How the Government's Attorney Became Its General

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On September 8, 1993, the Supreme Court of Israel issued a ruling which radically altered the constitutional makeup of the state's executive branch, transforming the position of the attorney-general—once a relatively inconsequential post, which to this day still bears the modest official title of "Legal Advisor to the Government"—into one of the most powerful positions in Israeli government. In the wake of this ruling, the government's "Legal Advisor" has the formal authority to veto decisions of the executive, at his sole discretion, without warning and without the possibility of an appeal. All this because, as the Supreme Court has ruled, the attorney-general is not really the government's "advisor" at all. He is, rather, its *judge*.

The court reached this startling conclusion in the following fashion: The attorney-general, in addition to bearing responsibility for the corps of state prosecutors, is also the government's formal legal counsel. As such, it is the attorney-general—and only the attorney-general—who has the authority to represent the government in a court of law in the case of a suit brought against it. But this being the case, what happens when the attorney-general finds himself agreeing with a suit filed against the government? That is, what

happens when the attorney-general is himself of the opinion that a government action is indeed illegal? It was such a case which faced the Supreme Court in September 1993: The court was asked to decide whether Deputy Religious Affairs Minister Rafael Pinhasi had to resign his post after being indicted on charges of tax and party-funding violations. Prime Minister Yitzhak Rabin had refused to fire Pinhasi, prompting Attorney-General Yosef Harish—who sharply disagreed with Rabin's refusal—to declare that he would not be able to defend Rabin's position in court.

In the *Pinhasi* verdict, signed by Supreme Court President Meir Shamgar and four other justices, then-Deputy President Aharon Barak pondered whether Harish was out of line in refusing to represent the government. Barak's conclusion was that really the shoe was on the other foot: The question was not whether Harish could refuse to appear in court, but whether Rabin was permitted by law to ignore Harish's opinion. And to this, Barak offered a stunning response: The attorney-general was not really the government's legal advisor, but its legal arbiter, and the government was bound to his decisions.[1]

Jurists hailed Barak's dictum as an important victory for the rule of law: For the first time, the government had been subordinated by law to the dictates of the attorney-general. Yet in many ways, this ruling merely formalized a breathtaking conceptual revolution effected twenty-five years earlier by none other than Meir Shamgar, when he himself held the post of attorney-general: That the attorney-general was not an advocatory role, but a judicial one; not the facilitator of government action, but its judge.

A quarter of a century later, Shamgar signed his own creation into the law of the land. Now, thanks to the *Pinhasi* verdict, one man—unelected and often appointed by a previous government—has the legal right to thwart government policy, or even dictate policies of his own. His power extends to every facet of the workings of government, including the determination of who may or may not occupy a given ministerial post. How this came to pass, without the slightest hint of legislative sanction, is yet another story of the disfiguring of Israel's young democracy by a well-meaning, hyperactive judiciary.

The legally sanctioned concentration of such great power in the hands of the attorney-general is of recent vintage in Israel, yet its roots go back as far as the founding of the state.

Under the British Mandate, the position of attorney-general followed the model of the United Kingdom: In Britain, the attorney-general enjoyed ministerial status, and was a Member of Parliament, with the public accountability it entailed; in Mandatory Palestine, the attorney-general was a member of the Executive Council, the closest thing to a cabinet in the governance of the land.[2] After independence, Israel's provisional government had apparently intended to retain the model by placing the authority to open and close criminal proceedings—the key power of attorney-generalship—in the hands of the newly created minister of justice. The original plans for the Justice Ministry included no mention of an attorney-general; rather, a civil servant called the "Legal Advisor to the Government" offered non-binding legal opinions to the government when called upon to do so.[3] But Ya'akov Shimshon Shapira, the first occupant of the post (who served from 1948-1950), set his sights on a greater share of authority, and within a few weeks had persuaded a complaisant justice minister that he should be given the power of prosecution as well.[4] While his authority was therefore still limited to criminal affairs, by investing such power in a civil servant with no direct accountability to the public at large, Israel had already departed sharply from the British model.

Yet the new office did not immediately acquire the independence it enjoys today. For many years, the attorney-general's subservience to the government was taken for granted, as was implicit in the post's nebulous legal status: A creation of the government, the position was never formalized in any law, and the attorney-general could be dismissed at the government's pleasure.

Thus it was understood that the government's "legal advisor" would reflect a sympathy for its political interests. Shapira, for instance, was an active figure in Israeli politics; he later became a Member of Knesset, and

eventually a minister in the Labor government. And no eyebrows were raised when his successor, Haim Cohen (who served from 1950-1960), simultaneously held the posts of attorney-general and justice minister for a period of several months. Since the attorney-general was so closely identified with the cabinet's interests, no one saw any conflict between the two roles.[5] Indeed, Cohen's later attempts to make the attorney-general more independent (after coalition needs had deprived him of his position as a minister) elicited considerable public criticism. A case in point was Cohen's decision to prosecute coalition MK Shlomo Lorincz for foreign-currency violations without first informing the relevant ministers. *Ha'aretz* ran an editorial sharply critical of Cohen's actions, and suggested that in order to rein in the attorney-general, Cohen should either be made a minister, with full parliamentary responsibility, or be made fully subservient to the justice minister:

> The Israeli arrangement is nothing but an unhealthy compromise between two viewpoints which are fundamentally opposed.... The practical result of essentially having two justice ministers, one of whom is accountable [to the government] while the other is not, is that the minister who is not accountable can do whatever he pleases, without worrying about parliamentary reactions.... It must be decided who between them will be the real justice minister: The cabinet member who bears this title, or the attorney-general, who is but a functionary.[6]

Cohen's successor, Gideon Hausner (1960-1962), also struggled for greater independence, and with similar results. Hausner, in fact, sparked a government crisis over his demand for total independence, and so great was his influence that he managed to persuade the cabinet to set up an independent commission, headed by Supreme Court Justice Shimon Agranat, to resolve the issue.

The Agranat Commission proved a disappointment for Hausner. While it did rule that the attorney-general was "free and independent" in making

prosecutorial decisions, it added that he had to consult with the justice minister, and if the latter disagreed with his decision, the minister had the right to assume the attorney-general's powers himself—in effect granting the justice minister veto power over the attorney-general's decisions.[7]

The commission also concluded that as far as government actions were concerned, the attorney-general's opinion was in no way binding. While the government should regard his opinion as somehow "reflecting the existing law," it ruled, "the government is entitled to decide how it should act in accordance with its own considerations."[8] And future governments internalized this ruling. In 1966, for instance, when Justice Minister (and former Attorney-General) Ya'akov Shimshon Shapira came under attack in the Knesset for an appointment of which Attorney-General Moshe Ben-Ze'ev (1962-1968) disapproved, Shapira began his response by reminding his colleagues that only the courts had the right to be legal decisors: The attorney-general was merely an advisor.[9]

While the early attorney-generals all endeavored to expand the independence of their position, even the most power-hungry understood that some questions were simply not their business. A case in point was Hausner's exhaustive 1960 report on the Lavon affair, in which a reserve officer was accused of forgery and other serious offenses as part of an alleged attempt to frame former Defense Minister Pinhas Lavon for ordering an Israeli undercover unit in Egypt to sabotage British and American targets in the 1950s. Hausner decided, for a variety of reasons, that criminal proceedings could not be initiated against the officer, and then raised the question of non-criminal sanctions such as dismissal. He concluded that he was not the proper person to decide such questions, since he was not the officer's superior, and that the "appropriate bodies will have to consider whether to retain his services in the regular army."[10]

Ben-Ze'ev showed similar restraint in the continuation of the Lavon affair, when David Ben-Gurion, on the basis of new evidence, challenged the findings of a 1960 ministerial committee which had absolved Lavon of

responsibility. In 1964, Ben-Ze'ev concluded that the committee's decisions were indeed deficient in many respects, but stressed that its decision to terminate the inquiry into the affair was a matter of policy rather than law (since the decision had been made by an elected, not a judicial, body), and he thus had no power to overturn it. "If the government feels a mistake was made, then it must correct the error at its own initiative, and if a citizen was harmed by an act of the cabinet, he has the right to take his case to the courts," he wrote.[11]

That the attorney-general not only was, but ought to be, subordinate to the government was widely accepted. As Ben-Ze'ev told the Knesset shortly after leaving his post as attorney-general: "It is clear that in the end the government has the upper hand, because it has the authority to fire the attorney-general.... In order to reach a desirable state of affairs, it is necessary ... not to create an institution which the government will not be able to influence short of the extreme option of firing."[12]

The nature of the attorney-generalship, however, underwent a dramatic change during the tenure of Ben-Ze'ev's successor, Meir Shamgar (1968-1975). Shamgar came to the job from a stint as the army's judge-advocate general, a position parallel in many respects to his new post but where, in his own words, "they knew that my opinions were legally binding, and that I came to meetings not to be silent but to express my opinion."[13] Shamgar was determined to inculcate the same expectations in his new position—and to a large extent, he succeeded. It is no accident that journalists soon nicknamed him "CEO of the State."[14]

Shamgar found his golden opportunity in a 1968 amendment to Basic Law: The Government. The amendment, meant to formalize an already existing practice, stated that "the minister responsible for implementation of a law may take upon himself any power given by that law to a civil servant, except for powers of a judicial nature." Shortly after the law's passage, Shamgar went abroad on government business, and Justice Minister Shapira prepared to assume the powers of the attorney-general himself, as had always been done in the past in such cases. Shamgar, however, responded

with a novel interpretation of the new law: The attorney-general's powers were "of a judicial nature," he said, and therefore could not be assumed by the minister.[15]

The notion that the head of the prosecution—one of the two opposing sides in every criminal case—is a judicial rather than an adversarial role was a radical departure from the traditional Western perception of the job, and one that had been explicitly rejected by a majority of the MKs in the Knesset subcommittee which discussed the bill.[16] As if to drive home the point, a proposed amendment which would have explicitly excluded the attorney-general from the list of civil servants whose powers could be assumed by the minister was later rejected by the Knesset as a whole.[17]

Yet Shapira inexplicably accepted Shamgar's ruling. By ceding the right to assume Shamgar's powers, Shapira forfeited an important vehicle for ensuring the political accountability of the attorney-general. Yet perhaps more importantly, he enabled Shamgar to effect a crucial paradigm shift: The attorney-general was no longer a political figure, but a judicial one—and therefore no longer a servant of the government, but its keeper.

Shamgar lost no time in applying this new paradigm to accomplish one of the most dramatic innovations of his tenure. Prior to Shamgar, the attorney-general was considered to be "the government's attorney," and was expected to represent it in court whether he agreed with its actions or not—just as an ordinary lawyer is expected to represent his client's interests regardless of his own opinions. But because Shamgar saw the attorney-generalship as a judicial rather than an advocatory role, he believed the attorney-general should be not the government's lawyer, but its legal decisor—and if he disapproved of the government's actions, he thus had a right to deny it legal representation.

In 1970, Shamgar exercised his new power by refusing to represent the government when Helen Zaidman, a Reform convert from the United States, petitioned the High Court of Justice against the Interior Ministry's refusal to register her as a Jew. Shamgar felt that in light of a previous High Court ruling, the government's stance was illegal, and for the first time in

Israel's history, an attorney-general forced his opinion on the government by denying it representation in court.[18] Not only did Shamgar himself refuse to appear, but he said he would not permit any of the attorneys in his department (all of whom were on the government payroll) to do so either.[19]

Shamgar's refusal nearly caused a coalition crisis, which was prevented only by the petitioner's own decision to undergo an Orthodox conversion and drop her petition. But except for the religious parties (who were concerned only with the political and religious implications of Shamgar's decision) there was virtually no criticism of Shamgar's unorthodox move; on the contrary, it enjoyed widespread support. In one commentary on the case, for instance, Ya'akov Rosenthal of *Ha'aretz* wrote that the proper interpretation of the law was "unequivocally in favor of the petitioner, and therefore in favor of the attorney-general's refusal to oppose her petition."[20] Rosenthal was one of the few commentators who not only lauded, but fully grasped the import of Shamgar's move (though in a startling bit of revisionist history, he insisted that Shamgar was merely applying the conclusions of the 1962 Agranat Commission):

> For all the substantive import of the problems raised by the Zaidman case, the entire affair is secondary to the challenge it presented Mr. Shamgar in his rejection of the mission imposed on him. Instead of "Who is a Jew?" we may now ask: "Who, or what, is the attorney-general?"... [He] possesses a thoroughly independent, quasi-judicial role and status, not dependent on any body whatsoever, including the government and the justice minister; and this is not only his right, but his duty. He may adopt the opinion of any other body, but only to the degree that it convinces him. Moreover, not only the justice minister but even the government as a whole do not bear any responsibility, even parliamentary, for the attorney-general's behavior.... In the long run, those who today cry foul will benefit from the positive precedent the Israeli attorney-general has set.[21]

Shamgar's view of himself as the government's judicial supervisor also led him to another fateful conclusion: The attorney-general's office should not merely respond to requests, but should initiate action. Unlike his

predecessors, Shamgar did not wait until a minister asked for a legal opinion before issuing one. Anytime something appeared improper in his eyes, he would issue an opinion without being asked, and then circulate it as a binding norm. By the end of his tenure, he had amassed hundreds of legal opinions in ten thick volumes, which are still referred to by Justice Ministry employees as "Shamgar's Bible."[22]

Ironically, the same man who recast the attorney-generalship as a judicial role was also responsible for involving the office in political affairs to an unprecedented degree. Perhaps because of his self-definition as a sort of judicial overseer, for whom no government action was outside his purview, Shamgar involved himself extensively in the day-to-day affairs of government. He was invited to attend most cabinet sessions—a forum from which the attorney-general had previously been excluded unless specifically needed[23]—and he became involved in a host of issues which were more political than legal. For instance, he negotiated an agreement with the Jordanian electric company to supply power to neighborhoods in east Jerusalem; he headed a government committee on the development of the town of Ma'ale Adumim; and he arranged a settlement between the government and the Jewish Agency regarding the allocation of money from abroad.[24]

Shamgar's greatest departure from tradition in this respect, however, was his heavy involvement in diplomatic affairs—an area from which past attorney-generals had been strictly excluded. Shamgar was an integral part of the team which prepared the cease-fire agreement with Egypt after the Yom Kippur War—something the justice minister, ostensibly Shamgar's superior, learned about only after the fact.[25] When Shapira resigned shortly thereafter, Shamgar ran the ministry for almost five months under the nominal supervision of Prime Minister Golda Meir, who had assumed the justice portfolio. During this time, he was closely involved in the cease-fire negotiations with Egypt and Syria and preparations for the Geneva Conference.[26]

When Shamgar was appointed to the Supreme Court in 1975, he was succeeded by another powerful personality who shared his judicial view of the institution, and Aharon Barak (1975-1978) continued the expansion of

the position where Shamgar had left off. Barak's prosecution of numerous powerful personalities in the Labor party—culminating with the wife of Prime Minister Yitzhak Rabin—raised the prestige of his office to new heights. He did much to cultivate the idea that only a truly independent attorney-general, free of any political concerns, could effectively combat corruption in high office.

Along with building the institution's prestige, however, Barak did much to continue building its power. Shortly after taking office, he was asked by Defense Minister Shimon Peres to rule on the legality of Ariel Sharon's job as a general advisor to Rabin, which included a seat on the Interministerial Security Committee. Barak decided it "was not in accordance with the rules of good government for an advisor to be the chairman or a member of an interministerial committee on security of which the chief of general staff is a member with equal rights." It was also "not in accordance with the rules of good government," he said, for an advisor to act as liaison between the prime minister and the chief of general staff.[27] Thus, from the outset, Barak had established an important principle: He was not merely the arbiter of what was legal, but also the enforcer of whatever he thought constituted "good government."

Barak also trampled on the last vestiges of the 1962 Agranat Commission report: He did not even consult with the relevant ministers before issuing indictments with political implications. When he decided to indict the mayor of Bnei Brak—a member of one of the government's coalition partners—the relevant ministers were informed only after the fact, despite the political tempest the decision triggered.[28] Indeed, this followed naturally from his presumably judicial role: Judges, after all, do not consult with politicians on the decisions they make.

The greatest boost to Barak's power, however, was the electoral upset of 1977, in which the Likud party took power for the first time since the founding of the state. Barak had actually intended to quit immediately after the elections, but changed his mind when the Likud won, feeling it was important to establish the principle that the attorney-general was not a

political figure and did not change along with the ruling party.[29] Since incoming Prime Minister Menahem Begin was eager to have him stay due to his experience, this precedent was established without a fuss—a seemingly minor point with far-reaching implications. Once the attorney-general was established as a non-political figure rather than as a key political appointment, a new government would find it very difficult to replace a sitting attorney-general, no matter how much he obstructed its policy agenda.

The Likud victory proved a boon to Barak for other reasons as well. Because Begin wanted to leave the Justice Ministry vacant for a small party he was wooing as a coalition partner, he assumed this portfolio himself, leaving Barak as the de facto head of the ministry for the first four months of the new government.[30] And since Barak was so experienced in the workings of government, Begin and his cabinet quickly came to rely upon his judgment. During the first week in office, Begin announced that Barak would attend *all* cabinet meetings—something which even Shamgar had not been able to achieve.[31]

Barak quickly took advantage of the situation to pilot his office into uncharted waters: The realm of direct policymaking. When Finance Minister Simha Erlich proposed to raise millions in uncollected taxes by offering an amnesty for tax evaders who were willing to declare their undeclared capital and pay taxes on it, Barak voiced his objection—not because it was illegal, but because he thought it was bad policy. An amnesty, Barak argued, would have a deleterious effect on the law enforcement system, and would essentially reward the criminal for his crime. A bitter argument broke out in the cabinet, and Begin was finally called upon to decide—which he did in Barak's favor.[32] Thus while Barak continued to emphasize the judicial nature of the office, he had taken on many of the features of a government minister.

Barak also dramatically expanded Shamgar's forays into foreign affairs. Even after a justice minister was appointed in October 1977, Begin continued to meet with Barak almost every day,[33] and when peace negotiations with Egypt began a month later, Begin asked Barak to play an active role. Barak held one-on-one meetings with U.S. Secretary of State Cyrus Vance,

President Jimmy Carter and Egyptian Minister of War Mohammed Gamasy, serving as co-chair of the Israeli delegation during talks with the Egyptians in Jerusalem, and suggesting his own changes in Begin's autonomy plan. Barak was so crucial a part of the talks that even after he was promoted to the Supreme Court in 1978, Begin insisted that he abandon the bench temporarily to participate in the final stages of the negotiations.[34]

Barak's involvement in political affairs did raise a few eyebrows. "When the prime minister orders the attorney-general to accompany the defense minister to Cairo not for the sake of giving legal advice ... but to make him a partner in the negotiations, one may ask whether a task of so political a nature would not be more appropriate for the justice minister," wrote one journalist covering the affair.[35] Another editorialist commented that Begin had shown a "growing tendency to make of Mr. Barak state general advisor on just about everything under the sun."[36] But approval was far more common. *Ha'aretz*, for instance, published an editorial entitled "Preserve the Independence of the Attorney-General," which stated that Barak's tenure "demonstrated to the public at large the importance of this office."[37]

Barak therefore left behind an office with enormous power, and his successor, Yitzhak Zamir (1978-1986), accepted the norms that Shamgar and Barak had set. As a policymaker, for example, Zamir was no less aggressive than Barak: When the government forwarded a bill to the Knesset to establish an independent telecommunications authority, Zamir attached a list of his objections—not on legal grounds, but on economic ones. He felt the bill granted the new authority such a broad monopoly that it would stifle the development of the communications industry in Israel.[38] Zamir also objected to the creation of an independent postal authority on economic grounds: There was no need for such an authority, he argued, and it would merely provide a pretext for higher wages on the part of the workers.[39] In addition, Zamir followed his predecessors' policy of using his control of the government legal corps to browbeat the cabinet. In 1983, for instance, the government wanted to offer yeshiva students who did not serve in the army the same child allowances as veterans, but it backed down after the policy

was challenged in the High Court of Justice and Zamir threatened not to defend it.[40]

In one case, Zamir took the attorney-general's political involvement to new heights. After the Kach party was elected to the Knesset in 1984, Zamir launched an intensive speaking and writing campaign against the new Knesset faction and its leader, MK Meir Kahane. "Kahanism, which has become a synonym for racism, is a shameful, loathsome and dangerous phenomenon, which is in sharp contradiction to the values we most cherish," opened one lengthy article he wrote on the subject.[41] It continued:

> A member of the [Knesset] House Committee has compared Kahanism to Nazism, and we would do well to remain conscious of the similarity between these two movements.... The battle against Kahanism, and for humanism, must be waged by various means. We must not only act through legal channels, which seem relatively easy and tempting, since the law alone cannot solve the problem. Moreover, if we concentrate our efforts on one way, we are liable to neglect the others....[42]

Zamir then said he favored a Knesset proposal to restrict the freedom of movement normally granted all MKs in Kahane's case, as long as the decision was "formulated so as to be restricted to the special circumstances surrounding this particular man and this particular issue, without creating a precedent...." He concluded: "In my opinion, the Knesset ought to express its clear objection to Kahane's actions, and actively limit these actions."[43]

Certainly, Zamir was not the only person in Israel to find the views of Meir Kahane "loathsome." Yet for an attorney-general to wield the full power of his office in battle against a duly elected party in the Knesset is a political act *par excellence*, and hardly accords with an "apolitical" office.

Although he made ample use of the power he had inherited, Zamir was not the empire-builder that Shamgar and Barak were. The role of the attorney-general did not grow significantly under his tenure, and in some respects, due perhaps to Zamir's personal modesty, it actually contracted slightly. In 1979, for instance, the High Court ruled that the government had to

evacuate the settlement of Elon Moreh, and issued a deadline by which the evacuation would have to be completed. The government decided on its own authority to extend the deadline by five weeks, and Zamir warned that he would not be able to defend this decision in court.[44] Yet when the court was petitioned against the delay, Zamir declined to take a leaf from Shamgar's book, and decided to represent the government in court.[45]

An even more telling incident occurred after the town of Yamit was evacuated in the Sinai withdrawal of 1982. Zamir wanted to prosecute settlers who had mounted a campaign of resistance to the evacuation, saying the organized resistance constituted "a real danger to the internal structure of society." However, Prime Minister Begin, backed by his government, argued that prosecutions would deepen the already deep rift in the country which the evacuation had created, and he preferred to try to heal the wounds. As Begin himself acknowledged, Zamir was under no obligation to defer to the government's opinion. Nevertheless, Zamir did so, saying that if the government believed "that in this special instance it is justified to forgive and seek reconciliation, to extend a hand of peace, I will accept the government's policy, though this is extremely difficult for me."[46]

Perhaps because of this attitude on Zamir's part, and perhaps also because Zamir never enjoyed the same rapport with Begin that Barak had, the government did not automatically bow to every opinion Zamir issued. For the first time since the 1960s—when the Agranat Commission had granted the government final say in policy decisions—the government actually began on occasion overruling the attorney-general. In 1980, for instance, the government approved construction of a new road to Elon Moreh despite Zamir's opposition.[47]

However, this slight retreat under Zamir made hardly a dent in the overall pattern of the attorney-general's growing authority. Indeed, by the time Zamir resigned in 1986, this power was so evident that it had begun to evoke criticism in some legal and political circles. Hebrew University professor Claude Klein—a former dean of the university's law school and an expert in constitutional law—charged that the attorney-general's power had

grown beyond "logical proportions."[48] Deputy Prime Minister Yitzhak Shamir and other Likud MKs called for placing limits on the attorney-general's authority.[49] Yet there was also strong legal and political support for maintaining the attorney-general's power. David Kretzmer, for instance—also an expert in constitutional law at Hebrew University—claimed the Israeli attorney-generalship was the object of worldwide envy, because "in a country that is largely politicized, the institution of the attorney-general—with its tradition of impartiality—is a source of strength."[50] Law professor and Labor MK David Liba'i charged that any effort to weaken the attorney-generalship "would undermine the rule of law."[51] Thus when Yosef Harish assumed the post in June 1986, he enjoyed powers that far exceeded those of any other attorney-general in the Western world.[52]

Unlike most of his predecessors, Yosef Harish (1986-1993) was widely considered an ineffectual attorney-general. As one journalistic retrospective of his career put it, Harish

> has absorbed harsher criticism during the years of his tenure than any of the attorney-generals who preceded him. He has been called spineless; people have said that he is hesitant and incapable of making decisions.... The media have criticized him harshly. They said he has caused a decline in the status of the attorney-general, and that the post has lost some of the prestige it enjoyed during the tenures of Meir Shamgar, Aharon Barak and Yitzhak Zamir.[53]

Three months before his retirement in November 1993, however, his invertebracy suddenly vanished. As that same retrospective put it, Harish "was suddenly revealed as a different man. In the Der'i and Pinhasi affairs, Harish stood on his hind legs, reared himself up and became aggressive and unyielding in his decisionmaking."[54]

The "Der'i and Pinhasi affairs" began in June 1993, when, after a police investigation which had lasted for years, Harish announced his

intention to indict Interior Minister Aryeh Der'i on charges of bribetaking, fraud, breach of trust and falsifying corporate documents. The Movement for Quality Government in Israel, a watchdog group that had been trying to get Der'i ousted for years because of the investigation against him and had petitioned the High Court against Der'i's continued tenure shortly before the planned indictment was unveiled, now reworded the petition to place the draft indictment at the center of its arguments.

Prime Minister Yitzhak Rabin's view was that the indictment changed nothing. While the law gave him the power to fire Der'i, he said, it did not specify when this power must be used, and he therefore preferred to wait until the indictment was actually filed in court—a day Rabin hoped might not come, since the filing of an indictment would depend on the Knesset's acting to lift Der'i's parliamentary immunity. Rabin argued that even that date went beyond the call of duty, since most elected officials are required to resign only when actually convicted. No extant law said anything about when a minister must resign, Rabin added, and a recently passed law due to take effect after the next elections stipulated that ministers must resign only upon conviction of a crime—so that as far as Rabin was concerned, his decision was consistent with the law, both in letter and in spirit.[55]

Harish, however—whether motivated by genuine repugnance or by anger over Rabin's rumored plans to replace him in November—refused to back the prime minister. Instead, he told the court that he now agreed with the petitioners: "The appropriate norm, according to fundamental principles of justice and government, is that Der'i should not continue to occupy his office," he wrote in a statement to the court.[56]

In August, while the Der'i case was still pending before the High Court, another group, Amitai–Citizens for Good Government, filed a petition demanding the ouster of Deputy Religious Affairs Minister Rafael Pinhasi, also of Shas, against whom Harish had also recently prepared a draft indictment for violations of tax and party-funding laws during Shas' 1988 election campaign. Again, Harish took the petitioners' side, while Rabin adamantly opposed firing Pinhasi. Harish refused to appear in court for the

hearings on either petition, leaving State Attorney Dorit Beinish in the unenviable position of representing both the attorney-general and the prime minister in court, despite their diametrically opposed positions.

To understand fully the predicament Rabin found himself in, one need only recall that in mid-August, his government revealed its secret negotiations with the PLO which would lead to the signing of the Oslo accords on September 13. The government enjoyed only a razor-thin parliamentary edge on by far its most significant policy initiative, and a dismissal of Der'i and Pinhasi would seriously undermine Shas' commitment to the governing coalition and thus undermine the upcoming Knesset vote on Oslo. Small wonder, then, that Rabin clung tenaciously to his own interpretation of the prevailing law.

On September 8, 1993, a five-justice panel upheld Harish's opinion that Rabin had to fire both Der'i and Pinhasi. The court's deputy president Aharon Barak, who wrote the *Pinhasi* verdict, did not stop at merely siding with Harish in this particular case, however. Replying to the charge raised by Pinhasi's lawyers that Beinish's double duty had left Rabin inadequately represented, Barak replied that while Rabin personally may not have been represented, the government had been perfectly represented—because in any case where the attorney-general disagrees with the government or the prime minister, the attorney-general *always* prevails, and his opinion becomes the official position of the government:

> 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 reason behind this approach is inherent in the view that the attorney-general is the authorized interpreter of the law for the executive branch.... This has become part of the accepted law in Israel.[57]

The significance of this *obiter dictum* was largely lost on the public amid the political storm provoked by the verdict and, in particular, by the question

of whether Shas would leave the coalition and imperil Rabin's majority in the upcoming Knesset vote on the Oslo accords. But the legal commentators noticed.

"The High Court of Justice has clarified what should have been clear," wrote Ze'ev Segal of Tel Aviv University Law School in the daily *Yedi'ot Aharonot*. "The attorney-general is the supreme interpreter of the law for the government, and his opinion obligates the government. If the attorney-general believes a governmental authority is acting illegally, he has the right to announce that he will not defend its actions. One may say that it is even his duty to do so."[58] Moshe Reinfeld, legal commentator of *Ha'aretz*, observed that "the High Court has now made it clear that the attorney-general's opinion, and none other, is the prime minister's opinion in the field of law."[59] *Ha'aretz* also ran an editorial praising the court for giving "additional reinforcement to the institution of the attorney-general" by ruling that "his interpretation of the law obligates the government and the prime minister, and only he can represent the prime minister in court."[60]

In many ways, this verdict merely formalized the role attorney-generals had come to play ever since Shamgar's insubordination in 1968. Yet the implications of *Pinhasi* are potentially enormous. For the first time in Israel's history, an unelected official has been given the formal authority to act as the supreme arbiter of government policy. Thus, while the verdict did not create the problem of an overpowerful and politically unresponsive attorney-general, it both expanded and entrenched it.

The *Pinhasi* verdict had the effect of eliminating two important factors that had hitherto checked the attorney-general's powers. First, a government which sincerely believed that what it was doing was legal and proper could choose to ignore the attorney-general's opinion and, if necessary, defend its policy in court. While most governments exercised this option only infrequently, this tactic was still in use as late as the mid-1980s. Thus the attorney-general's power, while great, was far from absolute.

In the wake of *Pinhasi*, however, this is no longer the case. The government no longer has the legal right to contradict the attorney-general's opinion, even in cases where the law is far from clear-cut. In the *Der'i* and *Pinhasi* cases, for instance, Prime Minister Rabin's position was far from legally untenable: The only law on the books which offered criteria for when he was obligated to fire a minister or deputy minister was one that not only had yet to take effect, but which expressly established conviction as the criterion. Thus lawyers could and did disagree on whether Rabin or Harish was legally correct. Yet in the wake of Barak's ruling, the government would no longer even have the right to test its competing theory in court; it would either bow to the attorney-general's opinion, or face the court without legal representation.

The other potential check on the attorney-general's power which Barak's ruling effectively nullified is whatever sense of propriety or modesty might have accompanied an office as respected and exposed as that of the attorney-general. A scenario such as Yitzhak Zamir's 1982 decision not to prosecute the Yamit settlers would probably no longer be possible, because it depended on Zamir's willingness to subordinate his own legal position to other considerations enunciated by the government, such as the need for national reconciliation. Zamir never recanted his own legal opinion; he merely felt that in this case, the government's views counted for more than his own. But once the attorney-general has become the government's official judicial overseer, by what right could he defer to the government's judgment?

In the years since the *Pinhasi* verdict, attorney-generals have already begun making use of their new authority to thwart the will of the electorate and its representatives on matters of policy. In 1994, for instance, the Labor government signed a coalition agreement with Shas, a religious party, which stated that "if the status quo in religious affairs is violated, the two sides promise to correct the violation by means of appropriate legislation."[61] This provision, drafted in response to a series of Supreme Court decisions which had struck down long-standing government policies and municipal bylaws

affecting religious interests, was meant to ensure that any such rulings in the future would result in Knesset legislation to reinstate the overturned policy or bylaw.[62] The agreement, however, was challenged in the High Court, and Harish's successor, Attorney-General Michael Ben-Ya'ir (1993-1997), sided with the petitioners, reporting to the court that the clause in the coalition agreement was "inappropriate, and not to be acted on."[63] The court responded by issuing a show-cause order against the agreement (a necessary precursor to ruling it illegal), based primarily on the fact that Ben-Ya'ir's opinion was binding on the government, and his opinion that the agreement was inappropriate therefore made it presumptively illegal.[64] Prime Minister Rabin, foreseeing the seemingly inevitable final ruling, immediately began frantic renegotiations with Shas.

The court's decision on this case was little short of astounding. Promises to enact certain policies into law are a standard component of all coalition agreements, and are a vital means for the expression of public will in a parliamentary democracy. The petitioners argued that this promise was different because of its blanket nature, and constituted an illegal abdication of the government's duty to weigh all proposed legislation on its own merits. But since coalition agreements are not legally binding, it is hard to see how such an agreement could force the government to forward any legislation it did not consider justified. Indeed, the legal case was so dubious that Ben-Ya'ir himself refused to use the term "illegal"—he merely deemed it "inappropriate." In short, it was a policy ruling rather than a legal one. But that, in the post-*Pinhasi* era, was enough.[65]

On an issue which was pivotal to the success of the coalition, and thus vital to the government's historic policy initiatives, one would have expected the man known as the "Legal Advisor to the Government" to do his best to defend his client in court—particularly when the legal arguments against the agreement were less than compelling. Yet Ben-Ya'ir chose to block the government's efforts, let the chips fall where they may.

In the end, Shas' entry into the coalition was secured with a weaker version of the same agreement, accompanied by oral understandings that

the new wording still meant the same thing. Yet the incident amply demonstrates the breathtaking scope of the attorney-general's power: Without Shas firmly in the coalition, doubt would have been cast over the entire Oslo process. Ben-Ya'ir's ill-founded opinion was enough to undermine the government's crowning policy initiative—and, had Shas been less reliant upon Rabin's unwritten word, might well have derailed it altogether.

Another example of the attorney-general's immense power emerged immediately after the 1996 elections, when Prime Minister Benjamin Netanyahu was setting up his new government. Rafael Eitan, head of the Tzomet faction, was demanding the position of minister of internal security, an expanded police ministry created under the previous government. Ben-Ya'ir, however, opined that because of an impending indictment against him for violation of privacy in the context of an obscure rivalry within his own party, Eitan could not hold this or any other portfolio offering access to databases with sensitive personal information.[66]

Again, the legal basis for Ben-Ya'ir's ruling was questionable. As many legal experts pointed out, Eitan sat in the government's special "security cabinet" and had access to every classified document that crossed the government's desk.[67] Barring him from a particular ministry would do little to restrict his access to sensitive information. Had it not been for the *Pinhasi* verdict, which gave the attorney-general the final say, the government could simply have ignored the recommendation, or Eitan could have challenged it in court. The new legal paradigm, however, choked off any means of appealing or circumventing the attorney-general's opinion, and Eitan had to make do with the Agriculture Ministry.

Months later, when it was too late to reverse the damage, Eitan was fully acquitted. His vindication did more than just prove his innocence: It also demonstrated just how much power had accumulated in the attorney-general's unelected, unaccountable hands. With the alacrity of a seasoned despot, Ben-Ya'ir managed to take his own, wholly unlegislated notions of political propriety, translate them into a legal presumption of guilt without trial, and impose them on the composition of government without

having to convince *anyone* he was right—handing a major setback to the innocent Eitan and the tens of thousands of voters who had found voice in his party.

The *Pinhasi* verdict marked a watershed in the decades-long power struggle between the elected government and the unelected attorney-general: With this ruling, the balance shifted decisively in the attorney-general's favor. As if spurred on by the *Pinhasi* success, the attorney-general has scored in recent years a series of further victories in a relentless campaign to deprive the government of every last check on his powers.

The most important of these checks is the ability to dismiss an attorney-general whom the government considers recalcitrant. Precisely because the status of the attorney-general has never been codified in law, he enjoys no legal protections: He serves for an indefinite term, and can be dismissed at any moment by government decision. In practice, however, dismissing the attorney-general for failing to serve the government's needs is next to impossible, due to the powerful myth of the judicial attorney-general who is "above politics." And in light of a recent High Court ruling, firing the attorney-general might well be illegal.

The crucial precedent in this area was set in 1996, during a battle over the occupancy of another presumably "apolitical" office. Like the attorney-general, the civil service commissioner, a sort of director of personnel for state employees, is a senior and very powerful civil servant who, according to prevailing sentiment, is supposed to be independent and removed from politics. Yet he also oversees the implementation of government policies on administration and manpower, and since Prime Minister Netanyahu was planning a major reorganization of government ministries, he sought a commissioner who agreed with his ideas and would strive to implement them. He therefore dismissed incumbent Yitzhak Gal-Nur—replacing him with Shmuel Hollander, another long-time senior civil servant who had, among other posts, served as Yitzhak Rabin's cabinet secretary.

The Movement for Quality Government petitioned the High Court of Justice against Gal-Nur's dismissal (Gal-Nur himself later joined the petition), arguing that one of the civil service commissioner's main jobs is to prevent political appointments, and that he must therefore be independent and apolitical, and should not be replaced when the government changes. At the initial hearing, the justices made it clear that their sympathies were with the petitioners, and Netanyahu read the writing on the wall. He rescinded the dismissal without waiting for a ruling, telling the court in a written statement that he "expressed his full support for the independent legal status of the civil service commissioner and the status of the Civil Service Commission, and for the importance of preserving this institution as an independent body not influenced by political changes."[68]

Yet the court was not yet sated: It then acceded to the petitioners' extraordinary request that it rule on the petition anyway, even though the dispute had been settled. A month later, the court issued its formal ruling: "The fact that the government has changed does not justify replacements in the civil service, except in the case of those few positions which can be termed 'positions of trust.'"[69] "Positions of trust" are those appointees who, by the nature of the position, must be able to work very closely with the responsible minister and earn his personal trust. The civil service commissioner, according to the court, is not such a position. His effectiveness has nothing to do with his political inclinations, and thus a change of government cannot be grounds for his replacement.

The implications for the attorney-generalship are clear. The attorney-general is also widely perceived as being an independent, non-political official—one who Aharon Barak, the current Supreme Court President, felt even in 1977 should not be replaced just because the government changes.[70] Surely if an incoming government does not have the discretion to replace the civil service commissioner, it cannot replace its attorney-general either. Yet if a government cannot replace an attorney-general at its discretion upon entering office, when can it? The logical conclusion, unspoken yet hovering

like a dark cloud over the entire affair, is that it cannot replace the attorney-general at all.

Even in the unlikely event, however, that the court might refrain from forbidding some future government to dismiss its attorney-general, the public myth of the "independent, apolitical" figure would prove a powerful barrier. The outcry which accompanied a rumored plan by Netanyahu to dismiss Michael Ben-Ya'ir made this amply clear. In the end, Netanyahu chose to keep Ben-Ya'ir on, for fear of the public's reaction.[71] In short, the government's theoretical right to fire the attorney-general at will has been undermined if not cancelled, and still another check on the attorney-general's powers has gone by the wayside.

Furthermore, even the government's right to *choose* the attorney-general—which enables it at least to appoint someone sympathetic to its policies when the position becomes vacant—has now come under attack, thanks to the Bar-On scandal in early 1997. Subsequent to Ben-Ya'ir's resignation in December 1996, his successor, attorney Roni Bar-On, was forced to quit less than a day after his appointment took effect, due to overwhelming criticism of the appointment on professional and political grounds by the journalistic, legal and political communities —including many members of Netanyahu's own governing coalition. Ten days after his resignation, a reporter's allegations that Bar-On had been appointed primarily in order to facilitate a plea bargain for Aryeh Der'i prompted a criminal investigation into the affair. Among others, both Prime Minister Netanyahu and Justice Minister Tzahi Hanegbi were implicated in the scandal. The man who replaced Bar-On, Attorney-General Elyakim Rubinstein, eventually decided that while there was not enough evidence to indict either Netanyahu or Hanegbi, there were indeed grounds for a further indictment of Der'i, a decision which was upheld by the High Court of Justice.

In the aftermath, several of the shaken coalition partners presented Netanyahu with an ultimatum: Either the process of appointing the attorney-general, and other key senior posts, must be reformed, or they would quit the coalition and bring down the government. In June 1997, the

government responded by establishing a committee to vet candidates for the attorney-generalship, to be composed of a retired judge, the civil service commissioner and an unspecified public figure.[72] This committee would have the right to reject any candidate which it considered "improper," defined among other things as having personal or political ties to someone in the government.[73] Thus the government, scalded by a series of humiliations, has sharply limited its own ability to find someone sympathetic to its own program, who would help to push its agenda forward. Any such person would likely have personal or political ties to some member of the government and, depending on how aggressively the new committee pursues its mandate, would therefore be disqualified in advance.

Some members of the government have attempted to push this development even further. Justice Minister Hanegbi, for instance, recently proposed the establishment of a five-man committee to nominate candidates for the attorney-generalship, consisting of the justice minister, a retired Supreme Court justice, a former attorney-general or state attorney, a representative of the Bar Association and a law professor. Under Hanegbi's plan, this committee would accept proposals from interested candidates, weigh them and recommend the candidates it considered most appropriate for the job; the government would then be forced to choose from the short list approved by the committee.[74] Knesset Law Committee Chairman and coalition member Sha'ul Yahalom (now Minister of Transportation) submitted a bill which would institute an even more stringent procedure: Under Yahalom's proposal, the attorney-general would be chosen by an eleven-member committee of which five members would be non-politicians and a sixth a representative of the opposition—leaving the government with a minority representation—and could only be fired with the approval of nine of the committee's members.[75]

Even if these proposals, or others like them, never see the light of legal day, the reality is grim enough. The government is now saddled with a senior official who has the legal authority to veto virtually any government action or policy, against whom it has no means of appeal, and of whom it

can rid itself only with utmost difficulty if at all; and with an outside committee which has the power to veto any candidate who would be too likely to use his power in line with the government's wishes. Put bluntly: The elected government has ceased, at least in theory, to be the country's ultimate executive authority.

What exactly is wrong with having a powerful, quasi-judicial attorney-general acting as government watchdog? Foremost is the challenge to representative government it entails. In Israel, a significant part of the people's ability to determine their own affairs—from the final say in who will hold the country's highest offices to the right to veto the elected government's policy initiatives—has been transferred from the people's elected representatives to an official who is not only unelected, but who undergoes no popular approval process (unlike, for instance, the United States, whose much less powerful attorney-general must nevertheless meet Senate approval). Once chosen, he bears no accountability to the public, and is almost impossible to dismiss.

A further problem arises in the context of his "judicial" capacity. One of the most basic rights enjoyed by every citizen is the right to test his competing understanding of the law in court. Yet the elected government in Israel lacks that luxury: No amount of ambiguity in the law is enough to allow the government to choose the interpretation most in accord with its needs and try to defend it. Instead, the "Legal Advisor to the Government" has become its preemptive judge, before whom it merits no sympathetic legal counsel, and against whom it has no appeal.[76]

One might argue, then, that the attorney-general should simply restrict his rulings to unambiguous legal situations. The reality, however, is that such situations rarely exist: Lawyers, judges and legal scholars can and do disagree on many questions that would appear cut-and-dry. The main purpose of the court system, with its endless array of suits, countersuits, appeals

and rehearings, is to try to resolve these disagreements. But where government actions are concerned, the entire system collapses into the hands of a single man, while the cost of error is potentially far greater: A wrongful judgment risks not only denying justice to a single party, but stymieing the will of an entire nation as expressed through the acts of its elected governors—and democracy itself is brought into question.

The attorney-general's power to dictate to the government would therefore be unconscionable even if he confined himself to legal questions alone. But the anti-democratic nature of the system becomes even clearer when one considers the type of issues on which the attorney-general frequently rules. Questions such as the validity of the Labor-Shas coalition agreement or the propriety of appointing a man under indictment to a ministry are primarily moral and political issues rather than legal ones. This is precisely the type of judgment which the government is elected to make, and which it is the electorate's job to oversee. If the majority of voters felt that Labor's concessions to Shas on religious issues were unthinkable, or that Der'i should not be permitted to retain his ministry, they had all the forms of democratic expression at their disposal, from poster campaigns to the ballot box. Replacing the normal methods of democratic oversight with the oversight of a single, all-powerful unelected official is not entirely different from replacing democracy with autocracy.

The possible abuses of the attorney-general's newfound power are virtually unlimited. Michael Ben-Ya'ir's imposition of his own will on the government, though often substantial, was limited compared to what it might have been. When one considers the range of policies to which earlier attorney-generals have voiced strong objection—from Barak's opposition to an amnesty for tax evaders to Zamir's opposition to elements of Begin's settlement plan—and the degree to which they have succeeded in imposing their views even without the legal authority granted them by the *Pinhasi* verdict, it is clear that the unelected attorney-general could easily become a central figure in the shaping of government policy.

While the atrophy of democratic controls is the most obvious harm done by the attorney-general's excessive role, it is not the only one. Almost equally destructive is its effect on the criminal justice system.

The idea behind an independent, empowered attorney-general was, first and foremost, that it would help keep the justice system clear of politics. Obviously, this is a noble goal: A politicized law enforcement system would severely undermine the public trust in its institutions. But the result was the exact opposite of what was intended: The attorney-general's growing involvement in the daily workings of government, and the expansion of his operations beyond the strictly legal into the moral and political arenas, have inexorably brought about the politicization of his office and a commensurate distrust in the entire legal system.

Yosef Harish's decision to indict Aryeh Der'i provides a salient example of this problem. The Shas party has succeeded in convincing its voters that the long line of indictments against the party leadership (Der'i was neither the first nor the last) stem from ethnic bias rather than genuine legal criteria, since Shas is seen as promoting the interests of Sephardic voters. Harish reinforced that perception when he then ruled that Der'i and Pinhasi had to quit their senior government positions because of the indictments his own office had handed them. Again, this was far more a moral-political decision than a legal one, since nothing in the law books at the time mandated this step. Harish based his ruling on what he called "fundamental principles of justice and government" rather than on any specific law. The only possible result was that the indictments, in the eyes of Shas' voters and anyone unconvinced of their guilt, looked like merely another attempt to further a comprehensive political-ethnic campaign against Shas.

Politicization of the post reached its height, however, in the case of Ya'akov Ne'eman. Prime Minister Netanyahu named Ne'eman his justice minister in June 1996, and a journalist with a long history of grievances against Ne'eman petitioned the High Court against the appointment the same day. The petition accused him of a number of criminal offenses, most of which had already been investigated and found baseless. One charge,

however, troubled the court: The allegation that Ne'eman had attempted to suborn a witness in Der'i's trial. This was based on a 1992 police memorandum of a conversation between a police officer and the witness, who allegedly told the officer that Ne'eman was trying to get him to change his testimony. Both the police and the State Attorney's Office had known of the existence of the memorandum for four years, but had never considered it worth investigating. In response to the petition, however, Attorney-General Michael Ben-Ya'ir said there was "no choice" but to open an inquiry into the allegations. After a full police investigation, State Attorney Edna Arbel (who took over the case because relations between Ben-Ya'ir and Ne'eman had become so acrimonious) found that there was not enough evidence to charge Ne'eman with suborning a witness, but decided instead to charge him with perjury and obstruction of justice for his behavior during the court hearings and police inquiry—charges which a trial court later found baseless—and Ne'eman was forced to resign on the strength of the *Pinhasi* ruling.

The case was rife with mishandling and questionable motives, starting from the fact that an allegation which had been ignored by the legal establishment for four years suddenly became a "must-investigate" when Ne'eman was appointed minister. More telling was Ben-Ya'ir's decision to launch a criminal investigation into a charge he knew he did not have a prayer of making stick: Since both Ne'eman and the witness he allegedly suborned had been denying the truth of the police memorandum since the day after it was allegedly written, there were no witnesses to support the charge—and in fact, this is why Arbel ultimately decided not to prosecute. The fact that Arbel chose instead to file charges of perjury and obstruction of justice was equally telling, given the incredibly slim basis for them: They were based on errors in Ne'eman's original affidavit to the High Court, such as the fact that he gave a certain date as July 22, 1992, rather than July 22, 1991,[77] and similar factual errors in his initial testimony to the police—errors which were discovered by Ne'eman himself, who informed the court and the police, and volunteered the corrections. As the trial court

later wrote: "It would be wrong to set a judicial policy whereby a defendant who wants to fill in additional details risks being accused of [another] crime."[78]

Most shocking of all, however, were statements issued by Ben-Ya'ir's and Arbel's offices, warning that although there was "not enough evidence to indict" Ne'eman on witness-tampering charges, there were still "suspicions against [Ne'eman] that he did in fact suborn the witness Martin Brown."[79] The mindboggling assertion that the role of the nation's top law enforcement officials includes besmirching public officials whom they fail to indict—an assumption that met with virtually no public opposition—speaks volumes not only about the tendentiousness of Ben-Ya'ir and Arbel, but also about a poisonous admixture of the legal and moral responsibilities that the public has come to expect in an attorney-general.

The moral-legal confusion significantly complicates the attorney-general's functioning, because any legal vindication takes on the dimensions, in the public eye at least, of a moral acquittal. If an attorney-general wishes to clear the accused of only his legal charges, without rendering moral judgment, the only way he can do so is by going out of his way to reinforce the moral questions posed by the indictment, the way Ben-Ya'ir and Arbel did. But such statements necessarily undermine faith in the criminal justice system—for what greater declaration of its impotence is there than "we believe he did it, but we can't indict"? Moreover, they offer a golden opportunity for an attorney-general seeking to hurt a political, professional or personal rival. Given the relationship between Ben-Ya'ir and Ne'eman, one can understand charges raised by Ne'eman's supporters that Ben-Ya'ir and Arbel were simply out to get him.

This blurring of moral and legal lines resurfaced in the Bar-On affair. Attorney-General Elyakim Rubinstein, along with State Attorney Arbel, decided there was not enough evidence to prosecute either Prime Minister Netanyahu or Justice Minister Hanegbi.[80] At a press conference announcing the decision, Rubinstein declared that "this report deals with the criminal realm, not the public realm."[81] Yet the report itself totally belied his

words. It contained statements such as "there exists a real suspicion that his [Netanyahu's] motive was an illegal one" and "our conclusion is that there exists a real suspicion that the prime minister asked the cabinet to appoint attorney Bar-On as the attorney-general, either solely or among other reasons, in order to placate MK Der'i, while either aware of or deliberately closing his eyes to the possibility of an illegal conspiracy between Der'i and Bar-On"[82]—despite the fact that there was not enough evidence of this to justify an indictment.

Indeed, the report devoted considerable space to expressing astonishment and suspicion at Netanyahu's behavior, even in places where such astonishment seemed completely out of place: At one point, for instance, Arbel noted that Bar-On was not considered a first-rate lawyer by some of those Netanyahu consulted, and was therefore not a "natural candidate" for the job. The exception to this estimate of Bar-On's abilities was Hanegbi, who had done his apprenticeship under Bar-On and recommended him highly. As justice minister, Hanegbi was responsible for nominating candidates for the attorney-generalship; add the fact that Hanegbi was one of Netanyahu's most loyal supporters in the cabinet, and it is hardly surprising that Netanyahu would respect Hanegbi's opinion enough to grant Bar-On an interview. Yet Arbel and Rubinstein wrote that "these circumstances arouse astonishment at the very fact that an interview was granted."[83]

The picture that emerges from the report is that Netanyahu was quite guilty, but Rubinstein and Arbel decided not to indict him anyway. Yet when their decision not to indict was later challenged in the High Court of Justice, a very different picture emerged: The State Attorney's Office told the court that not only did Arbel and Rubinstein think Netanyahu stood a good chance of being acquitted if indicted; they thought the evidence was so slim that a trial court would throw the case out without even asking Netanyahu to present his defense.[84] In fact, government attorney Shai Nitzan told the court that even if the state could have proven that Netanyahu knew of Der'i's reasons for wanting Bar-On appointed, the appointment would still not have constituted a criminal act on Netanyahu's part unless it could

also be proven that Netanyahu approved the appointment specifically to help Der'i arrange a plea bargain for himself.[85] If the legal case against Netanyahu was indeed so weak, how could Rubinstein and Arbel justify casting such heavy suspicions at Netanyahu throughout the report?

The answer, once again, is the attorney-general's inability to restrict himself to legal judgments. Both Rubinstein and Arbel admitted freely that they were motivated by the extremely worrisome idea of a suspected criminal picking the country's top law-enforcement official. As Rubinstein put it, the allegations aroused the suspicion that "there was a threat to the rule of law here."[86] A simple declaration of insufficient evidence to indict would, they feared, send the message that Netanyahu—who was, after all, the man who pushed the Bar-On appointment through—was clean not only legally, but morally as well. The only way out was to make clear that the legal vindication was far from unambiguous. And thus their report was filled with insinuations of his legal guilt—insinuations which, given the lack of evidence, had absolutely no place in a strictly legal document.

The interweaving of the moral and the legal makes it extremely easy for particular subgroups in a society to impute bias to the legal system. Ne'eman, for instance, charged that the indictment against him was motivated primarily by a desire to rid the Justice Ministry of a religiously observant minister—a charge quickly taken up by all the religious parties. Whether or not this was in fact the motive, he clearly had grounds for suspecting that legal considerations were not the only ones at work. In such cases, the attorney-general inevitably leaves himself open to accusations of bias—religious in Ne'eman's case, ethnic in Der'i's case, political in Kach's case. And once such suspicions are aroused, suspicions which can rarely be disproved, they undercut the public's faith in the legal system—a faith without which a democratic society cannot long survive.

Thus the extraordinary power of the attorney-general, and his constant involvement in extralegal matters, is in the end self-defeating. The theory behind the "independent, apolitical" attorney-general was that he would increase the public's faith in government by ensuring that the government act

legally and morally. As Aharon Barak wrote in the *Pinhasi* verdict: "The government's ability to govern is based on the public's trust in it. Without public trust, the government cannot function."[87] Yet the new attorney-generalship has accomplished the exact opposite: It has tainted the legal system itself with the appearance of politicization, undermining public trust in this central institution.

And the damage does not stop there. The attorney-general's involvement in moral questions also seriously distorts the public moral debate: For if morality can be subjected to a legal test, is not any act which the judiciary or the attorney-general upholds also a moral one? The result is that if the moral concerns are somehow taken care of, the public will necessarily think it less vital to play itself the role of moral watchdog—and in the long run, the public grows numb to the moral stature of their elected officials.

The Bar-On affair provides a classic example of this. It was well-known even before the criminal investigation into the affair began that Hanegbi's conduct had been far from commendable: He misled the cabinet into thinking that Supreme Court President Barak approved of Bar-On's appointment, when in fact the opposite was the case. Rubinstein and Arbel concluded that such behavior, however reprehensible, was not criminal. Hanegbi then pounced on this as proof of his rectitude: "I have been strengthened in my opinion that there was nothing essentially wrong with the way I behaved during the proceedings to appoint the attorney-general, and State Attorney Edna Arbel's decision clears my name of all the false accusations hurled at me."[88] What was truly astonishing, however, was the degree to which the public and his colleagues tacitly accepted his claim: In most countries, a minister caught lying to the government would be pressured to resign by his own colleagues, for fear of the public's reaction if he remained. But with a few exceptions, the coalition backed Hanegbi's position that in the absence of an indictment, there was no reason for him to resign, and there was no serious pressure from the public to counteract this stance. The assumption appears to be that there is no such thing as a serious moral offense which is not also a legal one.

Such a premise is dangerous in any democracy. The law, by definition, sets the minimum standards of permissible conduct. Good government, however, demands a much higher moral standard. By far the most consistent and potent protector of that moral standard is public opinion—one of the reasons why freedom of press, speech and information are critical components of a functioning democracy. And if the public is taught that such moral judgments are the proper province of the attorney-general, it is too likely to abdicate this responsibility in the comfortable assurance that someone else will do the dirty work. What results is a vicious cycle: The government, unchecked by public outrage, follows its natural tendency to sink ever deeper into morally gray areas, and the attorney-general responds by assuming ever more moral authority—leading to an ever-deepening, and dangerous, public indifference to the vices and virtues of their leadership.

The Israeli legal community is not unaware of the problems raised by the attorney-general's multiple role as the government's judge, legal advisor and chief prosecutor, and how these problems have been exacerbated by his increased involvement in government affairs. State Attorney Edna Arbel recently proposed at least a partial solution: She suggested that the attorney-general's power to open and close criminal proceedings be transferred to the state attorney. Since the latter is completely disconnected from the government, she argued, this will strengthen the prosecution's status as a completely independent institution.[89]

The problem with this solution, however, is that it would not solve any of the current system's problems—problems which are caused not by the attorney-general's ties to the political system, but by his *alienation* from political concerns.

The two most serious problems with the attorney-generalship today are only made worse by his independence. His powers to overrule the executive might not so undermine democracy if he himself had to answer to public opinion. Similarly, the confusion of moral and legal concerns—which both

politicizes the criminal justice system and emasculates the public moral ethos—is only really a problem when the attorney-general is seen as being above politics, for who would seriously consider a politician's moral judgments to carry the weight of law, or his legal judgments to carry the weight of morality? For these reasons, many Western democracies have chosen an expressly political attorney-general post, as the lesser of two evils.[90]

Many Israelis find the idea of a political attorney-general abhorrent, because it raises the specter of politicized decisions on criminal proceedings. Yet this fear may be a chimera: Historically, both in Israel under the old system and in other countries, there have been relatively few cases of people being falsely accused or improperly let off due to political considerations, since in most democracies, the attorney-general is not the only line of defense against a corrupt government: In the Watergate affair, for example, President Richard Nixon's first attorney-general, John Mitchell, was heavily involved in the cover-up, and Mitchell's successor, Richard Kleindienst, at least failed to prosecute the case actively. Yet Nixon was ultimately forced by public pressure to appoint a special prosecutor, who would be independent of the Attorney-General's Office. Indeed, the Senate passed a unanimous resolution in May 1973 calling for such a step, introduced by members of Nixon's own Republican Party.[91] Later that year, Nixon fired the special prosecutor, but was immediately forced by public pressure—again, led by his own party—to appoint a replacement.[92] The work of these two special prosecutors ultimately forced Nixon to resign and led to a host of indictments, convictions and jail sentences, including a substantial jail term for Mitchell.

In many ways, the danger is substantially *greater* with a non-political attorney-general, because there is an element of public control over a political attorney-general which is totally lacking with an "independent" one. A political attorney-general who failed to prosecute a major scandal, or abused his powers to prosecute political opponents, would tarnish the government and risk a backlash at the polls. This creates a strong disincentive for him to overstep the boundaries, and a strong incentive for his political colleagues

either to restrain him or to replace him if he ignores those boundaries. In the case of the independent attorney-general, however, the only restraints are those imposed by his own character; however improper the public might consider his decisions, it has almost no tools for effecting his ouster.

This is even more true in the realm of policy. A political attorney-general who made a habit of thwarting the government's policy agenda would quickly be removed, while the government is helpless against the dictates of the independent attorney-general. More importantly, however, a political attorney-generalship would place the judgment as to whether a policy is proper or not back where it belongs: In the hands of the voters' elected representatives, and ultimately, in the hands of the voters themselves, who will reward or punish the government for its decisions come election day. Nor is the public without recourse should the attorney-general approve something which is actually illegal: They can always challenge the policy in court.

The powers of the attorney-general have been growing unchecked for almost half a century, thanks to the distorted view of the position as a judicial rather than political role. Against the backdrop of a constantly growing role of the courts in Israel, the new attorney-generalship represents a frightening encroachment by the judiciary branch into the executive realm, a further usurpation of the privilege of the electorate in a country already suffering from an over-empowered judiciary and a disempowered voter. It is long past time to correct this distortion and return the executive authority of the attorney-general to the government ministers who were elected to wield it.

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Notes

1. *Amitai–Citizens for Good Government and Integrity v. The Prime Minister of Israel* (HCJ 4243/93, 4287/93 and 4634/93), in *Decisions of the Israel Supreme Court*, vol. 47, section 5, p. 441. Since Pinhasi was the main focus of the decision and listed second among respondents after Rabin, the verdict has become known as the *Pinhasi* decision.

2. *The Jerusalem Post*, July 4, 1962.

3. Yechiel Gutman, *The Attorney-General versus the Government* (Jerusalem: Edanim, 1981), p. 48. [Hebrew]

4. Gutman, *The Attorney-General*, p. 52.

5. Cohen occupied the ministry for only seven months, but continued as attorney-general for the next eight years. What forced him out as minister, however, was not any sense that the dual role was improper, but ordinary coalition politics: Seven months after Cohen became a minister, David Ben-Gurion succeeded in persuading another party to join his government, and he needed a ministry to offer the newcomers. Cohen, not being an official representative of any party, was the easiest minister to dismiss to free up the necessary seat.

6. *Ha'aretz*, May 30, 1954.

7. *The Jerusalem Post*, October 29, 1962.

8. *The Jerusalem Post*, October 29, 1962.

9. *Ha'aretz*, February 3, 1966.

10. *The Jerusalem Post*, October 24, 1960.

11. *The Jerusalem Post*, December 8, 1964.

12. Protocol of the Knesset Subcommittee on Basic Laws, May 6, 1968, p. 6.

13. Quoted in Gutman, *The Attorney-General*, p. 211.

14. Gutman, *The Attorney-General*, p. 275.

15. Gutman, *The Attorney-General*, p. 232.

16. Protocol of the Knesset Subcommittee on Basic Laws, May 6, 1968. See, for example, the statements of subcommittee chairman Haim Zadok ("The justice minister should be able to take upon himself all the powers of the attorney-general," p. 8) and of former attorney-general MK Moshe Ben-Ze'ev ("I favor the proposal that the justice minister should be able to take upon himself those powers of the attorney-general granted by laws for whose implementation the justice minister is responsible, but other ministers should not be able to take the attorney-general's powers upon themselves," p. 6).

17. Protocol of the Knesset plenum, August 13, 1968.

18. Since Prime Minister Golda Meir decided to accept Shamgar's decision, it could be argued that he was not really setting himself in opposition to the government. However, it was quite clear to all concerned at the time that Meir was merely bowing to a decision she felt she could not change. It was for this reason that the religious parties responded by trying to pressure the attorney-general directly, rather than concentrating their efforts solely on the prime minister—for they knew who the real source of the decision was. See, for example, *Ha'aretz*, May 24, 1970.

19. Gutman, *The Attorney-General*, p. 213.

20. *Ha'aretz*, May 26, 1970.

21. *Ha'aretz*, June 2, 1970.

22. Gutman, *The Attorney-General*, pp. 214-215.

23. Gutman, *The Attorney-General*, p. 216.

24. Gutman, *The Attorney-General*, pp. 215-216.

25. Gutman, *The Attorney-General*, p. 244.

26. Gutman, *The Attorney-General*, p. 248.

27. Gutman, *The Attorney-General*, p. 281.

28. Gutman, *The Attorney-General*, pp. 328-329.

29. Gutman, *The Attorney-General*, p. 324.

30. Gutman, *The Attorney-General*, p. 324.

31. Gutman, *The Attorney-General*, p. 325.

32. Gutman, *The Attorney-General*, pp. 325-326.

33. Gutman, *The Attorney-General*, p. 331.

34. Gutman, *The Attorney-General*, pp. 338-341.

35. *Yedi'ot Aharonot*, April 7, 1978.

36. *The Jerusalem Post*, June 16, 1978.

37. *Ha'aretz*, July 10, 1978.

38. *The Jerusalem Post*, May 8, 1981.

39. *The Jerusalem Post*, May 8, 1981.

40. *The Jerusalem Post*, May 18, 1986.

41. *The Jerusalem Post*, December 14, 1984.

42. *The Jerusalem Post*, December 14, 1984.

43. *The Jerusalem Post*, December 14, 1984.

44. *The Jerusalem Post*, December 31, 1979.

45. *The Jerusalem Post*, January 20, 1980.

46. *The Jerusalem Post*, April 26, 1982.

47. *The Jerusalem Post*, July 10, 1980.

48. *The Jerusalem Post*, May 16, 1986.

49. *The Jerusalem Post*, May 13, 1986.

50. *The Jerusalem Post*, May 13, 1986.

51. *The Jerusalem Post*, May 13, 1986.

52. Hebrew University professor Claude Klein, quoted in *The Jerusalem Post*, May 16, 1986.

53. *Ha'aretz*, September 10, 1993.

54. *Ha'aretz*, September 10, 1993.

55. *The Jerusalem Post*, August 30, 1993.

56. *The Jerusalem Post*, August 10, 1993.

57. *Amitai*, p. 473.

58. *Yedi'ot Aharonot*, September 9, 1993.

59. *Ha'aretz*, September 9, 1993.

60. *Ha'aretz*, September 9, 1993.

61. *The Jerusalem Post*, October 13, 1994.

62. Since the Supreme Court has recently asserted the power to annul even Knesset legislation, such legislation might still be insufficient to protect the policy in question. However, it would make it much harder for the court to act, since the necessary justifications for overturning Knesset legislation are much more stringent than those needed to overturn an administrative decision or a municipal bylaw.

63. *The Jerusalem Post*, October 13, 1994.

64. *The Jerusalem Post*, October 13, 1994.

65. As a policy decision, however, the branding of the agreement as "inappropriate" was even more egregious. Certainly, many people did object to the agreement, even within the Labor party itself. But it was hardly an outrageously unreasonable policy. First of all, the religious status quo has always been a major electoral

issue in Israel, and a significant portion of the electorate strongly supports maintaining it. Indeed, the erosion of the religious status quo under the Labor-Meretz government of 1992-1996 was considered to be an important factor in Netanyahu's surprise victory in the 1996 election, and a commitment to preserving the status quo was an integral part of the Netanyahu government's coalition agreements. More important to Rabin at the time he signed the deal, however, was the fact that in order to continue with the Oslo process, he desperately needed Shas as a coalition partner. Without Shas' six seats, he represented a minority government, which might not have been able to make the highly controversial concessions Rabin was planning. Yet Shas had refused to join the government without this promise. Like any politician, Rabin was willing to concede a point he considered minor—the religious status quo—for the sake of obtaining his major policy objective: Support for the peace process.

66. *Ha'aretz*, June 12, 1996.

67. *The Jerusalem Post*, June 13, 1996.

68. *The Jerusalem Post*, July 4, 1996.

69. *Ha'aretz*, August 13, 1996.

70. Gutman, *The Attorney-General*, p. 324.

71. See, for example, *Yedi'ot Aharonot*, August 16, 1996, and *Ha'aretz*, December 4, 1996. Not to be outdone, Netanyahu chose the time-honored route of leaving his attorney-general out of the loop as much as possible until the latter finally resigned over his lack of influence—hardly the most efficient way to run a government.

72. *Ha'aretz*, June 22, 1997.

73. *Ha'aretz*, June 8, 1997.

74. *Ha'aretz*, June 20, 1997.

75. *Ha'aretz*, December 4, 1996. Yahalom's committee would consist of the Supreme Court president plus two justices of the president's choosing; two representatives of the Israel Bar Association, chosen by the association; the prime minister, the justice minister and one other minister chosen by the cabinet; and the Knesset speaker plus two MKs chosen by the Knesset (one from the coalition and one from the opposition).

76. While the government could theoretically call upon a private organization to petition the High Court against the attorney-general's opinion, such a move would have little chance of success since the government itself would be unrepresented in court, and since the legal presumption is in the attorney-general's favor.

77. *Ha'aretz*, May 16, 1997.

78. *Ha'aretz*, May 16, 1997.

79. Quoted from the declaration submitted by the State Attorney's Office to the High Court of Justice, November 12, 1996.

80. Rubinstein made the decision on Netanyahu, but left the decision on Hanegbi to Arbel because he felt he had a conflict of interest, since Rubinstein's wife is a senior Justice Ministry official.

81. *Ha'aretz*, April 21, 1997.

82. *Ha'aretz*, April 23, 1997.

83. *Ha'aretz*, April 23, 1997.

84. *Ha'aretz*, May 15, 1997.

85. *Ha'aretz*, May 15, 1997.

86. *Ha'aretz*, April 23, 1997.

87. *The Jerusalem Post*, September 9, 1993.

88. *Ha'aretz*, April 24, 1997.

89. *Ha'aretz*, June 15, 1997.

90. In the U.S., the attorney-general is a cabinet member, appointed by the president and approved by the Senate. In the U.K., the attorney-general is a minister in the government, and must be a member of Parliament.

There has recently been a substantial movement among Americans of all political stripes to make the United States' prosecutorial system even less independent —though it is already tame compared to its Israeli counterpart. The current outrage is focused on the institution of the independent counsel, which was created as a response to Watergate. Despite the success of the combination of a political attorney-general and a special prosecutor in obtaining indictments and convictions in Watergate, Americans were so traumatized by the corruption in the Attorney-General's Office during this scandal that they decided to try making the prosecution more independent of the executive. In 1978, therefore, Congress passed the Ethics in Government Act, which stated that if the attorney-general had credible evidence that a crime had been committed by one of seventy-five executive branch officials listed in the law, he could ask a special panel of three federal judges to appoint an independent counsel. This counsel is completely independent, answerable to no elected official at all. Ten years ago, conservative Supreme Court Justice Antonin Scalia warned that an unaccountable independent counsel was an invitation to abuse, since it is precisely political accountability which is the most effective check on governmental power. At the time, he was a voice crying in the wilderness. The dubious tactics used by independent counsel Kenneth Starr in his numerous investigations of President Bill Clinton, however, have sent shock waves through the liberal establishment, and liberals are now joining conservatives in demanding a

check on this institution. Scalia's ten-year-old opinion, reported *The New York Times*, is now "being passed around in liberal circles like *samizdat*." "The real question is whether something designed to promote public confidence is in fact undermining it," said Katy Harriger, an associate professor of politics and author of a book on the independent counsel. Linda Greenhouse, "Ethics in Government: The Price of Good Intentions," *The New York Times*, February 1, 1998. But for many liberals, this has ceased to even be a question. "Now I know that its creation was a mistake," wrote Paul Simon, a former Democratic senator who voted in favor of the Ethics in Government Act in 1978. Simon said the office has become a magnet for politically ambitious lawyers, who, once appointed, pursue high-profile investigations in order to make a name for themselves—"often with a zeal and a budget out of all proportion to the alleged violation of the law." Paul Simon, "One Attorney General for 10 Years," *The New York Times*, February 1, 1998. "The framers of the U.S. Constitution well understood the danger that Kenneth Starr illustrates: Give anyone absolute power, and he may abuse it, no matter how good his intentions," concurred liberal columnist Anthony Lewis. "That is why they created our elaborate system of checks on power. The independent counsel statute has given us a creature outside the constitutional system." *The International Herald Tribune*, February 3, 1998.

91. Fred Emery, *Watergate* (New York: Times Books, 1994), pp. 355-357.

92. Emery, *Watergate*, pp. 397-407.