



The case of the attorney general

It is time to restore the government's authority to appoint an attorney general of its choosing

THE APPOINTMENT of a new attorney general has again highlighted the shortcomings of the selection process for one of the most powerful positions in the Israeli system. It has also raised questions about the AG's powers.

The office of attorney general in Israel is unique with regard to the scope of the authority invested in an unelected official. The AG heads the state prosecution and is also the government's legal adviser – advice, which during Israel's "judicial revolution" received dramatic and binding significance.

The judicial revolution began in the 1980s and during its course the power of the judiciary grew enormously at the expense of both the executive and the legislature. The Supreme Court ruled that it had the authority to abrogate Knesset legislation, that virtually everything is justiciable, that government decisions can be ruled null and void on the grounds of "unreasonableness" and that every person has the right to petition the High Court of Justice against the governing authorities, even if he or she has no legal standing in the matter at hand.

The upshot is that every government decision is subject to appeal, including every appointment in the civil service, which can be revoked if considered "unreasonable."

A central component of the judicial revolution was a substantial increase in the attorney general's power. In 1993, Supreme Court Justice Aharon Barak ruled that the AG's opinion binds the government. In doing so, he relied on the report of the 1962 Agranat Commission set up to define the AG's powers.

However, the commission's conclusions were the precise opposite of those ascribed to it by Barak. It determined that in his role as chief prosecutor the AG is indeed totally independent; but when it comes to advising the government, the government is free to act according to its discretion, even if contrary to the AG's opinion.

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That had been the norm for many years. But Barak overrode that, introducing a new modus operandi under which the AG's opinion is binding. And since almost everything in Israel is justiciable, the AG has the power to revoke any executive decision or appointment, if, in his opinion, the decision or appointment is "unreasonable." In this way the AG became the government's commanding officer.

Barak also introduced another rule by which the AG has the sole authority to represent the government in court, but that, at the same time, he can take a position contrary to the government's. In other words, the government and the prime minister himself have no right to independent legal representation, and the AG can gag them.

The issue in question at the time was the

Supreme Court ruling in 1993 in favor of a petition that Shas cabinet minister Arye Deri and deputy minister Rafael Pinchasi should be fired because of criminal charges against them. But because the AG backed the petitioners' position, prime minister Yitzhak Rabin, who opposed it, had no right to argue in court against the dismissals. This led to severe criticism of a state of affairs in which the prime minister did not have the right to his day in court and the AG could effectively shut him up. This anomaly, however, is still in force.

The appointment of the AG is within the government's purview, but this was modified in 1997 after the so-called "Bar-On-Hebron" affair, during Benjamin Netanyahu's first term as prime minister. The government's appointment of lawyer Roni Bar-On, a Likud activist, as attorney general caused a scandal. Bar-On resigned and shortly thereafter a criminal investigation was launched against Netanyahu, justice minister Tzachi Hanegbi and others on suspicion that Shas wanted an AG amenable to its leader Deri accused of corruption, and that the appointment was a quid pro quo for Shas support for IDF redeployment in Hebron.

All the cases were closed.

While the investigations were still ongoing, the government decided to appoint a commission headed by former chief justice Meir Shamgar to consider the question of the attorney general. The government accepted its recommendation that a search committee recommend a candidate. The committee would be headed by a retired supreme court justice



appointed by the incumbent chief justice; other members would be a former justice minister or attorney general appointed by the government, a member of the Knesset's Constitution, Law and Justice Committee, a member of the Bar Association and an academic. Candidates would have to be approved by at least four of the committee's five members.

During my term as justice minister (2007-2009), to give the government a degree of choice, I instituted an amendment mandating the committee to put forward three candidates for the government to choose from.

TOWARD THE end of attorney general Meni Mazuz's term in 2010, the committee convened under the chairmanship of former Supreme Court Justice Theodor Orr. The process ended in fiasco. Two of the committee members, former Likud justice minister Moshe Nissim and Likud Knesset Member Yariv Levin, proposed the candidacy of lawyer Yehuda Weinstein and judge Noam Solberg, a brilliant jurist and today a member of the Supreme Court, who is also an observant Jew living in a West Bank settlement.

Obviously, both candidacies were reasonable as far as their professional qualifications were concerned and suited to Netanyahu's right-wing government. But they did not satisfy Orr or the academic representative, Prof. Eyal Benvenisti, who proposed other candidates. Attempts to reach a compromise failed, and no candidate received the mandatory four out of five committee votes. Nevertheless, the

government decided to appoint Yehuda Weinstein. And although Weinstein had not received the requisite four votes, a petition to the High Court of Justice against the appointment was rejected.

The search committee was conceived as a professional and objective body. But its failure stemmed from the fact that its members represented contradictory interests and ideologies. For example, as far as the Supreme Court is concerned, the AG should be its representative in the executive branch and prevent any moves that might curb the wide powers it has arrogated to itself; as for the government, it wants an AG who helps it advance its policies and not someone who might launch a campaign of investigations against its members.

Indeed, the search committee's failure proves the naïveté of the Shamgar Commission's working assumption that the appointment of people to high office is merely a question of professional and objective considerations. Indeed, it is naïve to assume that the law is somehow "objective," immune to competing interests and ideologies, especially in Israel, where almost everything is justiciable and attorneys in public service have wide discretionary powers on questions of morality and reasonableness.

The farcical parade continued in the search committee under former chief justice Asher Grunis, which was appointed recently to recommend a successor to Yehuda Weinstein. The committee failed to recommend the mandated three candidates, managing to put forward only one, Avichai Mandelblit, the current cabinet

secretary. He alone got four votes, but not that of chairman Grunis, who thought that there was a need for a cooling-off period between the positions of cabinet secretary, serving the government and working closely with the prime minister, and attorney general, who might be called upon to prosecute any one of its members, including the prime minister.

In these circumstances, in which the committee failed to fulfil its mandate, the government, in my view, would have been free to disregard its recommendation and choose any suitable candidate it saw fit. Nevertheless, there is no problem with the fact that they went ahead and appointed Mandelbit, although he will have to recuse himself from dealing with personal issues relating to the prime minister or other complaints made against him.

As expected, even before the appointment was approved a petition was lodged against it in the High Court of Justice. It was rejected as "premature" but may well be submitted again now that the appointment has been formally approved.

Bottom line: The repeated failure of the search committees dealing with the appointment of an attorney general shows that the time has come to do away with them. It is time to restore the government's authority to appoint an attorney general of its choosing without the Supreme Court and other bodies trying to dictate the outcome. ■

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