

Government Basic Law Amendment [Unofficial Translation]

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Proposed Government Basic Law (Amendment – Government Authority in Legal Matters), 2023

Amendment to Sec 32A	
Government Authority in Legal Matters	<p>32A.</p> <ul style="list-style-type: none">(a) The government is authorized to determine its legal position as a rule or for a specific matter.(b) The Prime Minister and all other government ministers are authorized to determine the position of their department or administrative branches under their responsibility in legal matters, as a rule or for a specific matter.(c) Legal counsel provided to the government shall not bind it and shall not change its legal situation.(d) Legal counsel provided to the Prime Minister or to government ministers shall not bind them and shall not change their legal situation.(e) The government, the Prime Minister and all ministers are authorized to reject legal counsel and to act in opposition to it.(f) The government, the Prime Minister and any minister in their ministerial field, may set their position, that will be presented in their name, or in the name of the administrative branch under their responsibility, before all who have judicial authority according to law.(g) The government, the Prime Minister and any minister in their ministerial field, may chose according to their discretion that their position, or the position of the administrative branch under their responsibility, will be presented, in a specific proceeding, before any judicial authority according to law, by any representative according to their choice, including representation by a private lawyer.

Platform for discussion in Constitution, Law and Justice Committee – Advisory and Representation Authorities of the Attorney-General

In its upcoming sessions, the Committee will discuss proposed legislation dealing with the status of the Attorney-General's (AG) department and its director, and its authorities in the field of counsel and representation. In advance of the discussion, below is a platform for discussion, which summarizes the issue's legal situation, its ambiguities and the problems that it raises.

1. The Attorney-General's Advisory and Representation Authorities – General Overview

The principle of constitutionality is a meta-principle of administrative law, according to which a public department is authorized to act only within the confines of jurisdiction given to it by law. However, the jurisdiction of the Attorney General in the advisory and representational fields have never been enshrined in law in a comprehensive manner. Despite this, the AG's position, based upon *obiter dicta* in the case law, is that their interpretation of the law is binding upon the government, and that they are authorized to prevent the government from receiving separate representation when they refuse to represent its position.

The issue of the AG's status was first dealt with in the Jurists Commission on the AG's Status led by Justice Agranat, in 1962. The report largely dealt with their prosecutorial powers, with a limited focus on non-criminal advisory powers. It stated that it is proper for the government to treat their legal opinion with seriousness as representing the existing legal situation, in order to maintain the State's good order. However, in contrast to the other administrative branches "**the government, based on the above assumption, may decide how to act in a specific matter according to its discretion.**" Namely, the report **explicitly** established that the government is not subject to the AG, and that it has full freedom of action as long as the court has not ruled otherwise. The Agranat Commission Report was adopted by a government decision on 28.10.1962.

In complete contradiction to what it actually says, the Agranat Commission Report became the basis for the approach according to which the AG's position binds the government. In the **Deri and Pinhasi** matter decided before the Supreme Court in 1993, the Agranat Commission Report was cited as the source for two basic jurisprudential principles regarding the AG's advisory and representational authorities: **First**, the AG is the authorized interpreter of the law for the executive branch; **Second**, the AG has exclusive representational authority before the court, both in the sense of exclusive authority to represent the government, and in the sense of determining the position to be presented before the court. In the context, two important points must be mentioned: **First**, faced with the adoption of a "substantive" reasonableness grounds adopted by the case law, these authorities give the AG the power to interfere in almost every issue, and even in issues that are not clear-cut from a legal perspective; and **second**, these matters are in contradiction to Sec 10 of the Amendment to the Civil Procedure Law (State as Legal Party), 1958, which excluded administrative procedures before the Supreme Court from the AG's exclusive representation, in extremely clear and explicit language.

In 1997, the Shamgar Commission was set up with the main goal of dealing with the way of appointing AGs. The Commission expanded its mandate and discussed the AG's authority and tried to reconcile the position of the Agranat Commission report with the *obiter dicta* in the **Deri and Pinhasi** matter. Regarding the binding nature of the AG's counsel, the report is ambiguous. However, it stated that "**in terms of leading constitutional rules, it must be recalled that official branches, as do all persons, have the right to be represented by a lawyer who will set out their position before the court in the most convincing manner that the law and ethics allow.**" Contrary to the Agranat Commission report, these portion of the Shamgar Commission report were not enshrined in a government decision.

In decisions given since then by the Supreme Court, there is ambiguity regarding the binding nature of the AG's legal opinion, as well as his representational monopoly. A great portion of the rulings express the approach described above, according to which the AG has the power to instruct the government how to act, and that the government must obey his commands. Therefore, according to this approach, the AG has a monopoly on government representation before tribunals, and he is authorized to withhold from the government private counsel. For example, in the **Lavi** judgement from 2008, the President Beinish adopted the approach according to which the AG's position binds the government in an unequivocal and absolute manner, with a complete rejection of the opposing approaches.

By contrast, there are other approaches in the case law, according to which the matter is not an established rule but rather an *obiter dictum*. In the **Shai Gini** and **Tnuva** rulings, Justices Solberg and Stein expressed the position that administrative bodies must be allowed effective representation when the AG refuses to defend their position. In addition, in the second **Amitai** issue, Judge Stein dealt with the issue of exclusive representation and held that this was not a binding precedent, and that the AG is **obligated** to allow the administrative body to receive legal representation: "**The AG and their representatives are not obligated to argue in favor of an administrative decision in whose legality they do not believe, however they are obligated to ensure that the body that took the decision, and whose opinion in the matter is not that of the AG, will receive effective legal representation by another lawyer, who will defend the decision in court.**"

In summary, the AG's advisory and representation authorities in matters of public law have never been enshrined in law, despite their heavy bearing on the system of governance in Israel. Even among Supreme Court judges, there is no consensus regarding the binding legal situation. Finally, the Knesset has never conducted a comprehensive discussion on the desired legal state in this matter.

It must be stated that as of recently, in the **Gun on the Kitchen Table** case, the AG refused to represent the position of then-Interior Safety Minister, Amir Ohana, and refused to allow separate representation. In the matter, the Justices refused Minister Ohana's request for separate representation. This event underscores that the problematic nature of the matter, and the law's silence, remain as relevant as ever.

2. The Problems in the Current Situation

The first and central problem in this issue, is that there is no legal source for the claim of binding advice and representational monopoly. This is a novel judicial creation, even according to those who hold that it was set out in a binding Supreme Court ruling. Beyond this, there are many inherent problems in the current position.

- A. **First**, this approach violates the right to due process in the most basic way since even the worst criminals, justly, are entitled to legal representation; and only the public and its elected officials have no one to represent them when the AG presents a different position or presents it in a lackluster or even subversive manner.
- B. **Second**, this approach violates the democratic process, as the public's desire to actualize its objectives by means of its representatives, is thwarted by jurists whom the public did not elect. This problematic nature is magnified in the Israeli legal system, in which legal issues are not clear-cut and are very dependent on discretion. As such, legal questions touch on purely value questions, in a manner that allows the AG to prioritize values other than those in whose name the officials were elected, according to their personal beliefs and worldviews.

- C. **Third**, this approach impedes governance, since legal advisors delay and block procedures, and prevent the government from functioning and executing the policies for which it was elected.
- D. **Fourth**, there is a violation of public government accountability, since the legal advisor blocking the government's actions does not bear accountability for the minister's failure in meeting their ministry's goals; meanwhile, due to the advisor's interference, the minister who failed is able to evade both his accountability in meeting his ministerial goals and his accountability to the rule of law.
- E. **Fifth**, this approach violates the Court's accountability towards the public. The Court holds public accountability when it issues an order against the government. By contrast, the AG, who delivers an order through the Court's interpretative ruling, removes the Court's accountability for the ruling.

3. The Advantage of the Current Situation

Alongside the number and deep deficiencies, the current situation has a number of advantages.

- A. **First**, the main advantage of the representative monopoly is the conformity of the legal positions presented by the government, so that the government "**speaks with one voice**".
- B. **Second**, if every department were to obtain independent representation, the Court would become the arbitrator in disagreement between departments, instead of the government or the Prime Minister. This situation is not desirable. The representational monopoly prevents such a situation, and allows the government to be the body that integrates the varying positions in its branches.
- C. **Third**, the situation according which the AG's position binds the various government branches brings legal conformity in its behavior. The situation in which every department and branch operates in a separate and different way in different legal questions is undesirable, and may lead to legal chaos and incoherency in the executive's policies. Part of the time, cooperation is required between branches and departments, and the diffusion of legal advice may lead to departments being unable to act due to disagreements between different legal advisors.
- D. **Fourth**, some argue that the multiplicity of positions before the Court will complicate and harm the efficiency of judicial proceedings.

4. A Comparative Overview

As is known, the position of binding advice and representational monopoly in Israel is exceptional and even **unique** by global standards. As Dr. Eitan Levontin describes, "**there is no such thing, to the best of my understanding, in any other place. The legal situation in Israel is not a minority opinion, but rather a single opinion, and it seems to me that a chasm – not just a disagreement – lies between it and the legal situation in any comparable country.**"

By contrast, in the UK, the US, Canada and Germany, the AG – or the parallel figure – is a political role similar to the minister, and in some countries is actually a government minister. As such, they have no power to bind the government to their positions; the government can act in oppositions to their

positions; the government is authorized to dictate to the AG the position to present before courts; and he is forbidden to put together legal opinions absent government request.

For the sake of convenience, attached is a table describing the AG in Israel, its exceptional characteristics, compared with prominent Western countries.

	US	UK	Canada	Germany	Israel
Is the AG a political position?	✓	✓	✓	✓	X
Can the president/ government act against the AG's position?	✓	✓	✓	✓	X
Can the president/ government dictate the position to be presented in Court?	✓	✓	✓	✓	X
Is the AG barred from responding to an inquiry from a non-government entity?	✓	✓	✓	✓	X
Is the AG barred from putting together a legal opinion absent a governmental request?	✓	✓	✓	✓	X

5. Summary and Solutions

The status of the AG's advisory and representational authorities in the Israeli system requires a thorough and comprehensive treatment by the Knesset, which has not yet been done. First, there is a need to fill in the law's silence regarding the status of the AG's legal opinion and their monopoly on representation. Second, there is a need for a solution to the problems that the current legal situation causes for procedural and representative principles in a democratic system, and primarily the principle by which the elected officials must receive their day in court. With all of this, the deficiencies of the current situation must be weighed against its advantages, and a solution must be formulated that offers the best response to the various considerations.