H-Net Reviews
in the Humanities & Social Sciences

Pnina Lahav. *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century.* Berkeley: University of California Press, 1997. xvii + 314 pp. $29.95 (cloth), ISBN 978-0-520-20595-6.

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Published on H-Law (November, 1998)

From Chicago to Jerusalem, Interviews and Narratives

A progressive lawyer, born in Louisville, Kentucky and educated at the University of Chicago and its Law School; a pistol-carrying judge in a provincial magistrate court of a tiny Asian British colony; a supreme court justice in a de-colonized third world state who invalidated executive closure of Communist-party anti-American newspapers at the height of the Cold War's McCarthy era; the chairman of an investigative commission who ordered the termination of the career of glorified and decorated generals, the elite of a militaristic and nuclear regional power. These are not four separate people, living radically different lives, but rather four episodes that occurred over 50 years in the life of Simon Agranat. By taking upon herself the task of writing the biography of as multi-faceted a person as Agranat, Professor Pnina Lahav of Boston University Law School embarked upon a most challenging, yet rewarding, project. The outcome of this project is an impressive example in the field of Israeli legal and constitutional history–it is, in my judgment, the best treatment of those subjects written to date. It is a major contribution in the genre of judicial biography as well, as Laura Kalman, herself a master of the genre, notes on the dust jacket of Lahav's book: "this is the best biography I have ever read."[1]

What made Lahav's project even more challenging and rewarding are the three fundamental decisions she made as historian and narrator. First, she has placed Agranat's biography within the wider historical contexts of the histories of Zionism, of Israel, and of Israeli law and constitutionalism. Second, she has connected these subjects to twentieth-century American constitutional theory and jurisprudence. And, third, she embarked on the project during Agranat's lifetime, thus turning her actual interviews with him into an important historical source, and also a fascinating feature of the narrative.

All three choices make a great deal of sense. As one of the first scholars to write a major work in the emerging field of Israeli legal history, Lahav has used the opportunity to shape the field beyond the biography of one individual. Agranat's life and role cannot be grasped without understanding his American intellectual connections; Lahav, who is Israeli-born with a Hebrew University and Yale education, is well versed in both his worlds. Agranat left a limited trail of written records because Israel's Supreme Court, unlike the United States Supreme Court, does not preserve documents other than official opinions. Thus Lahav's extensive interviews with Agranat enabled her to produce a biography of depth and humanity otherwise impossible.

The first, or Chicago, chapter of Lahav's biography focuses on Agranat's family and friends, his daily life, his Progressive ideas, and his Zionist activities. Simon grew up in a Russian-Jewish immigrant family, who struggled, like many other immigrant families, for economic survival, cultural Americanization, and upward social mobility. Yet, unlike most of their neighbors, the Agranat family was torn between prospects of integration into Chicago's professional middle-class Jewish-American community and Simon's father's obsession with the idea of a second, national-Zionist immigration to Palestine. Here Lahav reveals the fundamental intellectual influences that shaped Agranat's adulthood: Eastern European "yiddishkeit" (culture or *Zeitgeist*) and Western European utopian Zionism, mixed with American-Jewish identity; and Progressive political thought and formalist legal thought spiced with small bits of sociological jurisprudence. Lahav ably connects Agranat's first 24 years (1906-1930) to the wider story of post-World War I Zionism. She has elegantly woven into the biography of one young man such matters as: the 1917 Balfour Declaration (by which the British government endorsed the creation of a Jewish homeland in Palestine), the dispute between Chaim Weizmann and Justice Louis D. Brandeis (then leaders of the World Zionist Organization and its American branch respectively) over the future course of the Zionist movement,

the founding of the Hebrew University in Jerusalem, the waves of immigration to British Palestine and the early years of Tel Aviv (the first modern Hebrew city).

Under the influence of a domineering father, Agranat's immigration to what was then Palestine became inevitable, and after an aborted stay in Tel Aviv in 1922, Agranat emigrated permanently in 1930, settling in Haifa. Armed with a hidden revolver and a brand-new Illinois Bar license, Simon passed through the gates of the newly-constructed Haifa port and into the second scene (chapter 2) of Lahav's story. Here Lahav recounts more than the story of Agranat's eighteen years under British rule as a law clerk, a practicing lawyer, and a magistrate (Justice of the Peace): she takes us on a tour of Palestine under the British Mandate government. The subjects she deftly integrates into her discussion include: the ruler-native relationship in general and in the colonial legal system of Palestine in particular; the worsening Arab-Jewish conflict; and the tension between labor Zionism and right-wing Zionism (in respect to the use of force against the British rulers, compromise with the Arabs over the future borders of the state, and the organization of the Jewish society and economy).

In this period, Agranat found the practice of law to be unfulfilling and politics too dominated by power and self-interest, and decided to change his personal career and make his contribution to Zionism through the judicial channel. Here, Lahav ably elucidates Agranat's personal and professional ambitions and the frustrations that were no longer evident after his appointment to the highest judicial post.

Agranat failed to impress seasoned political leaders. He struggled through his clerkship, realizing that the University of Chicago had not really prepared him for practicing law as a native in a corruption-laden colonial legal system. Agranat declined the offer of the lawyer for whom he clerked to become a junior partner in his Jerusalem law office, preferring to work as a sole practitioner in Haifa. But the young attorney soon realized that practicing law was not his destiny and wanted to join the judiciary.

This decision posed two dilemmas for him, which Lahav skillfully lays out. First, rather than using a note of recommendation to the High Commissioner and given him by Norman Bentwich (his wife's uncle and Palestine's first Attorney General), Agranat determined to try to make his own, longer way into the colonial judiciary by virtue of his knowledge of the English language and manners, his presumed tennis talents, and his legal abilities. Agranat's nomination confronted him with a second dilemma: should he obey the Mandate government's requirement that he give up his American citizenship to accept judicial office? Renouncing American citizenship and national identity was a step that he was reluctant to take. Nonetheless, after consulting the American consul and his father, Agranat did acquire Palestinian citizenship. Though to us this decision might seem a natural and inevitable step from support for a Zionist home to allegiance to an independent Jewish state, Lahav shows that this quandary was Agranat's "worst personal crisis to date" (p. 65). In her discussion, Lahav demonstrates the doubts of many ardent Zionists as to their project's future success, as well as Agranat's strong ties to the American nation and culture. This subject also illustrates the value of Lahav's numerous interviews with Agranat, without which this story and many like it would not have been preserved.

As Agranat took his seat on the bench of His Majesty's Colonial Judiciary, his world was as remote as one can imagine from the world of his childhood friend, Arthur Goldberg (who in the 1960s became, first, Secretary of Labor and then an Associate Justice of the United States Supreme Court). Agranat served as a magistrate during the last eight turbulent years of the British mandate (1940-1948). He tried not to cross the line of collaboration with the Mandate regime's anti-Zionist activities, though he faced such disturbing challenges as sentencing illegal Jewish immigrants or being taken by an armored military vehicle from home to the trial of violators of a general curfew; Agranat justified his actions by citing the need to uphold British law, which was positively binding though it might well be unjust.

When, in May 1948, David Ben Gurion announced the State of Israel's Declaration of Independence, both Haifa, Agranat's hometown, and the courts of law throughout Palestine were already irreversibly altered. Only 3,000 of Haifa's 70,000 Arabs remained in the city; the flight of the Haifa Arabs helped to create what would become the Palestinian refugee problem, which still bedevils Palestinians and Israelis, Arab leaders and American presidents, and historians old and new. Moreover, as the Arab and British judges left, locking the courthouse gates, the legal system came to a halt. Agranat recognized that he would have to play a central role in reviving it.

Agranat had already acquired a reputation as a learned and thorough judge who relied on a wide range of British and American sources and wrote lengthy, scholarly decisions; thus, he was a natural candidate for the new all-Jewish Israeli Supreme Court. His long

friendship with newly-appointed Attorney General Jacob Shimshon Shapiro was no hindrance. And yet, as Lahav documents, Agranat discovered to his dismay that, because of a political compromise with coalition parties, his name was dropped in the last moment by the Minister of Justice from the list of Supreme Court nominees. He was named instead chief judge of the Haifa District Court. Only after six more months, was Agranat (then 43) promoted and named the sixth justice of Israel's Supreme Court. As Lahav shows, the conflict surrounding Agranat's promotion to the Supreme Court illustrates both the extent of political intervention in the young Israeli judiciary and Agranat's repeated personal frustration in dealings with politicians.

At this stage Lahav's story changes. No longer is she recounting the narrative of a young bystander witnessing the unfolding history of Zionism. She now tells us the story of an influential jurist, who often found himself at key junctures in the formative history of Israeli law and the history of Zionism. Here Lahav makes the crucial decision to focus on a few landmark decisions and crises, rather than attempting to synthesize the whole of Agranat's writing–his hundreds of opinions–into one judicial portrait. This decision enables Lahav to place each selected case or controversy into its rich historical, constitutional, and jurisprudential contexts.

As Lahav shows throughout her analysis of Agranat's service on the Israeli Supreme Court, the Israeli government often called on the Court's members to perform extrajudicial tasks. For example, in 1950 Agranat served on the commission named to investigate the 1948 assassination of the United Nations mediator for Palestine, Count Folke Bernadotte. At the same time, Prime Minister Ben Gurion attempted, by invoking harsh emergency powers, to crush right-wing factions suspected of involvement in Bernadotte's murder. Lahav sets forth the conflicting pressures on Israel's legal system that the Bernadotte case and investigation brought to bear:

The Bernadotte affair captured the impossible dilemma faced by the legal profession in matters of national security: on one hand, judges and lawyers wished to restrain the executive branch, maintain the rule of law, and expose manifestations of illegality. On the other hand, they were constantly aware of the government's fragility, the dangers from without and within. There was always a sense that the state was holding on by the skin of its teeth; that the world was arrayed against 'us,' applying a magnifying glass to Israel's slips and errors; that citizens had a duty to protect the government against the chorus of ill-wishers. This dilemma, the tension between utopian and catastrophe Zionism, would accompany Agranat for decades to come (p. 89).

At the same time, the Israeli government, its legal system, and Justice Agranat had to deal with threats to the survival of the government and the rule of law on another front: that of the Palestinian Arabs. In 1950, Agranat wrote for the Court in granting the petition for a writ of habeas corpus filed by a Palestinian Arab, a former officer of the Mandate police force, who had been detained without trial on suspicion of having made and tolerated attacks on Jews (pp. 93-95). In this and related cases, Lahav notes, Agranat struggled with the task of devising a constitutional grounding for protecting rights under law in a nation that had no written constitution–and has no written constitution to this day.

Israel and its legal system also faced a series of unprecedented dilemmas arising from the Holocaust, in the 1950s a matter of current events rather than history. The first was the controversial Kasztner affair of 1953 (chapter 7), in which a Hungarian-Jewish leader, then serving as spokesman for Israel's Ministry of Trade and Industry, sued for libel after having been accused of collaborating with the Nazis. The second was the even more notorious case of Adolph Eichmann (chapter 8), the Nazi official who had been in charge of administering the genocide both in Hungary and elsewhere, and was forcibly abducted from Argentina to stand trial in Jerusalem. Lahav's extended and nuanced coverage, which enables her to bring the horrors of the Holocaust to the forefront, is pathbreaking. By contrast, standard narratives of Zionism and of Israel relegate the non-heroic history of Jews in the diaspora to a relatively minor role and refer to the Holocaust mainly as a legitimization of the establishment of the State of Israel at the expense of the Arab-Palestinian population. Lahav also touches on some of the most sensitive issues in Jewish history – the relationships among victims, victimizers, collaborators, and bystanders. Agranat was the only American Jew on the Court; his life experience was profoundly different from that of his colleagues, who had far longer and more directly painful experiences of anti-Semitism. Unlike them, he had no direct knowledge of the entire Eastern-European Jewish way of life that had perished at the Nazis' hands. For Agranat, the insoluble tensions between utopian Zionism and catastrophe Zionism, and between Jewish demands for retribution and the universal norms of criminal justice, became most evident during these two trials. With remarkable sensitivity, Lahav shows that Agranat's decision to vote for imposing the death sentence on Eichmann–a seemingly foregone conclusion for his colleagues–marked his reluctant abandon-

ment of his life-long liberal and humanist opposition to the death penalty. Coming to terms with this decision had profound ramifications that dominated the rest of Agranat's judicial career.

Lahav's discussions of two other cases–*Kol ha-Am* (1953), dealing with freedom of expression with respect to closing the Communist Party press (chapter 4), and *Yeredor* (1965), dealing with issues of political representation in the banning of an Arab party whose platform allegedly aimed at the destruction of Israel as a Jewish state (chapter 11)–provide intriguing examples of how she connects Agranat's opinions to his American roots and to the larger picture of Israeli legal history. Lahav reads *Kol ha-Am* in conjunction with Agranat's progressive Chicago education, and his reconnection with that tradition during his trip to America (visiting old friends, eminent jurists, and the United States Supreme Court) in the spring of 1953, shortly before the Court handed down its decision in *Kol ha-Am*. Noting and analyzing Agranat's extensive references to American First Amendment doctrine and his many quotations from such leading American jurisprudential figures as Justices Oliver Wendell Holmes, Jr., and Louis Brandeis and Professor Zechariah Chafee, Jr., Lahav shows how Agranat's American roots resurfaced, even became stronger, at this critical junction in his judicial life, with implications for the subsequent course of Israeli legal history. She concludes: "Agranat transplanted the American doctrinal protection of expression into Israeli law, thereby providing the Israelis with the legal framework for protecting their right to freedom of speech against the government. Second, Agranat celebrated American political and legal culture....Third, the jurisprudence utilized by Agranat in *Kol ha-Am* was distinctively American, rooted in an upswing in Progressive thinking and politics. *Kol ha-Am* rejected legal formalism and rigid positivism and recognized law as a social system and the judicial process as an enterprise engaged in balancing political interests. In short, Agranat's opinion in *Kol ha-Am* vindicated sociological jurisprudence" (p. 108). This was not the Agranat who graduated from Chicago on the eve of the 1929 crash, unable fully to appreciate the split between legal formalism and sociological jurisprudence and unaffected by legal realism and New Deal constitutionalism. In *Kol ha-Am*, Agranat showed himself to be a much more widely-read jurist, well aware of legal realism, McCarthyism, and the early civil rights movement, and of the role of policy ends and doctrinal and rhetorical means in Supreme Court adjudication.

In *Yeredor*, American law played a different role. At issue in that case was the Israeli government's power to ban the Arab Socialist Party from participating in elections. Chief Justice Agranat wrote the Court's opinion sustaining the government's ban on the party. Lahav's careful and sensitive analysis of Agranat's opinion traces the new centrality to Agranat's constitutional jurisprudence of the Zionist narrative of Israel's origins, purposes, and right to self-protection. Agranat now used the history of American law to cite instances–including the Civil War and the Cold War–illustrating that a government may well risk violating civil liberties to preserve its own existence.

In addition, Lahav's presentation of *Yeredor* breaks the orthodox periodization of Israeli legal history. The discussion of periodization usually focuses on the 1950s and 1980s. Some Israeli scholars view the 1980s, dominated by Chief Justice Meir Shamgar and Justice (now Chief Justice) Aharon Barak, as the decade in which the Supreme Court made the great leap forward, towards liberalism, judicial activism, and explicit value and policy rhetoric. Others, perhaps inspired by Lahav's earlier published work, view the 1950s as the crucial starting point in which the Court, moving against the stream of collectivism, nationalism, and socialism, laid the foundation for Israel's unwritten progressive-liberal constitution. Common to both these approaches is a neglect of the 1960s and 1970s and a linear, Whiggish view of the Supreme Court's history.

Here, by contrast, Lahav offers a promising revision to the periodization of Israeli constitutional and jurisprudential history. She contrasts *Yeredor* with *Kol ha-Am* and argues that Agranat–and, following his lead, the court as a whole–was more progressive and activist in 1953 than in 1965 and beyond. Having ordered the opening of the Communist party's newspapers in 1953, Agranat affirmed the banning of the Arab nationalist party in 1965. The operative outcome and the set of beliefs that the *Yeredor* decision represents indicate a new trend in favor of nationalism, collectivism, and judicial self-restraint. Lahav attributes the reverse trend mainly to Agranat's changing views. The experience of the Eichmann trial, the political attack on the judiciary, his expanded public responsibility as Chief Justice, and his age and years in Israel, made Agranat more cautious and restrained. The general historical narrative does not hint at such a trend, because in many respects, the Israel of 1965, with a much larger Jewish population, a more industrialized economy, stronger foreign support, and military (possibly also nuclear) might, was more stable and secure than the Israel of 1953. In Lahav's hands, the biographical genre, usually limited in its ability to contribute to historians' general periodization debates, pro-

vides the most interesting insights. The more collectivist and restraint trend of the Court since 1965 is better identified and accounted for from the perspective of Chief Justice Agranat than from any more general and thus less context-sensitive perspective of Israeli history.

The new trend was manifested in Agranat's opinion in *Shalit's Case* in 1968. In that case the question of "Who is a Jew?" was laid open starkly as a legal issue for Israel's Supreme Court. At issue was whether the children of a Jewish father and a non-Jewish mother, who grew up in Israel among Jews and saw themselves as Jews, could be registered in State records as having Jewish nationality (distinct from their religion, which was not Jewish according to halakhic rules – that is, the rules of Jewish law). The secular and liberal majority among the Justices, despite strong political pressure, favored the separation of state and religion, which meant, among other things, that Jewish national identity was to be determined by the individual person, and that religious belonging was a matter between the individual and God. In what he perceived in retrospect to be the most difficult judicial decision of his career, Agranat dissented, joining the traditionalist and religious justices. Lahav devotes a full, fascinating chapter (chapter 12) to this case, discussing its historical and political context, the court's dynamics and leadership crisis, and Agranat's American-Israeli and secular-Orthodox internal tensions. This chapter further strengthen Lahav's thesis that in the mid-1960s Agranat was moving away from progressive liberalism, relying on process jurisprudence and judicial self-restraint as his justification. The public and political backlash to the majority decision in *Shalit*, and the Chief Justice's resurgent leadership, must have influenced some of the liberal justices to join Agranat's position in favor of judicial self-restraint in later cases.

With the *Eichmann* case and the *Yeredor* and *Shalit* decisions, Agranat, who became Chief Justice in 1965, entered a new phase in his public life. As a major public figure, well-known in Israel, the United States, and elsewhere, his impact was no longer limited to his written opinions and their legal readership. He went on to chair a public commission that defined the powers and professional autonomy of the Attorney General, to represent the judiciary in harsh conflicts with the Minister of Justice and the religious parties in the Israeli Knesset, to lead his fellow judges both on the Supreme Court and throughout the nation's court system, and to meet the press and public opinion. As it turned out, he found the last two duties to be most burdensome.

Agranat's discomfort with being the focus of criticism by the press, politicians, and the general public became particularly difficult as he faced his gravest public challenge. In the aftermath of the 1973 Yom Kippur War, he was appointed to chair the Agranat Commission of Inquiry. The Commission inquired into the responsibility of the Cabinet and the military command for failure to anticipate the surprise combined attack by the Syrian and Egyptian armies that drove Israel to its greatest casualties and first territorial loss since the 1948 War of Independence. To the disappointment and the profound disapproval of many Israelis and much of the press, the Agranat Commission recommended only the discharge of the Chief of Staff, the Chief of Intelligence, and other top generals. By contrast, the commission relegated the task of judging the responsibility of Prime Minister Golda Meir and Defense Minister Moshe Dayan to the Knesset (via a no-confidence vote) and the public (via general elections). Neither the Knesset nor the electorate were likely to pass such a judgment due to the political dominance of the ruling Labor party.

Chief Justice Agranat, who had lived in the country through the Mandate period and the struggle for Israeli independence, through wars and Holocaust trials, now was part of the Israeli political elite, no longer an American outsider. According to Lahav, Agranat was now trapped in the founding generation's world of labor collectivism, catastrophe Zionism's worship of national security and militarism, and the jurisprudential tilt towards British constitutionalism and legal formalism. He was, she continues, unable to realize that the 1973 war was a watershed in Israeli society, which increasingly yielded to individualism, a critical view of the nation's political leadership and a more active role of the judiciary in disciplining the executive branch. Criticism of the Commission's report and of Agranat personally overshadowed his last two years as Chief Justice and his retirement. The Commission became a taboo subject for Agranat. Here Lahav as an interviewer and narrator tackles a most complicated and delicate task, performing it with exemplary sensitivity and integrity–presenting his story and her story and the tension between the two. "Every mention of the Agranat Commission," she writes of her interviews with Agranat, "would trigger a change in the atmosphere. Agranat would puff on his pipe for a longer time and would answer questions defensively, generally by reading aloud from the official report and reiterating its statements, a glimmer of suspicion in his eyes. At one point, as I probed, he retorted, switching to English: 'You ate the prejudices of the rest of the crowd"' (p. 224).

Lahav's is undoubtedly the authoritative, even ultimate, biography of Agranat, one that sets very high stan-

dards for future biographies of other Israeli Chief Justices and Justices. It goes beyond the individual to encompass the entire field of Israeli legal history, by raising new questions and providing new answers to them from Agranat's perspective. These questions will remain at the center of the Israeli legal history agenda, some even at the core of the ongoing Israeli historiographical debate. Different answers have already been provided recently to some of these questions, coming from different perspectives and genres with different methodological approaches, and more are still to come in this young and energetic field.

Some might say that Lahav has overemphasized Agranat's role, compared to the roles of his fellow Supreme Court justices–a common criticism of any judicial biography. Others might question the weight of American influence, as compared with British and German influence, on Israeli constitutionalism and jurisprudence. Still others would offer different schemes of periodization. Some would criticize the role that Lahav has assigned to the Kasztner and Eichmann holocaust trials in the Israeli collective memory. Some would say that Lahav has overstressed the Palestinian narrative of the last century on the expense of the Zionist narrative, others that she did not give it sufficient voice. But neither Lahav's questions nor her arguments can be ignored and these will certainly shape the field.

Judgment in Jerusalem is a book for readers of many sorts. It is certainly a must for historians of Israel, whether their focus is legal, political, social, or cultural. It is essential reading for modern Jewish and Middle Eastern historians. It is imperative methodological reading for legal biographers everywhere. It provides many comparative insights and interesting observations for American constitutional and legal historians, to historians of colonialism, and to comparative legal scholars. And, to a degree rare for first-rank scholarship in the fields of constitutional, legal, and jurisprudential history, it is enjoyable and compelling reading.[2]

Notes

[1]. For a more elaborated and differently focused evaluation of Lahav's important contribution to the biographical genre, in the context of recent trends in that genre, see Laura Kalman, "The Power of Biography," 23 *Law and Social Inquiry* 479-530 (1998).

[2]. I thank R. B. Bernstein, Laura Kalman, Pnina Lahav, and Assaf Likhovski for their invaluable assistance and comments on this review.

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Citation: Ron Harris. Review of Lahav, Pnina, *Judgment in Jerusalem: Chief Justice Simon Agranat and the Zionist Century*. H-Law, H-Net Reviews. November, 1998.
URL: http://www.h-net.org/reviews/showrev.php?id=2463

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