Cohen about his term as the AGI in the early fifties. He notes that even in the cases where he believed that the government did not act properly, he saw himself as its advocate, and therefore had to defend its position to guarantee its right to proper representation.[102]

However, the view according to which the AGI is obliged to defend the position of the government did not last for too many years, and with time it was replaced by another perspective that held that AGI should be granted independence in representing the government. This change in trend had started in the seventies, during the tenure of AGI Meir Shamgar, who publicly refused to defend the position of the government in the *Zaidman* affair. In this case, the Minister of the Interior refused to register a Reform convert as a Jew. At the end of the day this case was not heard in the court; nonetheless, this was the first time that AGI refused to defend the stance taken by the government. The next case occurred in 1986, during the term of Itzhak Zamir, in the *Laor v. Film & Play Review Board* case. The view expressed by Zamir before the court stated that a government entity does not have the right to express its considerations and explain its stance before the court in contradiction to the stance of the AGI. Additionally, it stated that the appointment of a private attorney who is to represent the government is within the authority of the AGI and subject to his discretion.[103]

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Over time, this view also prevailed among the justices of the Supreme Court, who had enshrined it in their rulings.[104] In the *Amitai* case, the court obliged Prime Minister Rabin to fire Deputy Religious Affairs Minister Rafael Pinhasi following his indictment on charges of tax and party funding violations. The AGI, Yosef Harish, strongly disagreed with Rabin's opposition to the removal of Pinhasi and refused to represent the PM in court. Then-Deputy President Aharon Barak not only sided with Harish but also issued some sharp statements regarding representation of the Prime Minister.[105] In response to Deputy Minister Pinhasi's argument that State Attorney Dorit Beinish represented two clients with opposing positions, Justice Barak replied that those were not divergent positions, and that the State Attorney did indeed represent the Prime Minister (despite the discord between them):

> "It is true that the Attorney General's position was different from that of the Prime Minister. They tried to convince each other, but did not succeed. In this situation, the Attorney General **must represent the Prime Minister before us according to the Attorney General's legal viewpoint.**"[106]

This trend continued in the ruling in the *Deri* case, whereby the court forced the Prime Minister to fire Interior Minister Aryeh Deri against the backdrop of his indictment on charges of bribe taking, fraud, breach of trust, and falsifying corporate documents. In this ruling, Justice Matza criticized Prime Minister Rabin for his deviation from the stance of the AGI:

> "[The Prime Minister] tried to oppose the legal opinion of the Attorney General on the very nature of the legal norm regarding removal of a minister from the office. This approach is contrary to the constitutional principle guiding our system, by virtue of which the Attorney General is held as the authorized interpreter of the law for the Executive Branch . . . and the Prime Minister, with all due respect, **could not be heard on these grounds at all.**"[107]

Justice Barak replied, "It is true that the Attorney General's position was different from that of the Prime Minister. They tried to convince each other, but did not succeed. In this situation, the Attorney General must represent the Prime Minister before us according to the Attorney General's legal viewpoint."

The meaning of this statement is clear: whenever there is disagreement between the Prime Minister and his legal adviser, the Prime Minister has no right or ability to express his position. As mentioned in the comparative legal survey in the previous chapter, in the other countries surveyed, when a dispute arises between the head of the Executive Branch and the official in charge of its representation, the position of the former shall prevail.

C.3. The question of legal advice

The question of legal advice arose in Israel in its early days. In 1962 the Agranat Commission was formed in view of the dissension between the Minister of Justice and the AGI that revolved around the division of authority between them, and the independence of the AGI in criminal matters. As mentioned, the field of criminal justice is not the concern of this study, nevertheless, alongside the commission's conclusions adopted by the government,[108] the commission also undertook to discuss civil issues and the relationship between the AGI and the ministers and the government in the realm of legal counsel. The conclusions of the commission relevant to our discussion are the following:

a. "Good governance requires that the government generally treat the advice of the AGI as the reflection of the existing law, as long as the court did not rule otherwise."[109]

b. "Notwithstanding the above, the government may decide how to act in a particular case according to its own discretion."[110]

c. "As for the other authorities of the executive branch, there can be no doubt that it is their duty to regard the AGI counsel as the guiding opinion on the questions of law and justice."[111]

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b. "Notwithstanding the above, the government may decide how to act in a particular case according to its own discretion."

However, even though the conclusions of the commission explicitly determined that the government may deviate from the AGI opinion, it seems that AGIs, followed by the courts, interpreted those conclusions differently. In the 1986 article published in the aftermath of the Bus 300 Affair,[112] then-AGI Itzhak Zamir wrote that the conclusions of the Agranat Commission determined two rules: First, in legal matters the government is subjected to the opinion of the AGI, and second, only the AGI is authorized to represent the government.[113] During the *Kach faction* case, Justice Barak incidentally noted that the AGI is vested with the power to interpret law for the executive branch, which is binding on the branch in its entirety,[114] and in the *Amitai* case he adopted the interpretation of Zamir and determined that the opinion of the AGI binds the entirety of the government.[115] In this regard, one should note Prof. Ruth Gavison's criticism of the court using the Agranat Commission to substantiate its view:

> "Not only did the Agranat Commission not support the rules in question, but it also explicitly denied them. Incidental remarks in court rulings and scholarly analyses had managed not only to create a belief that there is a convention but also to present it as it was an assumed truth… Since it was determined that the Attorney General was the authorized interpreter of the law for the government as long as the court did not rule otherwise… and that the Attorney General can exercise his representation authority (or refrain from it) to present his own opinion before the government – the government and the jurists communities accepted it without thinking of its meaning and its dangerous implications."[116]

This court approach regarding the status of the AGI counsel became even deeper ingrained over the years. It can be illustrated by the *Meretz faction* case that involved a ministerial committee decision to disqualify the candidacy of the traditional (Conservative) Jewish movement and the progressive (Reform) Jewish movement representatives from serving as members of a religious council. In this matter, Justice Dalia Dorner determined the following:

> "Personal opinions of elected officials or civil servants regarding the existing legal situation are irrelevant. When exercising their powers, they must comply with the legal opinions issued by the AGI and his representatives."[117]

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Another example is the *Yael German* case, which involved participation by the municipality council of Herzliya in the costs of a legal proceedings against the Herzliya mayor at the time in the wake of his acquittal. The Minister of Interior approved the expenditure, subject to a certain reduction of the amount. The petitioner argued that the amount paid by the council was too high, and the AGI also believed that the Minister of the Interior should reduce the amount. However, during the court proceeding, the AGI representative argued, contrary to the original stance of the AGI during the counsel stage, that the petition should be denied, and that the decision of the Minister of the Interior **should not** be voided. Justice Dorner rejected the argument of the Minister's representative during the representation stage, on the following grounds:

> "The Minister failed to substantially comply with the opinion of the AGI… [even though] it is stated in the law that the government and its agencies must comply with the opinion of the AGI. **And to state more precisely: the position of the agencies (as opposed to the personal opinions of the civil servants employed therein) regarding legal matters, being an institutional matter, is determined by the AGI.**"[118]

Itzhak Zamir,:"It is not correct to say that a minister does not have any standing. A minister has a say when it comes to deciding whether to bring before the AGI the question of the government, a relevant consideration, but it should be a consideration, not an edict. When the AGI contemplates a question he has to decide on, as part of his consideration, he should take into account a minister's opinion, who, as a politician, brings another perspective, one of the government. It is an important consideration; however the final decision must be made according to the AGI's understanding of what is legal and right." The power of the AGI lies not only in the binding status of his opinion, but also in the fact that he serves, according to the customary perception in Israel, as the "exclusive provider" of counsel services to the government.

Itzhak Zamir, during the interview he gave after retiring from the posts as the AGI and the President of the Supreme Court, completely turned the tables when he discussed the need of the AGI to consider the opinion of a minister prior to deciding on the minister's manner of action:

> "It is not correct to say that a minister does not have any standing. A minister has a say in bringing before the AGI the opinion of the government. This is a relevant consideration, but it should not be a dictate. When the AGI contemplates a question he has to decide on, as part of his consideration, he should take into account a minister's opinion, who, as a politician, brings another perspective, the government's. It is an important consideration; however the final decision must be made according to the AGI's understanding of what is legal and right."[119]

The power of the AGI lies not only in the binding status of his opinion, but also in the fact that he serves, according to the customary perception in Israel, as the "exclusive provider" of counsel services to the government.[120] Indeed, the AGI directives set out an arrangement that allows for receipt of external legal advice, although the scope of this arrangement is very limited.[121] First, it is not the minister himself who may seek external advice, but the legal adviser to the ministry, who is, as mentioned, subordinate professionally to the AGI. Even once it is decided to use external advice, the external adviser would be a mere tool of the AGI, assisting him and subordinate to him.[122] Second, this arrangement is implemented only when there is an overload or there is a need for special expertise. This arrangement does not apply to sensitive cases, which require an approval by a committee comprising mostly jurists of the Ministry of Justice and excluding representation from the ministry that seeks the advice.[123]

When it comes to the question about who is entitled to seek an AGI opinion, Israel is an exception. This is due to the fact that Israel does not have a procedure or regulation preventing the AGI from rendering legal advice to non-governmental entities. Additionally, in terms of confidentiality of advice, according to the practice inculcated during the tenure of Meir Shamgar as AGI, the AGI occasionally issues general directives for legal advisers and ministries on various issues. Moreover, some of these directives are published on the Ministry of Justice website,[124] and the objections of the AGIs to the government positions are reported by the media.[125] All this, as mentioned, is extremely exceptional in comparison to the countries examined, where there is practiced a norm – and mostly even a duty – of confidentiality

With regard to initiation of advice, as stated above, the AGI issues general directives to the various ministries even without being asked for advice. The support for the authority of the AGI to initiate advice can be seen in the following Shamgar Commission statement: "The advice could be initiated by the AGI whenever he finds it necessary for the correct legal guidance of a certain act by the government."[126]

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With regard to initiation of advice, as stated above, the AGI issues general directives to the various ministries even without being asked for advice.

C.4. The question of institutional separation between representation and legal advice

In Israel there is administrative separation between the provision of legal advice to the government, and its representation. The legal advisers of the various ministries advise their respective ministries, while Counseling and Legislation Department at the Ministry of Justice renders advice to the government as a whole. The State Attorney's office, through its various departments, represents the government in various courts and related proceedings. However, in practice the AGI is in charge of both the legal counsel and the representation systems. Indeed, subordination of the legal counsel and the representation systems to the same person exists in other countries surveyed in this paper. In Israel, however, contrary to the situation in those other countries, this joint subordination creates crossover powers between the counsel and representation functions. As shown above in the *Amitai* case, basing its ruling on the fact that the AGI is the authorized interpreter of the law for the government, the court inferred that the AGI is vested with the authority to decide to represent the government in court, in a manner that is contrary to its actual position.[127] Thus, it is apparent that non-separation between the legal advice and the representation authorities can have a crucial influence on the way the government is represented.

Non-separation between the legal advisers and representation is also evident in other situations. First, the Counseling and Legislation Department at the Ministry of Justice, subordinate to the AGI, opines on the matters pending in court (as opposed to the situation in the United States, for example).[128] Morever, as part of the procedure adopted by the Department of the Supreme Court of Justice, in the State Attorney's Office (HCJ) Petitions Department, which has been coined "pre-petitions," a petitioner can contact the department on the grounds that he has been wronged by a governmental authority.[129] The department, whose explicit role is to represent the government in petitions and appeals of this sort, considers whether to accept the "petition" of the complainant. If it decides to accept the petition, the department contacts the relevant governmental authority and advises it (i.e. provides binding advice pursuant to the authority of the AGI) to change its position. As such complaints are often a preliminary step before filing a petition with the HCJ, the department may notify the governmental authority that if the latter refuses to comply with its opinion, the department will not be able to defend the authority's position before the court. This is an example *par excellence* of a mix up that exists in Israel between legal advice and representation. It should be noted that this tradition has developed while being acknowledged and even approved by the court:

> "The pre-petition phenomenon can be seen as an additional and a far-reaching stage of the development... whereby the State Attorney's office is actually becoming the long arm of the court. This process takes place with the approval and encouragement by the court..."[130]

Finally, one should note that the attorneys from the Department of the Supreme Court of Justice, in the State Attorney's Office (HCJ) Petitions Department and their colleagues from the Counseling and Legislation Department at the Ministry of Justice regularly hold joint meetings – both on the issues brought before the Counseling and Legislation Department for the purpose of counsel, and on the matters handled by the HCJ Petitions Department during the course of a legal proceeding.

In conclusion, the comparison between the legal counsel in Israel and its equivalents in the four countries examined shows that the AGI is most unusual in the scope of his powers. While in none of the countries the opinions of legal advisers are binding on the government or the ministers,[131] the court in Israel determined that AGI can oblige the government to comply with his opinion both in terms of legal counsel as well as representation. Not only is this approach incongruent with global practice, but it is also at odds with the conclusions of the Agranat Commission and the Shamgar Commission, which were set up to examine the roles of the AGI. This approach is reinforced by the fact that the AGI enjoys exclusivity, which has no equivalent in the other countries. None of the legal service organs in the surveyed countries enjoys such broad authorities.

Our review also shows that the political system has minimal supervision over the AGI, save the exceptional dismissal procedure, which also must be examined by a professional committee (even though its conclusions are not binding on the government). All this is in stark contrast to the situation in the rest of the examined countries, whereby the president, the prime minister, the ministers or cabinet members directly supervise the attorneys who advise and represent them – they appoint them according to their discretion and may dismiss them at any given time.[132]

The main points of our review can be summarized in the following table:

The AGI vs. president/government

	US	UK	Canada	Germany	Israel
Is the AG a political role?	✔	✔	✔	✔	✘
May the president/government act in opposition to the position of the AG?	✔	✔	✔	✔	✘
May the president/government dictate to the AG the position that shall be presented on their behalf before the court?	✔	✔	✔	✔	✘
May the president/government use external representation without approval of the AG?	✔	✔ [133]	✘	✔	✘
Is it forbidden for the AG to respond to legal questions from non-governmental entities?	✔	✔	✔	✔	✘
May the president/government impose confidentiality requirements upon the legal advice rendered by the AG?	✔	✘ [134]	✔	✔	✘

The AG vs. ministers

	US	UK	Canada	Germany	Israel
May ministers act in opposition to the position of the AG?	✔ [135]	✔	✔	✔	✘
May ministers dictate to the AG the position that shall be presented on their behalf before the court?	✘	✔	✔	✔	✘
May ministers use external representation without approval of the AG?	✘	✔	✘	✔	✘
Is legal adviser to a ministry subordinate to the respective minister in terms of legal matters?	✔	✔	✘	✔	✘

It is important to point out that even in those few respects where any of the countries are similar to Israel, there is actually no resemblance whatsoever. This is because the AG in all the other countries is a minister or a cabinet member, and as such he a *priori* identifies with its positions, has responsibility towards the government and his tenure is conditioned by the commitment towards it.

D. Normative discussion

D.1. The question of position holders

The proper structure of legal service within the government of the State of Israel and the proper division of authorities within it are derived from conclusions regarding the nature of the different roles that the AGI currently fulfills. This research, however, focuses only on the representation and legal counsel roles and not on all the different roles the AGI is currently assigned. Therefore, within the framework of this research we do not address the question of position holders. In the above comparison with other countries we discussed the distribution of roles in those countries; however, we did so only to create an equal platform of discussion on the legal counsel and representation authorities, and not as a subject of independent discussion.

D.2. The question of representation

> "When it was time to respond to the High Court of Justice in the petitions against Aryeh Deri, Beinish told Rabin, 'Your position opposing the resignation of Deri certainly can be defended, however, there are no guarantees that the High Court of Justice would accept it.' Rabin replied, 'Have I asked for guarantees? Are you my insurance company? It will suffice that you defend me in court.' Dorit replied, with a smile, 'The problem is that he (Harish) won't'."[136]

As previously mentioned, the legal view in Israel holds that the AGI (with all of his representatives) enjoys the exclusive authority to shape the content of legal opinions to be presented before the court on behalf of the government, and to do so according to his own stance and belief, even if the government or cabinet ministers believe otherwise. In the cases whereby the AGI decides not to defend the government position, he also decides, according to his discretion, whether to allow the government to use external representation. This situation leads to many problems.

Even the most lowly criminal in Israel has the right to due process of law using legal representation before the court, but the very government of Israel, representing the democratic choice of the citizens of Israel, does not have the right to authentic representation of its position when it is faced with a petition or an appeal filed against it in court.

First, the Israeli government has literally no representation.[137] Even the most lowly criminal in Israel has the right to due process of law using legal representation before the court, but the very government of Israel, representing the democratic choice of the citizens of Israel, does not have the right to authentic representation of its position when it is faced with a petition or an appeal filed against it in court. The government may want to promote one policy or another, but it does not have any way to defend its position before the court if the AGI determines that this position is not legally appropriate. As is shown in the *Amitai case*,[138] the opinion of the AGI — and not the opinion of the government— is the "official opinion of the state."

Another example that aptly illustrates this point is the legal proceeding that took place during *Gaza Village Kibbutz* case.[139] In this case a disagreement arose between the chairman of the Israel Land Council (ILC) and the AGI on whether a petition filed against the Council should be accepted. The AGI representing the ILC has stated before the court that the "respondent" is of the opinion that the petition should be accepted. However, Ehud Olmert, who was then the Chairman of the ILC, was present in the courtroom, and contested the position of the AGI, claiming that it was not the position of the "respondent." The court called on the "parties"— that is, the minister and the AGI representing him, to reach a unified position.[140]

Further to this event, the AGI clarified his legal position before the minister, notifying him that he would not defend his position. In view of this, Olmert laid out before the ILC "the position of the AGI and the implications inherent in its rejection and the refusal of the AGI to defend the first transitional provisions in the hearing that was to be held before the court".[141] As a result, Olmert and the council adapted their position to that of the AGI. Thus the AGI imposed his opinion on the minister and the council he represented. In the wake of this the court ultimately ruled that the opinion devised by the AGI is the opinion of the state. Following this course of events a petition was filed by the holders of interest in the lands, against the arrangement imposed by the AGI upon the ILC, claiming that "the new transitional provisions were adopted by the council out of submission to the pressure exerted by the AGI, which forced them to disregard their own discretion".[142] Some of the appellants even presented a letter written by the minister, which stated that "the change of the council decision was directly effected by the pressure exerted by the AGI," and that the new transitional provisions were "a compromise forced" upon the ILC.[143] However, the court refused to accept the minister's "testimony," and ruled that, in its view, it was the state that adopted the AGI position despite the described circumstances. It goes without saying that in this proceeding, as well, the AGI represented the minister.

This created an absurd situation: the council and the minister withdrew their position based on an understanding that it would not be defended in the court, and ultimately had to rationalize before the court the stance imposed on them by the AGI. Even more absurd is the fact that the AGI, who imposed his opinion on the minister, is the one who represented him when the latter was blamed for surrendering to the AGI's opinion.

The second problem is the imbalance between the decision-making power and the responsibility for the results thereof. Vesting authority and responsibility in the same person is a pre-condition for prudent and efficient functioning of any given entity. When a legal adviser orders the government to take action or refrain from action, it is not he who will eventually bear public responsibility for the results of the act or the oversight if his instruction leads to poor or disastrous outcomes. There is no moral justification to grant authority to those who do not bear the entailing responsibility. In terms of economic efficiency as well, when an agent who is liable to inflict damage carries the responsibility for it, he has every incentive to prevent the potential damage. However, if the agent vested with decision-making authority externalizes the damage and does not carry the responsibility for the results of his actions, there is concern that he will not be careful enough to prevent excessive or unjustifiable damage.

The other aspect of the problem is denying responsibility of the government. If the authorized government is forced to withdraw its opinion in favor of the opinion of the legal adviser, then in the event of failure it can argue, not without grounds, that it is not responsible for the failure. Thus, ultimately, neither the adviser nor the government bears full responsibility for the way authority is exercised.

When a legal adviser orders the government to take action or refrain from action, it is not he who will eventually bear public responsibility for the results of the act or the oversight if his instruction leads to poor or disastrous outcomes.

The third problem is the question of authority versus the legal responsibility. Let us imagine a case in which the state wishes to promote a certain policy; however, the AGI is of opinion that the policy is not legally appropriate. In this situation, the policy of the AGI becomes the policy adopted in practice. Now, in case there is a petition filed against implementation of the policy, and the AGI fails to convince the HJC of his cause, the government and the ministers (being the representatives of the "State") will bear the legal responsibility for a policy that was not determined by them. And this responsibility will exist albeit the fact that the ministers will not be able to express their own objections to that very policy for which they are held to be responsible. To highlight the absurdity of the situation, it should be mentioned that if the state wishes to challenge the stance of the AGI, it cannot do so unless it finds an external petitioner who petitions against it. Nevertheless, even if such a petitioner is found, the consequences and the legal responsibility are borne not by the AGI, but by the government, which for the lack of any other options, complies with the AGI's binding opinion.

Let us illustrate the point. Following the assassination of Prime Minister Itzhak Rabin, Nava Arad was to enter the Knesset as the next candidate of the Avoda party list. However, at the same time she was serving as the Prime Minister's Adviser on the Status of Women. The AGI, contrary to the position of the Speaker of the Knesset, opposed her inauguration because of her role in the executive branch.[144] Arad petitioned to the HCJ, which accepted her claim as opposed to the "position" of the Speaker of the Knesset.[145]

This episode gives rise to a **fourth problem**. The result of the approach practiced in Israel today is that the AGIs prevent legal debate.[146] Had it not been for Arad appealing to the court, the Knesset Speaker would not have had any way to challenge the position of the AGI before the court, as the original position of the Knesset Speaker[147] could not be represented due to the exclusivity of the AGI in representing the state. What is even worse, the petitioner was forced to oppose the position of the Knesset Speaker, although as a matter of fact, he actually sided with her position.

The authority to decide whether to represent the government is in the hands of the AGI, and so is the exclusive authority to decide whether to allow the government to use external representation.

The **fifth problem** with the existing situation in Israel involves the quality of representation that the government is provided as a result of its exclusive nature. As shown above, the authority to decide whether to represent the government is in the hands of the AGI, and so is the exclusive authority to decide whether to allow the government to use external representation. This leads to a situation where the AGI and his representatives may agree to represent the government, but they will do so hesitantly and half-heartedly. The result is a false impression: Ostensibly the government enjoys legal protection; however, in practice such representation may undermine the government and its position. This situation is especially problematic because it is difficult to prove the existence of such unmotivated representation, and therefore it is difficult to blame the representative. Thus the transparency of the proceeding is marred. The ability to point to the existence of this phenomenon depends on the ability of judges to discern that the representation is provided half-heartedly. This can be illustrated by the verdict in the Yunas case:

> "In response to the claim of discrimination made against her, **Ms. Beinish argued, apparently without much conviction,** that the petitioner does not have the right anchored in law to receive the remedy he requests."[148]

Moreover, with regard to the potential of poor representation, it should be noted that the reality whereby the legal adviser is the one who determines and represents the position of the state results in a severe "principal-agent problem."[149] This was referred to by Yoav Dotan as follows:

> "The State Attorney's Office should not be regarded as a "transparent" actor whose sole function is to represent the interest of its principal—the respondent administrative authority—in the High Court of Justice. But— as we have shown— it is a bureaucratic agent enjoying the utmost level of administrative and professional autonomy with respect to its clients, and it sometimes has unique ideologies, interests, and even policy, and it might have strategic interests exceeding the relevant litigation and therefore not necessarily matching the immediate interest of the respondent authority."[150]

The **sixth problem** is that government authorities will, *a priori*, refrain from consolidating an opinion that might collide with the opinion of the AGI. As the ministers and the rest of the authorities know that the AGI is the one representing them in court, they will refrain from formulating an opinion in opposition to his standpoint, for they know that it is pointless if their position will not be represented. This way the authentic position of the relevant authority is never consolidated.

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The **seventh problem** involves the issue of democracy. According to the rules of constitutional and the administrative law practiced in Israel, issues involving reasonableness, relevant considerations, proportionality, and proper purpose of the public policy are all legal issues. This situation, combined with the described powers of the AGI, enables the former— who is not an elected official— to determine policy matters. These decisions replace the decisions of the government ministers, who were appointed by the prime minister following the election by the sovereign in a democracy — the people.

Thus, for example, the Deputy AGI decided to recognize non-citizen Palestinians living on the western side of the West Bank barrier in the Jerusalem area as eligible to receive national insurance benefits, as a part of a legal process that took place in a labor court.[151] The AGI is not an elected official, but this decision by the Deputy AGI can be extremely influential: it is crucial in matters of immense economic value, it determines the State's treatment of the West Bank barrier as being political- or security-related, and it can even open a window to a decision that could be critical to the natural sovereignty of the state—the future naturalization of those Palestinians, or the prevention thereof. All these are ones that the government ought to decide. However, the judge who heard the matter did not turn to the government to clarify its stance, but instead turned to the AGI. Moreover, in light of the above, it is doubtful whether the government is able to appeal the decisions of the AGI and his representatives.

D.3. The question of legal advice

The perception that legal advice to the government is exclusive and binding creates grave normative problems. Various agents, including the AGI himself, define the powers of the AGI, including counseling powers, as being quasi-judicial in nature.[152] This definition reflects the view according to which the AGI does not comprise a part of the government, but is an independent agent auditing it. Below is the account of some of the problems entailed by this approach.

Before we discuss the central problems arising in the existing situation, it should be noted that the binding counsel institution creates ambiguity. The obligation of the executive branch towards the opinion of the AGI is naturally limited solely to legal questions. In view of the expansion of the legal discourse in Israel, it is clear that the AGI will tend to regard each question as legal, while the ministers, interested in keeping their autonomy, will tend to reduce the scope of this definition.

Additional ambiguity involves the meaning of the legal obligation to comply with the opinion of the AGI. Suppose that a minister acted contrary to the instruction of the AGI and the case reached the court. It is inconceivable that the court would choose to reject the minister's stance only on the grounds of noncompliance with the AGI's opinion if, in fact, the court prefers the opinion of the minister over that of the AGI.

Following is the account of some of the problems implied in the approach that prescribes binding legal advice:

The first and the most acute problem is that the binding advice approach contradicts the principles of democratic rule.

The first and the most acute problem is that the binding advice approach contradicts the principles of democratic rule. The basic principle in a democratic regime is that elected officials are those who determine government policy. When an elected official is subjected to the opinion of a clerk of any rank, the result is violation of the rule of the people principle. This problem is significantly intensified when the worldview of the legal adviser does not match the worldview of a minister. Since there is a risk that improper considerations of moral preferences will affect the opinion of the AGI, in a situation where this opinion is binding there is concern that a government will be forced to accept a worldview that contrasts with its own.

The second problem is the impairment of the governance ability of the government and ministers. Impairment of governance undermines the ability of elected officials and their proxies to promote efficient public policy. When the government is subjected to the opinions of its legal advisers, its ability to promote public policies is weakened.

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The third problem is the issue of separation between the holder of authority and the bearer of responsibility, which has already been presented in the discussion about representation authorities, and which is even more severe here. Since the opinion of the AGI is binding on the ministers, in the event of a dispute between the two, the authority is handed over to the AGI. Nonetheless, AGI is not the one who will carry the public responsibility for the results of his action or inaction; therefore the AGI will have a lesser incentive than a minister to prevent damage resulting from poor decisions.

The other side of the coin is the ability of the government to dissociate itself from the responsibility for failure, on the grounds that due to objection of the AGI it does not have the authority to make the necessary decisions. This problematic phenomenon already manifests itself in Israel.[153]

The fourth problem, relating to the separation between authority and responsibility, involves inherent imbalance that the AGI faces between the incentives to allow an action and the incentives to prevent it. Naturally, most of the criticism of the AGI's operation deals with the actions he approves, and not those that he prevents. Conversely, the AGI gets no credit for approving a policy that turns out to be successful. Therefore, the tendency of the AGI is to be risk averse and to err through prohibition of the permitted rather than through permission of the prohibited. Therefore, the natural tendency of the AGI is to create hurdles in promoting a policy, as opposed to the position of a minister, or the government itself, that will try to promote it.

The fifth problem also stems from the separation between the authority and responsibility. We discussed above the difficulty in providing a definition of a legal question.[154] This problem is intensified in view of the fact that the AGI enjoys the authority but does not carry the primary responsibility. In this situation the AGI does not have the incentive to limit the definition of a legal question because he will not pay the price for his failure.

The sixth problem still has not manifested itself in practice until this day; however, it might be the next natural step that follows the perception of AGI's opinion as binding. There might be an argument presented, according to which the opinion of the AGI is binding on the government when it is about to initiate government bills. Legislation is one of the key expressions in the democratic system because it is the primary tool for a comprehensive policy change. In Israel, as in many other countries, the government can sponsor and promote legislation within the Knesset. According to the binding advice principle, legal advisers might argue that they are authorized to prevent the promotion of government bills that are not constitutional in their view. Such attempts might interfere with the core authority of the government in legislation matters, and as a result even with the authority of the Knesset to hold discussions and make decisions. The counseling phase in a legislation process provides a vital tool for the government when it is about to initiate a bill; however, this phase should remain in effect only in terms of advice.

A widespread argument that seeks to justify the obstacles pertaining to the counsel authorities is that ministers are not lawyers, and therefore they must obey legal experts. This argument is not particularly convincing. In other fields ministers are not obliged to comply with experts' opinions, such as experts in the fields of security, medicine, or sociology. Hearing the opinion of an expert is important in the legal field as in any other field; however, the decision must be made by an elected official, who carries the responsibility.

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The preference of the legal field over other fields of expertise leads to a situation whereby legal advisers make decisions in fields in which they have no expertise, and even against the opinion of the experts in those fields. For example, according to the currently practiced procedures, the legal advisers not only counsel IDF commanders regarding operational activities, but also approve or prohibit them. The Report of the Commission of Inquiry into the Events of Military Engagement in Lebanon 2006 (also called the Winograd report), found that during the 2006 Lebanon War the army refrained from action when the legal advisers did not give their approval. The report criticized this conduct both because of the damage inflicted on the operational activity and because of the shifting of responsibility from the elected officials and the army commanders to the legal advisers.[155] In spite of the conclusions of the Winograd report, it seems that during the Protective Edge operation in summer 2014 the phenomenon only worsened.

D.4. The question of institutional separation between legal advice and representation

The customary legal approach in Israel, binding together the spheres of legal advice to the government and its representation before courts, is artificial and inefficient, for several reasons:[156]

First, because counseling is a preliminary stage that takes place before any action is taken, in the interest of the State that wants to avoid paying the cost of mistakes, it must be objective and elaborate both on the legal arguments that support the proposed government action and those that are meant to prevent it. In contrast with counseling, representation needs to be conclusive, because its main role is to convince others that the action that took place was legal. In the view of the principal difference between the two roles, there arises a serious difficulty in vesting both roles in the same person, especially when the adviser's opinion is not confidential. How can the adviser defend the government action in court when that action is taken contrary to the adviser's opinion and it is published and known to all?

We will further reiterate that this argument is relevant even if we adopt the position of those who believe that it is appropriate that the opinion of the AGI shall be binding. This is because even according to those who hold that belief, it does not mean that the State is not entitled to protection before the court in the event that it deviated from the directive of the AGI. Not only is the problem relevant when the legal advice of the AGI is regarded as binding, it is even more serious in this case. After all, if the State acts in opposition to the AGI's opinion, the court may not permit AGI to change his opinion when representing the State, due to the binding status of his counsel, and thus the right to representation would be severely undermined

Second, while the role of the AGI is to reflect the existing judiciary reality, the role of the representative is also manifested in the attempt to influence the court to change case law.[157] In the absence of separation between legal advice and representation, the representative is not motivated to act for the change of law. On the contrary, he will prefer to maintain it, because it reinforces his primary position as an adviser, a position that he uses to present the existing theory. As the result of this phenomenon, we witness cases whereby the adviser declares from the start that he would not be able to represent positions "that would not pass the HCJ test".[158]

Third, the unusual approach in Israel, according to which the AGI may counsel private parties seeking to challenge the government, harms the government litigation process twice:

1. Contacting the adviser ahead of the hearing becomes a preliminary inspection of the potential of the appeal against the State, voluntarily conducted by the very attorney who is supposed to protect the legal interests of the State.

2. If the position of the State differs from the one that the AGI presented on behalf of some entity in the past, it would be very difficult for him to represent the State, because that entity can confront him regarding the AGI's earlier decisions and opinions. These problems are reinforced given the fact that legal opinions for external parties are rendered without any prior consultation with the relevant authorities.

Finally, we should reiterate that the conclusions of the Agranat Commission support the separation between the two authorities. The commission had determined that the government should regard the opinion of the AGI as reflecting the judicial reality as long as the court did not determine otherwise, but it may decide against his advice.[159] This conclusion provides that the government may present before court a position contrary to the position of the AGI so that the court can make its decision.

D.5. The background concepts underlying the current legal situation and the criticism thereof.

In light of the above, how can we rationalize the extraordinary powers held by the AGI? It seems that this view is founded upon two basic concepts that have taken root in the Israeli legal discourse: the first holds that the AGI is the gatekeeper of the law; the second maintains that it is not the government that the AGI serves, but rather the public at large. Even though these two concepts are different, they influence each other.

Endowing the AGI with the "gatekeeper" status means that his role is to protect the rule of law even from violations by the government. In other words, this view regards the AGI as the court's representative within the government. This viewpoint is manifested in many cases: in the *Kach faction* case then-President of the Supreme Court Barak regarded the AGI as an integral part of interpretation of legislation by the court;[160] on another occasion Justice Zamir referred to the AGI as "the internal restrain of the government... He creates the first line of defense for the rule of law that allows the court to operate as the second;"[161] there is even an explicit directive from the AGI himself stating that he is the gatekeeper;[162] and even the Abramovich Report, which discusses the legal advisers in government ministries, adopted this view.[163]

In our view, this perspective is improper. In a situation where the AGI has the exclusive authority to both counsel the government and represent it, oftentimes the government is left without legal counsel or representation, something to which even the worst of criminals is entitled. Additionally, this view prevents elected officials from representing the people and materialize their vision, and undermines one of the most basic principles of democracy–the separation of powers. Elected officials must themselves carry the responsibility for ensuring the rule of law, and should be supervised by the court, as well as the people who elected them, and not their attorney.

Some will argue that the real client of the AGI is the public at large, rather than the government. It is unclear who actually is "the public," and raises questions about how the AGI can insist that his opinions meet the wishes and best interests of that public. The AGI is not an elected official, but a senior government functionary. This is in contrast to the government, which enjoys the confidence of the public.

As mentioned above, some will argue that the real client of the AGI is the public at large, rather than the government.[164] This viewpoint is similar to the previous argument, stating that the protection of the rule of law is in public interest. For example, Aharon Barak is of opinion that "Attorney General ought to engage in proactive appellant or petitioner activity whenever the government acts contrary to the law";[165] Rubinstein and Medina maintain that the "[AGI] has the authority – the duty indeed – to appeal to the court for a remedy whose purpose is to obligate the government to act according to the law";[166] Zeev Segal also sided with this approach.[167]

This viewpoint is problematic for several reasons: First, it is unclear who actually is "the public," and raises questions about how the AGI can insist that his opinions meet the wishes and best interests of that public. The AGI is not an elected official, but a senior government clerk. This is in contrast to the government, which enjoys the confidence of the public. In light of this, it seems that the most proper way to serve the public is by assisting the elected officials to fulfill the wish of the public.

One of the duties of the AGI is representation of the public interest. This role is reflected in a series of laws, according to which the AGI is required to opine on certain matters before the court.[168] However, a clear disctinction should be made between the "sitting adviser" in the name of public interest, and the perception of the adviser as protector of public interest in proceedings where the government itself is a party. When wearing his hat of representing the public interest as a "sitting adviser," the AGI intervenes in those cases where the government is not a party; those where the legislators entrusted him with the duty to represent the public interest. The intervention of the AGI stems from the recognition that even though the State is not a party in a particular case being heard in the court, the public has interest in the subject under discussion, and therefore the AGI must represent it. In contrast, in the situation where the government is one of the parties, the government is responsible for keeping the public interest, and the AGI is its agent. In such cases the representation should be performed according to the position and the policy of the government.

The job description of the AGI as a trustee of a specific government, rather than pubic at large, does not interfere with the rule of law. The courts are authorized to keep the government from deviating from the law, and they are bound to do that, just as it is done in other countries examined. This is a job of the court, and not a suitable job for the AGI.

E. Recent Developments

In the months between the publication of this policy paper in Hebrew and its publication in English there has been a significant increase in the powers attributed to the AGI in the area of counselling. This increase is reflected by the view according to which the opinion of the AGI is binding on the government when it intends to initiate primary legislation. Thus the AGI becomes the world's only legal adviser that has a veto power over primary legislation. On the other hand, in the area of representation the AGI was subjected to a critical decision by the Supreme Court that perhaps indicates a change in trend whereby the AGI controls the positions he represents on behalf of the government.

During the elections to the 20th Knesset, the AGI and his Deputy, Adv. Dina Zilber, issued two unprecedented directives that prevent legislation processes.

The first directive was issued on 26.2.2015, when the Deputy AGI Zilber issued a legal opinion according to which the government cannot continue operating within the settlement areas through the Settlement Division of the World Zionist Organization, at least by following the same format under which it was operating for decades.[169] The legal opinion initiated by the AGI contains a section entitled "operational directives" and within this section the Deputy AGI states: "The State must stop the direct budgeting of the Settlement Division, whether by the budget law or by other direct money transfers. This means that the 2015 budget bill will not include a clause for budgeting the division." Further to this, the Deputy AGI sent another letter to the government secretary, in which she informed him that clauses in the coalition agreement between the Likud and the Bait Yehudi factions regarding the continued funding of the Settlement Division through primary legislation contradict the legal provisions in her opinion, and therefore they could not be implemented. The AGI reiterated the statement before the Supreme Court in response to the petition to the HCJ by the head of the *Meretz faction*, MK Zahava Galon, and declared with regard to the mentioned clauses in the coalition agreement that "the said agreements in this clause are not applicable as they contradict the legal provisions within the opinion."[170] Galon's petition, as well as the counter-petition filed by the Kohelet Forum which maintained that the AGI and his Deputy exceeded their powers in the said provision, were rejected by the Court that determined that, at this stage, it is not right for the court to intervene considering that the Executive Committee was formed by the government to discuss the issue.[171]

The second directive was published on 22.3.2015 by the AGI, and dealt with implementation of political agreements of budgetary significance.[172] The directive prohibits the government from writing in the bill that certain clauses implement political agreements as it used to prior to the AGI directive; it instructs the civil servants to avoid implementing budgetary political agreements that allocate budget funding to particular entities. It instructs the civil servants to refuse to obey the instructions of the chairmen of the committees of the Knesset if the chairmen do not conduct the deliberation according to the new procedure recommended by the legal opinion of the AGI. Finally, the directive instructs the civil servants to refuse to perform a budget transfer lawfully decided upon by the Financial Committee if it is not approved by the legal adviser to the Treasury and the legal adviser to the entity to which the budgeted funds are transferred.

It is quite possible that the concepts outlined in the said legal opinions are appropriate policy recommendations that the Knesset should consider for adoption. The succinct criticism we present here is limited to the question of whether it is appropriate that the position of the AGI, when it opposes the initiation of primary legislation, would be binding on the government and the Knesset.

These directives seek to dictate the actions of government in its legislation capacity, in accordance with the Knesset regulations. Even according to those who support the authority of the AGI to instruct the government, a position we criticize in this policy paper, this authority stems from the government's duty to act according to law and the AGI being the authorized interpreter of the law. When it wishes to initiate legislation, the government does not wear its hat of the executor of the law, but rather its initiator, in other words, it wears the hat of an actor in the legislative branch in accordance with the Knesset regulations.

Moreover, in the second directive about the implementation of political agreements of budgetary significance, one can identify direct intervention with the powers of the Knesset in its legislative capacity, and not some abstract interference with the powers of the government . The directive to the administration officials to refrain from their obligation to provide aid during the Knesset Committees' meetings and to avoid implementing budget transfers decided upon by the Financial Committee of the Knesset but under the conditions of the AGI, not only restrains the power of the government to initiate laws but also the power of the Knesset committees, to which AGI is not even authorized to advise.

Alongside the significant increase of powers assumed by the AGI in the field of advice, a reverse trend can be identified in the field of representation, this time at the court's initiative. In response to a petition against the policy of enforcing the law prohibiting Kashrut fraud, implemented by the Chief Rabbinate of Israel,[173] the Chief Rabbis sought to present a certain position; however the AGI refused and instead insisted on presenting on their behalf a contradicting position that partially supported the position of the petitioners. During the hearing at the HCJ the justices told the legal representative of the State who presented the position of the AGI as the position of the rabbis, that they had learned from the media that the position of the Rabbinate was different from the one the State presented on their behalf.[174] The State representative argued that the position of the AGI is binding on Chief Rabbinate. However, the justices stopped the hearing and ordered a new hearing where the legal adviser to the Rabbinate would present before them the actual position of the Chief Rabbis, while the attorney who sat as the representative of the "State" would also present the position of the AGI.[175] It was the first decision of the court in a direction toward limiting the control that the AGI exerts over the positions of the state authorities he represents; it is still early to declare a change in trend. Time will tell whether there really is a turning point in the exercise of authorities by the AGI and in which direction that trend will follow.

F. Conclusions

1. The government or individual ministers facing legal proceedings should be authorized to determine their own positions, and the role of the legal adviser representing them is to provide a faithful legal representation.
2. The government or individual ministers who believe that they would not be faithfully represented by the AGI should be eligible for private representation.
3. The role of legal adviser is to provide **advice** to the government members, and his position should not bind the elected official.
4. The legal advisers of the ministries should not be subordinate to the AGI. Their role is to provide professional advice to a minister while staying subordinate to that minister, just as do advisers to ministers in any field other than law.
5. Consideration should be given to adoption of an approach according to which the legal opinions of legal advisers would be confidential, and would be intended only for the governmental authority that consulted them.
6. In exceptional cases the government or ministers should be eligible to receive private legal advice according to their discretion.
7. There should be institutional separation between advice and representation, and the pre-petition practice should be abolished.
8. The appointment and dismissal of the AGI should be made upon the political discretion of the government, and the powers of appointment and dismissal of criminal prosecution authorities should be governed by the same procedures.

ENDNOTES

1 A quote by Aharon Barak, as cited in Dina Zilber, ***In the Name of Law*** [in Hebrew], 161 (2012).

2 Yoav Dotan, ***Lawyering for the Rule of the Law: Government Lawyers and the Judicial Power in Israel,*** (2014).

3 Ruth Gavison, "The Attorney General – a Critical Review of the New Trends" [in Hebrew], 5 PLILIM 27, 95-96 (1996).

4 Eitan Levontin, ***Representation of the State in Court*** [in Hebrew, with abstract in English], 231 (PhD dissertation, Hebrew University of Jerusalem, 2009) (hereinafter: Levontin, ***Representation of the State in Court***); Eitan Levontin, "Imaginary Truth and the Truth as It Really Is: Marking the 50th Anniversary of the Agranat Commission Report" [in Hebrew], ***Studies in Law – Honoring Avigdor Levontin,*** 131 (eds. Celia Fassberg, Barak Medina, and Joshua Weisman, 2013) (hereinafter: Levontin, "Imaginary Truth"). See also the co-written article by Eitan Levontin & Ruth Gavison, "On the (non) Bindingness of the Opinions of the Attorney General" [in Hebrew], ***Essays in Honor of Meir Shamgar,*** Vol.1 221, 237 (ed. Aharon Barak 2003).

5 Amnon Rubinstein & Barak Medina, ***The Constitutional Law of the State of Israel*** [in Hebrew], Vol.2 1002 (6th edition, 2005).

6 Because the definiton of "political role" might be amorphous, we defined a role as political when it is clearly so, such as a government minister or a cabinet member.

7 As stated above, this research paper does not deal with the representation of the "State" in criminal proceedings.

8 28 USC. § 510 (1966).

9 28 USC. § 516 (1966); Judiciary Act of 1789, ch. 20, § 35; An Act to Establish the Department of Justice, ch. 150 (1870).

10 28 USC. § 503 (1966).

11 28 USC. § 505 (1966). Beyond the fact that the president has the power to dismiss the SG, some scholars believe that the Congress attempt to limit this authority by legislation would be unconstitutional. See: Joshua I. Schwartz, ***Two Perspectives on the Solicitor General's Independence,*** 21 Loy. L.A. L. Rev. 1119 (1987–1988); Janene M. Marasciullo, ***Removability and the Rule of Law: The Independence of the Solicitor General,*** 57 Geo. Wash. L. Rev. 750 (1988–1989).

12 28 USC. § 505 (1966).

13 28 USC. § 541 (1966).

14 For subordination of SG, see: Nelson Lund, ***Rational Choice at the Office of Legal Counsel,*** 15 Cardozo L. Rev. 437, 490 (1993–1994). For subordination of the US Attorneys see: Article 9 of the Act to Establish the Department of Justice; Gregory C. Sisk, ***Litigation with the Federal Governmen***t 12 (Ali-Aba Comm. on Continuing, 2006).

15 28 USC. § 506 (1966).

16 Office of the Assistant Attorney General, ***Memorandum for Attorneys of the Office, Re: Best Practices for OLC Legal Advice and Written Opinions*** (July 16, 2010), available at http://www.justice.gov/olc/pdf/olc-legal-advice-opinions.pdf (Last reviewed on 12.6.2013) (hereinafter: OLC Memorandum.)

17 The AG is usually a member of the House of Commons but could be a member of the House of Lords. GLS – Government Legal Service, ***Guide to Government Legal Service Departments,*** https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/277712/Department_Guide_updated_July_2013.pdf. (Last reviewed on 12.3.2014).

18 Ibid.

19 Ibid.

20 The Governor General in Canada represents the British Crown, and his role is mainly ceremonial, similarly to the role of the President of Israel.

21 Eugene A. Forsey, ***How Canadians Govern Themselves*** 37 (Department of the Secretary of State of Canada, 2nd. ed. 1988).

22 Department of Justice Act, R.S., c. J-2, s. 4.

23 www.justice.gc.ca/eng/abt-apd/org.html.

24 In accordance to the reply of the German Ministry of Justice dated 28.8.2012 to the inquiry by the Kohelet Forum (hereinafter: reply of the German Ministry of Justice).

25 German Federal Ministry of Justice, ***Tasks and Organisation of the Federal Ministry of Justice*** (2013), http://www.bmj.de/SharedDocs/Downloads/EN/information_brochure.pdf?__blob=publicationFile.

26 Ibid. In addition to the mentioned DGs , there is also a Directorate General responsible for administration.

27 Ibid. German public service is divided into different levels. The Head of Directorate-General is a civil servant at the rank of Ministerialdirektor, which is a high rank, and as such his appointment and dismissal are primarily political.

28 Lund, supra note 14.

29 Marasciullo, supra note 11, p.750.

30 According to the OLC's legal opinion for the year 1977, as cited in Marasciullo, ibid.

31 Rex E. Lee, ***Lawyering for the Government: Politics,*** Polemics & Principle, 47 Ohio St. L.J. 595, 597 (1986).

32 Drew S. Days, III, ***When the President Says "No": A Few Thoughts on Executive Power and the Tradition of Solicitor General Independence,*** 3 J. App. Prac. & Process 509 (2001). The rationale behind non-intervention, as previously mentioned, is the desire to maintain the SG reputation and the acknowledgment of his professionalism and his ambition to promote the president's aims in the best way possible. On this matter see Lee, supra note 31; Richard L. Nacelle, Jr., ***Amicus Curiae or Amicus Praesidentis? Reexamining the Role of the Solicitor General in Filing Amici,*** 89 Judicature 317 (2006).

33 Days, ibid, pp. 516-517.

34 Ibid, p.513.

35 Ibid, p.519.

36 With the exception of specific agencies which enjoy independence versus the president.

37 To prevent possible confusion, we would like to clarify that there is no connection between the TSol and the Ministry of Finance (HM Treasury).

38 See TSol website – http://www.tsol.gov.uk/PanelCounsel/appointments_to_panel.htm (Last viewed on 12.6.2013).

39 Ibid.

40 Kent Roach, ***Not Just the Government's Lawyer: The Attorney General as Defender of the Rule of Law,*** 31 Queen's L.J. 598, 606–607 (2005–2006).

41 See Canada's Department of Justice Website – http://www.justice.gc.ca/min-la/aboutus-aproposdenous-eng.asp#sec4t.

42 The reply of the German Ministry of Justice, supra note 24.

43 German Federal Ministry of Justice, supra note 25.

44 See the OLC website – http://www.justice.gov/olc/index.html (Last viewed on 12.6.2013).

45 Ibid.

46 Exec. Order No. 12, 146, 3 C.F.R. 409, 411, §§ 1-401 & 1-402 (1979).

47 Randolph D. Moss, ***Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel,*** 52 Admin. L. Rev. 1303, 1308 (2000).48 Lund, supra note 14, p.449.

49 Ibid, footnote 23.

50 Griffin B. Bell & Ronald Ostrow, ***Taking Care of the Law*** 27 (1982). It is important to note that in the remaining part of the letter Bell writes that he does not know if he is able to defend the government's position before the Supreme Court, and that he should explore the question of whether an ethical argument can be found to support it. Ultimately it was his replacement who defended the state's position, but note that Bell shows the willingness to examine the matter, even though his personal opinion is known, i.e., he acknowledges the fundamental duty to represent not his position, but the position of the state.

51 Supra note 46 and the text preceding it.

52 OLC Memorandum, supra note 16, pp. 3-4.

53 An interesting question that arises in this regard is why would government agencies appeal to the OLC in the first place. It can be argued that the agencies seek OLC advice due to its prestige, quality, and liability. However, Lund doubts that, and suggests another interest as a possible reason. He argues that the agencies contact OLC when they are unsure about the legality of their activities and would like to receive external support to minimize political damage. See Lund, supra note 14, pp. 493-494.

54 5 USC. § 3106; Lund, supra note 14, p. 488; Levontin, ***Representation of the State in Court,*** supra note 4.

55 Lund, supra note 14, p.489. Lund notes that there is no mechanism than can examine whether the ministries indeed act according to the legal opinion.

56 Moss, supra note 47, p.1318.

57 Moss, supra note 47, p. 1319. This interim opinion is unclear, and is similar in its vague language to the Agranat Commission (that will be discussed in C.3).

58 OLC Memorandum, supra note 16, p.3.

59 Ibid.

60 See B.4. below.

61 OLC Memorandum, supra note 16, p.6.

62 Ibid, p.3.

63 OLC website, supra note 44.

64 Nati Perlman, "The Status and the Role of Legal Advisers in Government – Comparative Review" [in Hebrew] (Knesset Research and Information Center, 12.7.2011) http://www.knesset.gov.il/mmm/data/pdf/m02906.pdf.

65 Cabinet Office, ***Ministerial Code*** (May 2010), available at https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/61402/ministerial-code-may-2010.pdf. Interestingly, the 2007 Code had more extensive details of the cases in which legal advice was mandatory, but even then it was stated that this was not an exhaustive list.

66 Guide to Government Legal Service Departments, supra note 17, p.5.

67 According to the UK Government Legal Service response to the Kohelet Forum's inquiry from 28.6.2012.

68 See supra note 65.

69 Lord Palmerston's Statement to the House of Lords on 17th February 1865, as cited in John Llewelyn Jones Edwards, ***The Law Officers of the Crown*** 257 (1964).

70 See at length at K.A. Kyriakides, ***The Advisory Functions of the Attorney-General,*** 1(1) Hertfordshire L.J. 73–94 (2003).

71 It should be noted that research conducted by the Knesset Research and Information Center has found that while there is no statutory provision stating that the AGI opinion is binding on the government, in practice the government considers it as such. See Lior Ben David, "The Attorney General – Advice, Representation and General Prosecution Authorities – a Comparative Review", 8 (The Knesset Research and information Center, 14.2.2007) https://www.knesset.gov.il/mmm/data/pdf/m01701.pdf. As mentioned, we believe that given confidentiality, it cannot be stated that such obligation exists in cases when elected officials refuse to accept the advisers' opinions.

72 Elwyn Jones, ***The Office of Attorney-General,*** 27 Camb. L.J. 43 (1969).

73 See Canada's Department of Justice – http://www.justice.gc.ca/eng/abt-apd/index.html (Last reviewed on 12.6.2013).

74 Mark J. Freiman, ***Convergence of Law and Policy and the Role of the Attorney General,*** 16(2) S.C.L.R. 335 (2002).

75 Roach, supra note 40, p.634.

76 According to John LL.J. Edwards, ibid.

77 Ibid.

78 Ian G. Scott, ***The Role of the Attorney General and the Charter of Rights,*** 29 Crim. L.Q. 187, 194 (1986–1987).

79 Roach, supra note 40, p.632.

80 Canada's Department of Justice website – http://www.justice.gc.ca/eng/contact/Comm4.html (Last reviewed on 26.2.2013).

81 The German Ministry of Justice website – https://www.bundesjustizamt.de/EN/BfJ/Organisation/Organisation_node.html;jsessionid=5026AD3079A032CFDA8419598B029BB3.1_cid386 (Last reviewed on 12.6.2013).

82 The response of the German Ministry of Justice, supra note 24. The Ministry's reply stated that it is possible to seek an external legal advice "whenever there is need in high-level special expertise," but it seems that the purpose of this restriction is to prevent the development of the practice of turning to external lawyers that might be expensive. In any event, this is not the purpose of the exception and it does not seem that there is any entity which must approve the referral.

83 Response of the German Ministry of Justice, supra note 24.

84 Ibid.

85 28 C.F.R. § 0.25(a) (2010); Douglas W. Kmiec, ***OLC's Opinion Writing Function: The Legal Adhesive for a Unitary Executive,*** 15 Cardozo L. Rev. 337 (1993–1994).

86 OLC Memorandum, supra note 16, p.3.

87 Carl Brent Swisher, ***Selected Papers of Homer Cummings, Attorney General of the United States 1933–1939***, 276 (1939). In this context, the following is Cumming's quote indicating the proper relationship, according to his understanding, between the AG and the Congress and the president (ibid):

> "The situation is fundamentally different when the Attorney General is asked to pronounce upon the constitutionality of a statute after it has been passed by the Congress and approved by the President. Both then have evidenced their determination that the measure is constitutional. What before remained in the sphere of debate has now been elevated to the domain of law. Should the Attorney General now vouchsafe his opinion holding the legislation unconstitutional, he would set himself up as a judge of the acts of the Congress and of the President."

88 Although the content of the counsel is confidential, there is always the concern that whoever was present at the hearing or was exposed to the document might leak it.

89 John O. McGinnis, ***Models of the Opinion of the Attorney General: A Normative, Descriptive, and Historical Prolegomenon,*** 15 Cardozo L. Rev. 375, 427 (1993–1994).

90 See supra note 37-39, and supra note 64 and the following notes.

91 The reply of the German Ministry of Justice, supra note 24.

92 Civil Service (Appointments) Law 1959, Article 5.

93 Public commission formed to examine the methods of appointment of the AGI and matters relating to his service in the position. ***Annual Report,*** 38 (1998) hereinafter: ***Shamgar report***.)

94 In the Bar-On Affair, there were suspicions that the appointment of Adv. Roni Bar-On as the AGI in 1997 was part of an agreement between Prime Minister Binyamin Netanyahu and MK Aryeh Deri, whereby the Shas political party, headed by Deri, would remove its objection to the Hebron Agreement in exchange for the appointment of Bar-On, apparently in hope that the former would offer Deri a lenient plea bargain during the criminal proceeding that was conducted against him.

95 ***Shamgar report,*** supra note 93, pp. 64-73. It should be remembered that the method of appointment that was established deals with the AGI who also serves in the capacity of Prosecutor General. Therefore, one should examine the method of appointment in light of this perspective.

96 Decision #2274 of the 28th Government of Israel (20.8.2000).

97 According to the recommendations of the Shamgar Commission, a consensus of at least four members of the committee is needed in order to decide that the candidate is qualified and suitable. It should be noted that during the appointment process of the incumbent AGI Yehuda Weinstein, the selection committee failed to reach such a consensus. Therefore, the committee submitted to the Minister of Justice the names of the candidates who won a majority of three members, and the government chose Weinstein pursuant to its authority to deviate from the appointment procedure, as was determined by a government decision that adopted the ***Shamgar report***.

98 The original government decision did not require the confirmation by the Minister of Justice of the Chief Justice's appointee. This requirement was added by a government decision adopted in 2007, along with providing the Minister of Justice the authority to request from the selection committee a recommendation of two or three candidates of its choice. Decision #1773 of the 31st Government of Israel (10.6.2007) http://www.pmo.gov.il/Secretary/GovDecisions/2007/Pages/des1773.aspx

99 "The Legal Advisers to the Government Ministries" [In Hebrew], ***The Attorney General of Israel Directives*** 9.1000, 2(5762-2002) http://www.justice.gov.il/NR/rdonlyres/CBDA681E-6FE7-4311-BDAA-E4DCD262F94B/17207/91000.pdf (hereinafter: The AGI directives 9.1000).

Also see ***The Inter-Ministerial Staff Report on Examining Issues Relating to Legal Counsel to the Government Ministries*** [In Hebrew] (2008) (hereinafter: ***Abramovich report)***. This report was adopted by the government in decision # 4528 of the 32nd Government of Israel (1.3.2009).

100 For example, see ***Shamgar report***, supra note 93, p.12; Guy Lurie, "Performance Measures for Israel's Attorney General", Policy Paper 108, The Israel Democracy Institute, 135 (2015); Yechiel Gutman, ***The Attorney-General versus the Government,*** 25-26 (1981).

101 Article 10 of the Civil Procedure Amendment (State as a Litigant), 5718-1958; HCJ 151/82 ***Bar Ilan et al v. Manager of Land Betterment Tax, Netanya*** IsrSc 36 (4) 654 (decision).

102 Michael Shashar, ***Haim Cohen, a Supreme Judge: Conversations with Michael Shashar*** [In Hebrew], 220 (1989).

103 HCJ 14/86 Laor v. ***Film & Play Review Board,*** IsrSC 41 (1) 421 (1987).

104 Perhaps this change in the approach of the Supreme Court was effected by the appointment to the Supreme Court of former AGIs who championed this viewpoint. These include justices Meir Shamgar, Itzhak Zamir, and Aharon Barak.

105 HCJ 4267/93 ***Amitai – Citizens for Good Government and Integrity v. The Prime Minister of Israel,*** IsrSC 47 (5) 441 (1993).

106 Ibid, p. 475 (bold added by the author).

107 HCJ 3094/93 ***Movement for Quality Government v. Government of Israel,*** IsrSC 47 (5) 404, 427 (1993) (bold added). In this case, as in other cases brought below, one can see the non-obligated connection that the court makes between counsel and representation.

108 The exact government decision number could not be verified, but this statement appears in the ***Shamgar report,*** supra note 93, and in Levontin and Gavison, supra note 4.

109 "Jurists' Report on the Powers of the Attorney General" [in Hebrew], ***Klinghoffer Book on Public Law,*** 421, ed. Itzhak Zamir, 1993. (hereinafter: the ***Agranat report***). For an in-depth analysis of the distortion of the conclusions of the Agranat Commission, see Levontin's ***Imaginary Truth,*** supra note 4.

110 Ibid. An important question is whether a government minister may deviate from the AGI guidelines. Neither the ***Agranat report*** (ibid), nor the ***Shamgar report*** (supra note 93) offer an unequivocal answer to this question. It is our understanding that an Israeli minister who owes his loyalty to the Knesset, is to be judged on a par with the government according to the democratic rationale.

111 Ibid.

112 In essence, it is a scandal that broke out in 1984 after an incident in which GSS agents executed terrorists who hijacked a passenger bus 300 (en route from Tel Aviv to Ashkelon) without bringing them to trial and without reporting it. For more on this case and the extent of its impact, see Yechiel Gutman, ***A Shake-Up in the GSS – the Attorney General against the Government from the Tobianski affair to the Bus 300 affair*** (1995).

113 Itzhak Zamir, ***The Attorney General and the Struggle for the Legality of the Government,*** TAU LAW REVIEW 11 (411) (1986). The article itself was published in October 1986 but was based on the speech Zamir presented at the TAU Faculty of Law on April 8, 1986. Even though the Agranat Commission does not discuss or even mention the issue of representation, it seems that Zamir made this conclusion in light of his understanding that the government is obliged to accept the stance of the AGI with regard to legal counsel. As mentioned, this inference between counsel and representation is problematic, and is discussed at length below.

114 HCJ 73/85, ***The Kach faction v. the Knesset Chairperson,*** IsrSC 39(3) 141, 152 (1985).

115 ***Amitai*** case, supra note 105.

116 Gavison, supra note 3, 95-96. Also see former AGI Moshe Ben Ze'ev's comments about the constitutional distortion effected by the rulings, as cited in Zilber, supra note 1, 142.

117 HCJ 4247/97 ***Meretz v. Minister of Religion*** 52(5) 421, 277 (1998) (bold added).

118 HCJ 320/96 ***Yael German v. The Municipal Council of Herzliya***, IsrSC 52(2) 222, 239 (1998) (bold added).

119 Cited from the interview with Zamir in Zilber, supra note 1, p. 200.

120 Levontin & Gavison, supra note 4, p.237.

121 "Acquisition of External Legal Services by the Government Agencies," ***Attorney General of Israel Directives*** 9.1001 (5770 -2010) index.justice.gov.il/Units/YoezMespati/HanchayotNew/Seven/91001.pdf.

122 ***Abramovich report,*** supra note 98, p.10.

123 ***Attorney General of Israel Directives***, supra note 121.

124 Israel's Ministry of Justice website – index.justice.gov.il/Units/YoezMespati/HanchayotNew/Pages/Hanchayot.aspx (Last reviewed on 18.2.2014).

125 For example, see Edna Adato and Gideon Allon, "Once Again, AG Blocks Bill Giving Preference to Israelis Who Serve", ***Israel Hayom*** (17.6.2013) http://www.israelhayom.com/site/newsletter_article.php?id=10057.

126 ***Shamgar report***, supra note 93, p.20.

127 ***Amitai*** case, supra note 105. This approach by the court also manifests itself in the ***Shamgar report***, supra note 93, p.46, as well as in the academic writing in Israel (See Rubinshtein & Medina, supra note 5, p. 1002 and comments therein).

128 See note 151 below and the text preceding it.

129 Yoav Dotan, "Pre-Petitions and Constitutional Dilemmas Regarding the Role of the Attorney General's Office in Litigation Before the High Court of Justice" [in Hebrew], 7 ***Mishpat Umimshal*** 159, 160, 173 (2004).

130 Ibid, p.177.

131 Prima facie, there is the exceptional case of cabinet officers in the United States. Nevertheless, it is not similar to the situation in Israel because in the US – unlike in Israel and the other countries surveyed in this paper – the president represents the executive branch and the cabinet members do not.

132 Ostensibly, this is not applicable to the relationship between the AG and the cabinet officers in the US, but as mentioned the executive branch is represented by the president, and not the cabinet officers.

133 In Britain, the government routinely uses private attorneys for representation.

134 Even though the government cannot **impose** confidentiality on the Law Officers, it should be emphasized that the British practice is completely different from the Israeli tradition, and the actual Law Officers' opinions remain confidential.

135 Except of the case when two ministers disagree and the president does not decide on the matter, the opinion of the AG is the decisive one.

136 In Zilber, supra note 1, p.243.

137 For further reading about the right of the government to proper representation in court, and the importance of this right, see Levontin, ***Representation of the State in Court,*** supra note 4, p.102.

138 ***Amitai case***, supra note 105.

139 HCJ 10934/02 ***Gaza Village Kibbutz v. Israel Land Administration*** (published on Nevo on 30.3.2004) (decision). One can learn from this court decision about the development of the events.

140 Ibid.

141 Ibid, paragraph 5.

142 Ibid, paragraph 2.

143 Ibid, paragraph 5.

144 At that time, the Knesset too was represented by the AGI before the court. Following this episode, the law established the role of the legal advisor to the Knesset as a replacement of the historic roles of the AGI in respect to the Knesset.

145 HCJ 7157/95 ***Arad v. Speaker of the Knesset*** IsrSC 50(1) 573 (1996).

146 For more information on the importance of debate in democracy in general and in particular in courts see Levontin, ***Representation of the State in Court,*** supra note 4, p.106.

147 In this regard, also see the remarks of Justice Emeritus Mishal Hashin, "that in every case of a dispute it [the State] should be allowed a separate representation, otherwise the AGI becomes a crucial and indispensable agent and an ultimate authority, whereas the right to a final decision on the legality of governmental action should be reserved to the Supreme Court." Cited in Zilber, supra note 1, p.371.

148 HCJ 509/80 ***Yunas v. Director General of the Prime Minister's Office*** IsrSC 38(3) 589, 592 (1981) (bold added).

149 The principal-agent problem is an analytic tool used in political science, economics, corporate law and management. It refers to a situation whereby a person or entity ("agent") who represents another person or entity ("principal") will use his authority to promote his own interests at the expense of the principal's interests. For further discussion of the term "principal-agent problem," see, for example, "Triangle of Powers in Society and the Creation of Principal-Agent Problem," ***Sefer Berenzon (In Memoriam: Tzvi Berenzon)*** [in Hebrew] Vol.2 p.443 (2000), Nir Mendel, ***The Appraisal Remedy as a Solution to the Agency Problem*** (PhD Dissertation, Bar-Ilan University, 2006); Kathleen M. Eisenhardt, ***Agency Theory: An Assessment and Review,*** 14 Acad. Mgmt. Rev. 57 (1989).

150 Dotan, supra note 129, p. 191.

151 Yehuda Yifrach & Shay Cohen, "Mike's Place" [in Hebrew], ***Tzedek, legal supplement of the Makor Rishon newspaper***, 12.10.2012 zfonim.files.wordpress.com/2012/10/792.pdf.

152 Rubinstein & Medina, supra note 5, p. 997; "***The Roles of the Attorney General of Israel,***" Attorney General Directives 1.0000, 2 (2002) http://www.justice.gov.il/NR/rdonlyres/2F729150-6A82-49E2-8C22-D3F673E565A8/23608/10001.pdf.

153 Emilie Grunzweig, "IBA Can't Hire Correspondent Without Treasury Approval" ***Haaretz*** 9.2.2012 http://www.haaretz.com/beta/iba-can-t-hire-correspondent-without-treasury-approval-1.411822.

154 See above, second paragraph of this section.

155 The commission of inquiry into the events of military engagement in Lebanon 2006 (The Winograd Commission) ***Final Annual Report,*** Vol.1 487-488 (2008). Regarding the involvement of legal advisers in the military conduct, also see Zilber, supra note 1, p. 154.

156 For detailed and innovative discussion about the combining of legal advice and representation and its faults, see Levontin, ***Representation of the State in Court,*** supra note 4, p.224.

157 Ibid.

158 For further reading, see Levontin & Gavison, supra note 4.

159 ***Agranat report,*** supra note 109, p.448 (paragraph 8).

160 ***Kach faction*** case, supra note 114.

161 Itzhak Zamir, "The Attorney General at a Time of Crisis: The General Security Service (GSS) Affair", ***Sefer Uri Yadin (In Memoriam: Uri Yadin)*** [in Hebrew] Vol. 2, 47, 54-55 (Aharon Barak and Tana Spanic eds., 1990).

162 See Attorney General Directives 9.1000, supra note 99, p. 1.

163 ***Abramovich report,*** supra note 99, p.3.

164 Ibid, p. 5-6; Itzhak Zamir "The Attorney General: Civil Servant, not a Government Official," ***Klinghoffer Book on Public Law*** 451 (Ed. Itzhak Zamir, 1993).

165 Aharon Barak, ***Judicial Discretion*** 489 (1987).

166 Rubinstein & Medina, supra note 5, p.1002. It should be noted that the verdicts mentioned there deal with governmental agencies at a lower level. One is an appeal committee, and the second one is the Labor Court. This separation between different levels of authorities is, as mentioned, in line with the Agranat Commission conclusions.

167 Ze'ev Segal, ***Standing before the Supreme Court Sitting as a High Court of Justice,*** 212, 268-270 (second edition, 1993). It is interesting that one of the arguments behind this claim is that currently the right of a party to be heard before the court (***locus standi***) allows many public petitioners to access the court; and therefore the AGI all the more ought to wear the representation of the public hat. In our opinion, the conclusion should be the opposite. Because almost all the preliminary requirements of ***locus standi*** have actually been cancelled, and the court doors have opened before public petitioners, one can assume that "the public interest" is now protected and there is no need for the AGI to serve as public petitioner. Therefore, he can now attend to his duties as the representative of the State.

168 For the complete list, see Appendix 5 to ***Shamgar report***, supra note 93, p.113.

169 The Israeli Attorney General's legal opinion from 26.2.2015
http://index.justice.gov.il/Pubilcations/News/Documents/SettlementsReview.pdf

170 HCJ 3301/15 Zahava Galon v. the Likud faction (published on Nevo on 29.06.2015): the AGI [referring] to the Deputy AGI's (advice) letter dated 12.05.2015, which stated that according to the legal opinion, the division could not be assigned a budget item, and therefore the transfer of 50 million NIS, which does not have a clear and concrete designation and does not follow the required procedure, cannot be agreed.

171 Ibid.

172 AGI Directive 1.1801: Implementation of political agreements with budgetary significance
http://index.justice.gov.il/Pubilcations/Articles/Documents/Politicalagreementswithbudgetarysignificance1903.pdf

173 HCJ 6494/14 Shai Gini v. the Chief Rabbinate of Israel.

174 Yshai Karov, "Rabbi Lau Seeks Private Representation" [in Hebrew], ***Israel National News*** (12.5.2015)
http://www.inn.co.il/News/News.aspx/298266.

175 Supra note 173, decision from 13.5.2015.

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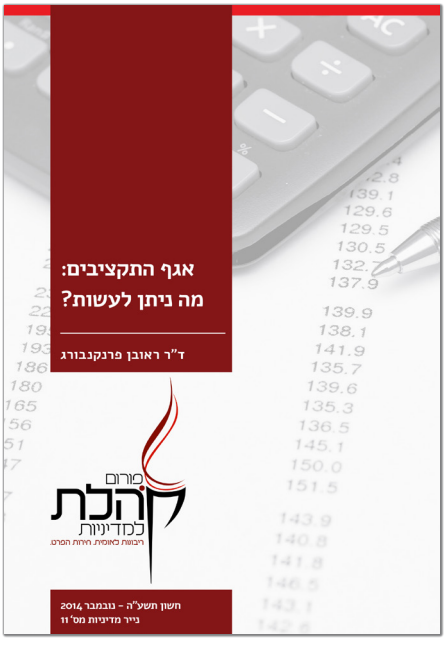

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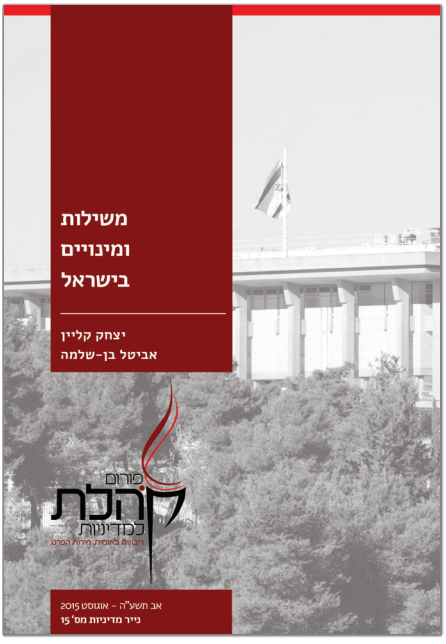

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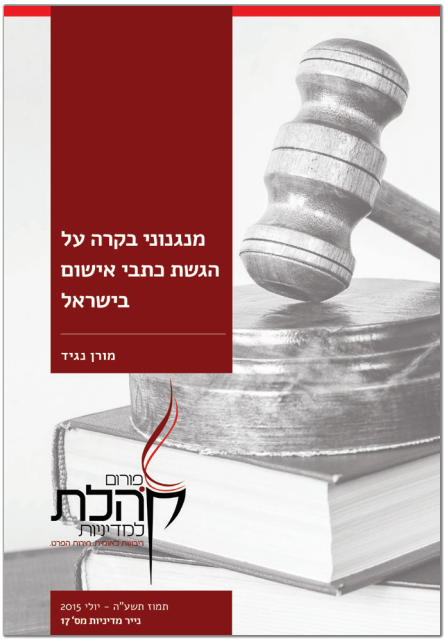

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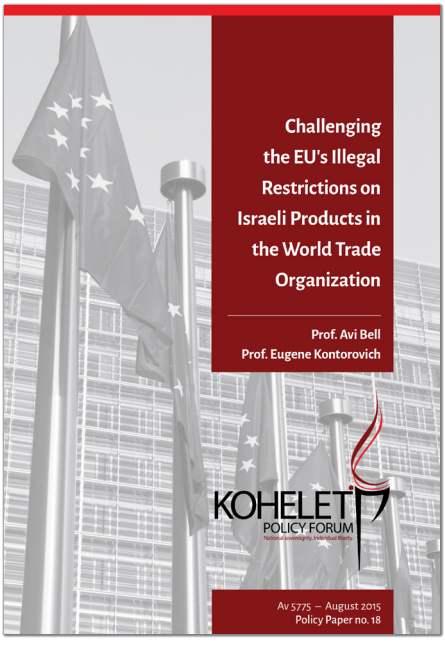

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