

Why Israel is heading to a constitutional crisis



Yariv Levin

Olivier Fitoussi



Baharav-Miara

Olivier Fitoussi

Analysis **Chen Maanit**

Last year, when the Netanyahu government began pushing for laws to radically overhaul Israel's judicial system, many feared the country would face a constitutional crisis – where the government might refuse to honor Supreme Court rulings declaring laws unconstitutional.

While usage of the term has somewhat subsided since then, particularly after the High Court suc-

cessfully blocked the government's law banning the reasonableness standard, Israel is nevertheless very close to such a crisis: The government has avoided carrying out several High Court rulings and has refused time after time to accept the position of Attorney General Gali Baharav-Mira as to the interpretation of the law.

Not honoring court rulings is not a new or rare

phenomenon in Israeli politics. For years, the right has presented the High Court and the attorney general as power-hungry and menacing bodies that supposedly run the country – even though in practice they depend on the government's goodwill to implement their decisions and hold no leverage over it.

But since Netanyahu's current coalition was formed, reluctance by the government to carry out High Court rulings and its opposition to the attorney general's binding opinions have greatly expanded, leading to a deterioration of Israeli democracy to an unprecedented level.

In the 1950s, for example, the High Court ordered the state to allow residents of the villages of Ikrit and Biram in the north to return to their homes, but the government did not implement the ruling. This was an exceptional step at the time, and since the 1960s government

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authorities carefully followed the court's decisions. The shift began in the 2000s. In 2010, then-deputy attorney general Yehudit Karp warned that the state wasn't following several rulings handed down by the Supreme Court and administrative courts, including the order to build classrooms in East Jerusalem and the prohibition of making work permits for foreign workers conditional on their being tied to a specific employer. After Karp turned to then-Attorney General Yehuda Weinstein, he instructed government ministries to honor the rulings, but the problem persisted. An important example of this was the High Court's ruling in June of this year, in which it ordered the government to draft Haredi men into the IDF. Justices wrote in their decision that the government could not prevent the drafting of Haredi men given the lack of a law permitting such exemption, stressing that the matter was especially severe at the height of a war, and because of the inequality in the "sharing of the burden" of military service. Attorney General Gali Baharav-Miara posited that in light of the ruling, the government must act to draft ultra-Orthodox men immediately. But while the court's ruling and Baharav-Miara's stance sent shockwaves, very few young Haredi men have since donned IDF uniforms, and the decision is not expected to be enforced in the foreseeable future. Another example is a 2017 decision, in which the High Court issued a precedent-setting ruling that required the government to provide detainees and prisoners with a minimum amount of living space to ensure a dignified life. This decision has never been fully implemented, and today, amid the war, the living conditions in Israeli prisons have been made even worse. In another case which exemplifies the treatment of the High Court, the government has violated for almost four years the court's order on disciplinary proceedings against the rabbi of Safed, Shmuel Eliyahu, for making racist statements. Eliyahu was finally disciplined in June of this year – almost four years after the ruling – but the government refuses to release the verdict and it isn't clear what steps were taken against him, if any. The tendency not to honor High Court rulings can also be found in the actions of Israel Police. Despite repeated rulings handed down over the years, the police have continued to confiscate signs at demonstrations calling for an end to the war and early elections, and regularly disperses protests against the war in the city of Haifa. In addition, the government just last week admitted in a response to the High Court that it wasn't following an order issued by the court in March, saying that it must continue to fund medical treatment for refugees from the war in Ukraine who are now living in Israel.

Issues in which the government refused to accept the attorney general's position that have come before the High Court

The Topic of the Petition

The decision that Netanyahu will appoint the civil service commissioner

■ The Attorney General's Position

Ruled that it is necessary to establish a search committee to handle the appointment of a new civil service commissioner

■ The State of the Petition

Still in court, the government has requested private representation

The Topic of the Petition

Requiring the justice minister to appoint a Supreme Court president in accordance with the seniority system

■ The Attorney General's Position

Determined that non-appointment of a Supreme Court president severely harms the judiciary

■ The State of the Petition

Still in court

The Topic of the Petition

The law to prevent declaration of the prime minister as incapacitated

■ The Attorney General's Position

Opposes the law because of its personal nature with regard to Netanyahu

■ The State of the Petition

The High Court has ruled that the application of the law will be postponed until the next Knesset

The Topic of the Petition

The amendment to the Police Order subordinating the police commissioner to the national security minister

■ The Attorney General's Position

Held that the amendment creates an unbalance enabling politicization of the police

■ The State of the Petition

No ruling has been handed down yet

The Topic of the Petition

Netanyahu's decision to appoint Arye Dery as a government minister despite criminal convictions

■ The Attorney General's Position

Determined that the appointment is unreasonable

■ The State of the Petition

The petition was accepted and the appointment was voided because of extreme unreasonableness

The Topic of the Petition

Conscription of Haredim into the IDF and funding of religious schools where students have not received exemptions from conscription

■ The Attorney General's Position

Says she is unable to defend the government's position that it is possible to avoid conscripting Haredi men who have not been officially exempted

■ The State of the Petition

The attorney general's position was accepted

High Court rulings the government hasn't implemented

2017

The High Court of Justice ruled that the government must provide detainees and prisoners with a minimum amount of living space

■ The Situation

The ruling was never fully implemented, conditions in detention facilities have worsened since the war began

2024 (and for years)

The High Court of Justice ruled that the police must allow freedom of protest and let demonstrators carry placards

■ The Situation

The police are confiscating placards at demonstrations and regularly dispersing demonstrations against the war in Haifa

2020

The High Court of Justice ordered the government to carry out disciplinary proceedings against the rabbi of Safed, Shmuel Eliyahu, for making racist statements

■ The Situation

Eliyahu was finally disciplined almost four years later, the government refuses to release the verdict against him

2024

The High Court of Justice ruled that the state can no longer exempt Haredim from conscription into the army

■ The Situation

Thus far call-up notices have been issued to 2,000 Haredim, out of a total of about 63,000 eligible for conscription

2024

The High Court of Justice ordered the government to continue funding medical treatment for refugees from the war in Ukraine who now live in Israel

■ The Situation

The government failed to follow the court's order and said it would establish an interministerial team to handle the issue

The High Court is just a hurdle

Dr. Roy Peled, a specialist on law at the College of Management Academic Studies, explains that the while government's shirking of its duty to implement High Court orders is not a new phenomenon, it has worsened both in extent and in character. "The phenomenon is especially callous with regard to enforcement of the law in the [Occupied] territories, and it is not by chance that it is also very evident now in the mat-

ter of conscripting the ultra-Orthodox," says Peled. He notes that for decades the ultra-Orthodox and the settlers have been handed very extensive political power and therefore both of these groups have been "causing the government to drag its feet with regard to High Court rulings in the best case, and to ignore them crudely in the worst case." He says that for many years, the two groups have perceived the state of Israel and its law enforcement system as a kind of "hurdle,

which one must find ways to leap over and circumvent," but that in recent years, "this perception is now found within the government itself." Prof. Yaniv Roznai of Reichman University adds that not implementing High Court rulings is another way for the government to enfeeble the judiciary system. "Instead of taking control of the court or diluting its authority, they simply don't implement its rulings," he says. Attorney Dafna Holtz-Lechner, who represents petitioners to the High Court of Justice, including in the petitions to declare the prime minister incapacitated, lays the blame on Netanyahu. She says it all began when the indictment was filed against the prime minister, in the wake of which he embarked on a smear campaign against the judiciary system, in order to weaken it and prevent implementation of its rulings. Netanyahu's attitude towards the court system is different from that of Likud prime ministers who preceded him. Especially memo-

able is Menachem Begin's comment: "There are judges in Israel" (often cited incorrectly as "There are judges in Jerusalem"). The meaning of his words was clear: The government must bow its head before the court's rulings. Dr. Peled notes that if a minister from the current government were to say "there are judges in Jerusalem," that would inevitably be followed by something about attempts to restrict them, circumvent them and wear them down. According to Dr. Oded Feller of the Association for Civil Rights in Israel, the situation has reached a point where "it is assumed that state authorities will not implement rulings, and we will have to fight for their enforcement."

"In the past, I could say that if the attorney general were to rear up on his hind legs, the rulings would be implemented. Today, even that isn't happening, because the government has no regard for the legal advisory system," he says. "This had already begun [during the tenures of former AGs] Meni

Mazuz and Avichai Mendelblit, and now it's completely out of control." Prof. Menachem Mautner of the Law Faculty at Tel Aviv University explains that the rise of populism hostile to the High Court has origins unrelated to the court's actions, although the institution itself contributed quite a bit to the opposition it faces. Mautner says that the activism of the High Court of Justice inevitably aroused opposition at the political level, where nationalist and religious elements have been in control for many years. This resistance has been accompanied by harsh criticism of the court by politicians and opinion leaders, which has brought a decline in the public's trust in the court.

The new normal

Even more than its readiness not to honor court rulings, the hostility and the scorn evinced by the government towards its attorney general, whose role is to interpret the law for it and instruct it as to how to act, are

unprecedented. Government ministers do not conceal their desire to fire Baharav-Miara, are openly hostile towards her, and ignore her professional opinions. Alongside this, the government has recently been basing its positions on the legal opinions of Cabinet Secretary Yossi Fuchs.

Until the current government was formed, it was generally understood that the attorney general represented the prime minister, government ministers, and the government in petitions submitted against them. In the past, a situation in which the government was represented by a private attorney because the attorney general refused to defend it in court for thinking its position was contrary to the law, was exceptionally rare. Today, it's become the norm.

In the wake of the government's refusal to accept the attorney general's opinion, and the ministers' refusal to act in accordance with the law, in nearly all petitions to the High Court it has been represented by a private attorney, with the attorney general representing an opposing opinion.

This was the case in the deliberations on the petitions filed against Netanyahu's decision to appoint Shas lawmaker Arye Dery to a ministerial position despite Dery's criminal convictions, in petitions against laws part of the government's judicial coup, and petitions against exempting yeshiva students from conscription into the army.

Recently, Justice Minister Yariv Levin asked the attorney general to approve private representation for the government in three additional petitions against its decisions that the attorney general viewed as having been made unlawfully. Last week, Baharav-Miara agreed to one of these requests, regarding the petition against the government's decision whereby Netanyahu will appoint the civil service commissioner, but refused its request regarding petitions against the appointment of a new chair of the Second Authority for Television and Radio Second Broadcasting Authority, and the project director for the rehabilitation of the north.

According to attorneys Daphne Benvenisty and Anat Tahan Ashkenazi of the Israel Democracy Institute, the government is requesting separate representation in "initiatives that intend to weaken Israeli democracy by means of damaging the court's authority to conduct judicial review of the government's decisions, eroding the court system's independence and harming the right to equality, proper administration and more." Moreover, they add, "In all the cases in which the government has asked for separate representation, The High Court of Justice has systematically adopted the attorney general's position and rejected the government's position."

Of this, Prof. Mautner says: "The government today is aiming to have legal advisors under its command, as though it were a matter of a business owner who has a lawyer. This is a regime that is hostile to the liberalism of Israeli law," he says, point-

ing to a judicial coup bill proposed in January of 2023, which "includes an element whereby the legal advisors will be loyal to the ministers and not to the public."

Dr. Peled adds that it would be hard to find governments in properly-run countries today behaving in ways resembling the government of Israel. "In the 19th century in the United States, there were presidents who ignored inconvenient court rulings, but this is a phenomenon that has pretty much vanished from the world," he says. "When the Supreme Court in the United States handed down the famous ruling that it is necessary to enable Black students to attend White schools, this created a tremendous political problem for the president and threatened the unity of the country."

However, explains Peled, "the president did not hesitate for a moment concerning his duty to enforce the ruling, nor did he try to interpret it narrowly and specifically. He understood the court's message, did not try to outsmart it, and when the need arose, sent soldiers to the recalcitrant states to ensure that the ruling was enforced both in letter and spirit, even though he was not enthusiastic about it." "It is very difficult to imagine today's government of Israel investing any effort beyond the minimum forced upon it to implement what is obligated by a High Court ruling, never mind taking the spirit of the ruling to heart," he adds.

Attorney Holtz-Lechner believes that even though the use of the term "constitutional crisis" decreased after the court invalidated the law to eliminate the reasonableness standard, Israel is in the throes of just such a crisis. "This phenomenon, of non-implementation of court rulings, along with non-compliance with the attorney general's instructions, in effect constitutes the constitutional crisis that the huge public feared when it took to the streets with determination and persistence from day one of the current government until October 7," she says.

Unlike her, Prof. Roznai says: "It's not certain that we are in a constitutional crisis, but apparently we are very close to that, and at the very least are in a situation of constitutional rot." According to him, "constitutional rot happens when there is ignoring of constitutional norms in a gradual way and over a prolonged period. For example, when politicians ignore the rules of fair political competition, undermine the public trust and consistently overstep the bounds of their authority in a bullying way to divert the system to their own benefit and perpetuate their rule."

By their actions, he says, such politicians cause erosion of the democratic constitutional system. Roznai names four causes of constitutional rot – loss of public trust, polarization among citizens, social and economic inequality and policy decisions that undermine trust in their representatives. "Israel," he stresses, "has already been there for a long time. And that's important, because prolonged constitutional rot can cause a constitutional crisis."



Justice Minister Yariv Levin in the Knesset.

Oren Ben Haim