Governing in the Shadow of Indictments

The New Crisis of Israeli Constitutionalism

Alon Harel

16.04.2025 doi: 10.59704/42984db27ee72e32

Israel has been experiencing fierce conflicts between the Prime Minister and the government on the one hand and prominent public officials on the other. Two such conflicts have occupied the public discourse in recent weeks: the conflict between the government and both the Attorney General (Gali Barahav-Miara) and the head of the internal security service (Ronen Bar). In both cases the government has been trying to remove these officials from office but such a removal encountered legal difficulties, in particular, difficulties grounded in accusations concerning conflict of interest.

These conflicts stem from two opposing principles within administrative law. On the one hand, elected officials are expected to have the authority to implement their policies, which includes the right to appoint and remove officials they do not trust. After all, elected officials are the ones that bear primary responsibility for the successes and failures of their policies and, to govern effectively, they need to have broad discretion as to who the senior officials who execute their policies are. On the other hand, every administrative decision made by an elected or non-elected official is governed by general principles of administrative law. It must meet certain standards of rationality and reasonableness. There is no ready-made solution to cases in which there is a conflict between these principles.

Appointing and dismissing the attorney general: the law

The attorney general in Israel has a unique role. Given the relative strength of Israel's executive branch and the absence of a rigid constitution and effective mechanisms for checks and balances, the attorney general is not merely an advisor to the government in the way that is the case in the UK or the US. Instead, they are also assigned the task of protecting the rule of law and in this role, they enjoy broad independence of the government. The power of the attorney general has evolved in case law over the years, and currently the law recognizes the attorney general as an authoritative interpreter of the law. Its interpretation binds the government unless the court orders otherwise. The attorney general also has the power to refuse to represent the government in court when she believes that the government violates its legal or constitutional duties.

The government is legally empowered to both appoint the attorney general and to make determinations concerning their removal. In 1997, following another scandal involving the appointment of Attorney General Roni Bar On (who, soon after his appointment, was forced to resign due to accusations concerning a corrupt political deal), binding procedures regarding appointment and dismissal were put in place. To guarantee reliable appointments, it was decided that the attorney general is appointed from a list of candidates proposed to the government by a permanent public-professional committee composed of five members: a retired Supreme Court justice, a former minister of justice, a member of the Knesset, a legal academic and a representative of the Israeli Bar Association.

The rationale for this complex procedure rested on the distinct role of the attorney general as not merely a servant of the government but of the public and the constitutional order. To adequately fulfil this role, the procedure needed to ensure that the selected individual had a degree of independence from the government as well as sufficient knowledge, experi-

ence and integrity to confront the government when this is necessary to protect the rule of law.

The government can dismiss the attorney general before completion of their term only if one of the criteria determined in the 1997 resolution is met. Those include incapacity, severe misconduct, loss of public trust or legitimacy and conflict of interest or disqualification. The relevant criterion used by the government now is the third criterion that includes cases in which there are substantive and continuing differences of opinion between the government and the attorney general, creating a situation that prevents effective cooperation between them. The process of dismissal is cumbersome. First the government needs to make a decision that it wishes to dismiss the attorney general. Then its decision and the reasons for it are submitted to the same committee in charge of appointment which then holds a consultation on the matter before bringing it to the government.

Legal obstacles to the current removal attempt

The first step in this lengthy process for dismissing the current attorney general has already been made. In an unprecedented step, the cabinet voted unanimously in favor of a no-confidence motion against Attorney General Gali Baharav-Miara. Justice Minister Yariv Levin, who is spearheading the process, said the move was a result of what he alleged was Baharav-Miara's "unfitting conduct" and the "substantive, and prolonged differences of opinion" between her and the government which Levin said prevented effective cooperation.

The Attorney General countered that the government was seeking to place itself above the law, and to operate without checks and balances. The opposition also condemned this move, and former retired attorneys general and retired supreme court justices expressed support and warned that the dismissal of Baharav-Miara would impose a grave risk to the rule of law in Israel.

A key obstacle to the dismissal process' continuation is the fact that the committee currently consists of only three people – retired Supreme Court Justice Asher Grunis, Adv. Tamar Olman, and Professor Ron Shapira. As a result, it cannot conduct the necessary consultation to allow the government to dismiss the Attorney General.

Another serious legal problem facing the government is the fact that Prime Minister Benjamin Netanyahu is currently charged for serious crimes including bribery and breach of trust. Netanyahu signed a court-mandated conflict of interest agreement in which he agreed not to be involved in decisions concerning the legal system including decisions concerning the appointment of senior positions in the legal system. This is particularly relevant here given that the Attorney General has the power to conduct criminal investigation and to make decisions concerning the ongoing criminal trial against the Prime Minister. Legal experts argue that the government cannot under such conditions appoint or dismiss an attorney general. This is because decisions concerning the appointment or dismissal of the attorney general should not be made by ministers who are vulnerable to dismissal themselves at the prime minister's hands. Their dependence on the prime minister raises concerns that their decisions are affected by his interests rather than by the public interest. On this view, the prime minister's conflict of interest extends to the entire government.

If the government succeeded in appointing a committee and dismissing the attorney general, a petition would be submitted to the Supreme Court. If the Supreme Court were to decide that given the circumstances, the dismissal decision involves an impermissible conflict of interest, the Court would have to void the decision. While an unlikely decision, it is not an impossible one and, if it were made, it would imply that the government is forced to work with an attorney general which it regards as untrustworthy. Such sour relations between the attorney general and the government are detrimental to the interests of the Israeli public.

Appointing and dismissing the head of the security service

The case of the Head of the Security Services Ronen Bar is similar in many respects. Like the attorney

general, the head of the security service cannot be directly instructed by the prime minister to conduct particular operations or investigations but has discretion in deciding how to execute the policies set by the government. The autonomy granted to the security service is important to prevent its sectarian use to promote the political interests of the prime minister, other members of the government, or the ruling party. Improper use of the prerogatives granted to the security services constitutes an immediate danger to democratic rule, due to the service's powers to use force against citizens, including the power to detain citizens, interrogate them, conduct body searches, enter into private property, wiretapping and many other powers.

On March 16, the government approved Bar's early dismissal due to his failure to anticipate the 7 October 2023 attack by Hamas. Netanyahu said in a video statement on March 16 that he sought to sack Mr. Bar because of an "ongoing distrust" between the two that had "grown over time". While the government is generally empowered to dismiss Bar at its discretion, it can do so only for relevant reasons – ones that have to do with his performance rather than for political or self-interested reasons. It matters in this respect that the security service is currently conducting an investigation into grave crimes ostensibly committed by two close advisors of the prime minister – media consultant Jonatan Ulrich and former spokesman Eli Feldstein. Both were allegedly hired to run a public relations campaign to improve Qatar's image among Israelis, while Qatar was at the same time negotiating for a ceasefire in Gaza. They are suspected of various crimes including contacting a foreign agent, bribery, fraud and other offences.

While the Prime Minister is currently not suspected of having known about the relations of his employees with Qatar, the scandal has harmed Netanyahu's reputation as it exposed serious irregularities in the way his office operates. Ronen Bar's dismissal is alleged to be motivated by the Netanyahu's desire to appoint somebody who would disrupt the investigation against his employees. In a letter to the Supreme Court, Ronen Bar also argued that Netanyahu asked him to inform the judges in the criminal trial against Netanyahu that it is unsafe for him to testify. He suggested that his refusal to write such a letter and thereby facilitate the continuation of the criminal trial against Netanyahu underpins the attempt to dismiss him. He further accuses Netanyahu of instructing him to use the security service against Israeli citizens; an illegal request he refused. Another former Head of the Security Services, Yoram Cohen, also testified that Netanyahu asked him to engage in illegal activities which seem to be motivated by his sectarian political interests. It suggests that in addition to the problem of conflict of interest, there are serious concerns that the real motive behind the appointment of a new head of the security services is to promote the political interests of Netanyahu.

On March 21, Israel's Supreme Court issued an injunction, freezing the dismissal until a hearing on the matter by 8 April. On April 8, the Court made a decision and urged the government and the attorney general to find a "a creative solution" by April 20. If no such solution is found, the Court declared it would make its own decision concerning the dismissal.

An unresolved conflict of principles

Both of these cases raise an unresolved question in administrative law, namely how to reconcile the two principles mentioned at the outset. On the one hand, the executive ought to have the power to appoint and dismiss public officials to ensure the proper execution of its policies. Distrust between elected representatives and public officials is disruptive to the public interest. Moreover, the general principle governing administrative law in Israel is that the government is entitled to promote its policies and those can best be promoted by public officials who share the vision of the elected officials. At the same time, administrative law requires that the decisions made by officials should be based on relevant considerations, namely ones that promote the public interest rather than the private or sectarian interests of politicians or political parties. In both of these cases, these two principles conflict with each other as the dismissal decision promotes the interests of Netanyahu in ending the investigations against him and/or his aides.

Most importantly, the lesson of these cases is that Israeli institutions have not been built to address the Kafkaesque situation in which highly corrupt politicians use their powers to promote their narrow interests. I conjecture that perhaps no institution can address the problems resulting from mass corruption of politicians. Institutions can be highly effective in dealing with mediocre people. But the general feeling in Israeli politics now is that the government has been hijacked by a corrupt Prime Minister and self-interested ministers who are committed to preserve their positions of power at the expense of the public.

It is perhaps worth adding that underneath these conflicts there are also ethnic and religious tensions as supporters of the government are typically religious and Sephardic Jews while the advocates of the attorney general and the courts are typically more secular and Ashkenazi Jews. There is fear that these conflicts will give rise to a civil war or alternatively a charismatic authoritarian politician who will use this crisis to undermine the very democratic foundations of the state. A possible name of such a politician is according to many...Benjamin Netanyahu!

ABOUT THE AUTHOR

Alon Harel

Professor Alon Harel holds the Phillip and Estelle Mizock chair in administrative and criminal law at the Hebrew University in Jerusalem.Professor Alon Harel holds the Phillip and Estelle Mizock chair in administrative and criminal law at the Hebrew University in Jerusalem.

SUGGESTED CITATION

Harel, Alon: Governing in the Shadow of Indictments: The New Crisis of Israeli Constitutionalism, Verfassungsblog, 16.04.2025, doi: 10.59704/42984db27ee72e32.

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Langzeitarchiviert bei IntRechtDok unter: doi.org/10.17176/20250417-012121-0.