



PROJECT DEMOCRACY – FIGHTING FOR THE GROUND RULES

CHAPTER 3: GOVERNMENT INSTITUTIONS

The danger to democracy in Israel is multi-faceted. Particularly worrisome, two of the central arenas from which these threats arise are the very ones charged with safeguarding democracy: The Knesset (Israeli parliament) and the government. Over the past two years, senior officials have voiced harsh and unprecedented statements directed against human rights organizations, political groups, and minorities, and have made various attempts to narrow their operations. At the same time, a long list of new legislative proposals have been introduced in the Knesset, some of which have been enacted, which clearly harm Israeli democracy and undermine the rights, the status, and the opinions of those who are not part of the current political majority or whom the majority wishes to shy away from. It is important to emphasize that these legislative initiatives are not only private proposals introduced by individual MKs, but bills that have, in some cases, received the support of the government and in other cases have even been introduced by the government itself.

Additionally, recent years have seen the continued erosion of checks and balances between branches of government, a basic democratic principle that is vital for the survival of any democracy. There have been serious defects in the legislative process, and legislation has been introduced that would strengthen the powers of the government and weaken those of the opposition, which represents Israel's minority voices.

Another dangerous phenomenon is the continued undermining of the status of the judiciary branch. This manifests itself in the government's refusal to comply with court rulings made against it, and in legislative attempts to weaken the power of the Supreme Court.

A. Knesset v. Democracy

The Knesset, Israel's house of elected representatives, is the heart of its democracy. As such, it is an important symbol that purports to be a source of inspiration for the public. The Knesset has an indispensable role in defending democracy, promoting democratic values, and preventing the tyranny of the majority over the rights of the minorities. It has an especially critical role to play regarding matters of public dispute, whether political or social. The statements and the conduct of Israel's senior officials, and especially its Knesset members, have far-reaching implications. They shape the opinions of the Israeli public, its stance toward democracy, and how it relates to human rights and to minority groups.

Therefore it is particularly disturbing that much of the Knesset's anti-democratic activity over the last two years has been carried out using legitimate parliamentary tools, first and foremost legislation. A significant portion of these initiatives have been aimed at undermining the rights of Israel's Arab minority, and have also targeted the rights to free speech, to demonstrate, and freedom of association – especially as these rights apply to minority groups (ethnic, social, or political) - and towards those whose positions are not consistent with the ideology of the ruling majority.

This legislative record represents what is commonly referred to as the "tyranny of the majority", i.e. the majority's exploitation of its numerical advantage in order to harm the interests of minorities. Its practitioners often try to create a sense of threat to national security and raise the arguments of "defensive democracy" in order to justify this violation of rights – primarily those of Arab citizens. Nevertheless, the use of such arguments does not make these tactics legitimate or just. The runaway legislative process which we have been witnessing is may eventually bring about the destruction of the entire democratic system. We believe that the defense of the state and of democracy must be carried out proportionately and in appropriate ways, such that fundamental rights can only be denied or curtailed under the most extreme circumstances - a principle that is already established in Israeli law. Routinely denying the rights of political minorities should not be legitimized in any way, shape or form.

In addition to efforts carried out through legislation, we have recently seen an increase in disturbing anti-democratic attitudes in the Knesset and its committees, including extreme

examples of intolerance, verbal violence and even attempts at physical violence. These expressions of intolerance and delegitimization are primarily directed against representatives of the Arab minority in Knesset, and had reached an unprecedented nadir in the attack against MK Haneen Zoabi.

At the end of the Knesset's summer session, ACRI appealed to Prime Minister Benjamin Netanyahu and to Knesset Speaker Reuven Rivlin, warning of the grave abovementioned trends¹. In response, the Speaker of the Knesset wrote that he too is troubled by a portion of the bills advanced in the last session of Knesset². A response sent in the name of the Prime Minister to ACRI notes that a number of the proposed bills did not receive the support of the government and that others were not advanced in the Knesset.

Thus far a number of the abovementioned bills were passed through legislation while others reached advanced stages in the Knesset, in some cases with government approval. Additional bills are expected to be advanced during the current Knesset winter session. It is important to note that the wave of anti-democratic bills and the attempts to advance them cause damage even if the bills eventually rejected. Additional attempts to enact anti-democratic legislation are described below.

1. Harm to the Arab minority

In the previous chapter of this report³, which dealt with status of Israel's Arab minority, we examined in detail the laws that were passed and the bills that were advanced during recent Knesset sessions that have caused significant harm to the Arab minority in Israel. These fall into two major categories:

First, a series of legislative proposals currently being advanced are seeking to make the civil rights of Arab citizens conditional upon their accepting the “Zionist narrative” and their demonstration of “loyalty” to the Jewish State and the Zionist vision. In the face of this legislation it is crucial to stress that civil rights cannot be made subject to any conditions, certainly not to declarations of loyalty to specific values, and certainly not when those

¹ See also ACRI position paper from October 2010, “Harming Democracy in the Heart of Democracy”, detailing anti-democratic trends in Knesset (English) <http://www.acri.org.il/pdf/knesset031010en.pdf>

² Knesset Speaker Reuven Rivlin on anti-democratic trends: <http://www.acri.org.il/eng/story.aspx?id=778>

³ Project Democracy: The Arab Minority Chapter <http://democracy-project.org.il/en/wp-content/uploads/2010/10/democracy-minorities.pdf>

values are explicitly and intentionally exclusive of a segment of the nation's citizenry. These bills further ignore the rights of Israel's Arab minority as an ethnic minority and an indigenous minority, including their right to equality, to dignity, to freedom of speech, and the right to preserve their unique culture and character. Finally, a democratic state may place limits to prevent illegal and dangerous action by its citizens, but if it wishes to remain a democracy it must not impose limits on their beliefs, their opinions and their freedom of expression.

Second, a number of racist and discriminatory legislative proposals, violating the right to equality of Israel's Arab citizenry, were introduced. One such proposal enables communal villages to reject residency applicants on the basis of their "unsuitability to the social and cultural fabric" of the community – a well-known codeword for excluding Arab applicants, as well as members of other underprivileged groups such as immigrants or people with disabilities.

Another such example is the proposed legislation introduced by MK David Rotem and Robert Ilatov of the Yisrael Beiteinu party, which seeks to grant financial benefits towards higher education and housing for those who have served in the military or volunteered for National Service. In the explanatory notes of the legislation, military service and National Service are couched in terms of "loyalty to the state", and as such, one of the objectives of this law is "to show the state's appreciation to its loyal citizens who faithfully serve her." The proposed legislation has passed its preliminary reading.

2. Violation of freedom of speech, association, and political activity

In a democracy, freedom of speech and those rights deriving from it – freedom of dissent, freedom of association, and freedom of political activity – are essential and their significance cannot be overstated. Freedom of speech underlies our ability to give voice to ideas, to argue, to persuade, to influence, and to choose; as such it is the basis of all democratic activity and is hence referred to as the "heart" of democracy.

The protection of freedom of speech is especially needed when unpopular and even harsh, aggravating, and provoking ideas are expressed. In September, a judge at the Be'er Sheva Magistrate's Court system ruled on the right of a demonstrator to protest and said: "The right to protest is meaningless when the stage is only given over to popular opinions, held

by the majority, which are not widely disputed. The true meaning of the right to protest in a democratic society is evident when holders of a minority opinion make use of this right in order to try and persuade the majority.”

In the last chapter of this report, to be published in December, we will discuss in detail the violation of freedom of speech and political activity, and the infringement on the right to protest and the right to free political association. The erosion of these rights is part of a larger campaign that seeks to delegitimize the positions of minority groups and human rights organizations. In this chapter, we only address the legislative aspect of this trend, i.e. those proposed laws that threaten to undermine our essential rights. Below are a few examples

- Enforcing the notion of “Jewish and democratic” - broadening the prohibition on incitement: According to the bill introduced by MK Zevulun Orlev (Ha-Bayit ha-Yehudi), the law against incitement currently in the Criminal Code would be broadened, so that anyone who publishes a call that negates Israel as a Jewish and democratic state would be placed under arrest. This redefinition of a criminal offense is intended to limit political expressions that are unacceptable to a particular political group. The proposed legislation passed its preliminary reading in the Knesset and is expected to come before the Knesset's Constitution Committee in order to prepare it for first reading.
- Targeting human rights groups: Broadening disclosure requirements for organizations supported by foreign entities: The bill was submitted in February 2010 by MK Ze'ev Elkin (Likud) and others. According to its original language, any organization or person receiving financial support from a foreign government must register with the Political Parties Registrar in order to immediately report all such support. Furthermore, they must mark all their documents and declare at the start of any conversation that they are supported by a foreign government. Severe penalties were prescribed for those who violate these provisions. A more scaled-down version of the bill, which was approved in the Knesset's Constitution Committee, establishes the obligation to submit quarterly reports on donations, and also requires reporting specific campaigns that are funded by foreign countries. The bill passed its first reading.

The purpose of this bill is to delegitimize those human rights organizations and NGO's advocating social change that are funded, among other sources, by donors from foreign

countries. It seeks to harm their activities and their free exercise of association.

Following the demand of human rights organizations, the chairman of the Constitution Committee promised that the bill would be broadened to include reporting of all donations from foreign sources (including corporate and private donors, not only foreign governments.) Nevertheless, the damage has already been done – specific organizations have been marked as illegitimate. As for the transparency of funding, it is important to note that the existing law already obligates organizations to report such donations. Thus it is clear that the purpose of this bill is to heap additional obligations upon human rights groups, marking their activities as illegitimate and subversive.

- Boycotting the right to protest: Making boycotts illegal: The bill, which was submitted by 25 MKs in July of this year, would make it illegal for any person to initiate, promote, or publish material that could serve as an informational basis for a boycott. Such actions would violate criminal law and civil law, and make the violator liable for damages to any party injured in a boycott. A compensation for the sum of 30,000 NIS would be assessed without any need to prove actual financial injury. If a foreign citizen were involved, they would be prohibited from entering Israel for 10 years and would not be allowed to conduct business here. If a foreign government were involved, money owed to them by Israel would not be transferred, and they also would be barred from conducting business on Israeli soil. As if that were not enough, all these penalties would be applied retroactively, to one year prior.

Boycotts, as unsympathetic as they may seem, represent a legal, non-violent, and legitimate means of protest that is widely accepted throughout the world. As such, this bill violates Israeli citizens' freedom of speech and rights to protest and association. It discriminates against those who hold certain political positions that are opposed to those of the current political majority, and seeks to neutralize their ability to act.

The bill passed its preliminary reading and is supposed to be discussed in the Constitution Committee at the start of the Knesset's winter session in preparation for its first reading. It should be noted that the Ministerial Committee on Legislation did not approve the provisions on foreign nationals and countries – possibly for fear of damaging foreign relations – nor was the clause about retroactive damages accepted.

- Like a bad movie: Film industry must pledge allegiance: According to the bill proposed

in March of this year by MK Michael Ben-Ari (National Union) and others, Israeli filmmakers seeking public financing would be obligated to declare their loyalty to “the State of Israel, its symbols, and its Jewish and democratic values”.

The bill, which was rejected by the Ministerial Committee on Legislation, threatened to harm freedom of speech and the right to protest, and more specifically, targeted the artistic freedom of filmmakers in Israel. Proposed legislation of this sort seeks to prevent artistic freedom and to create art that is loyal and devoted to the political positions of the regime, as done in the darkest of regimes. As in the case of other bills discussed, the demands placed by this bill before artists are intended to limit the free speech of those political and national groups who do not accept the political positions of those who created the proposed bill.

In a similar context, following the announcement of certain artists that they would refuse to perform in the Ariel Cultural Center located in the West Bank, MKs Ronit Tirosh (Kadima) and Yariv Levin (Likud) initiated a bill that would deny state support to theater companies employing actors boycotting any venue on political grounds. That proposed law has not yet been advanced.

- Isolation from the world: Closing down NGO's involved in lawsuits against senior Israeli officials: According to the bill, submitted by 25 MKs in April 2010, any existing NGO involved in lawsuits against senior Israeli officials abroad would be shot down, and any request to establish an NGO promoting this topic would be denied. The explanatory notes to the bill, which has not yet been advanced, state that in recent years Israel's ability to present, justify and explain itself in the international arena have been significantly impaired, and that, “It is unfortunate that precisely in this era, when we should be united against baseless accusations made against Israel, there are Israeli organizations and NGO's that operate, subversively, against the State of Israel.” Based on this explanation, one can assert the position of the MKs who introduced the bill – they believe that all citizens have an obligation to help the ruling regime in its public relations overseas, and they must be united in their opinions against criticism leveled at the state.

Both the explanatory notes and the bill itself contradict the basic idea of democracy, according to which citizens are free to think as they wish, including views about the

government and the military, and that they are free to express their opinions and to act upon them in legal, non-violent ways in order to change the policies they oppose.

Criminal law expert Prof. Mordechai Kremnitzer commented on the bill on the Israel Democracy Institute website: "This proposed law would gravely harm freedom of association and freedom of speech, because it seeks to prevent activities that are legal by their very nature, and which could potentially advance the public's right to know, support freedom of information, and impact the enforcement of international law, to which Israel is obligated."

3. Additional violations of basic rights

- "Abu Basma Law": Deferring local elections: The Amendment to the Regional Councils Law, initiated by Interior Minister Eli Yishai (Shas) and enacted in November 2009, allows the Interior Minister to postpone local elections indefinitely. Though the law uses generalizing language and refers to "new regional councils", it is well known that the law was intended to indefinitely postpone elections for the Abu Basma Regional Council in the Negev. This regional council, created in 2003, is home to some 30,000 Bedouin citizens of Israel. Though it was set up seven years ago, no elections have yet been held for the council, and it is administrated by an official appointed by the Interior Minister. Thus, residents are denied their basic democratic right to elections are left without representation. ACRI and Adallah have petitioned the High Court of Justice against this amendment.
- Revocation of citizenship and rights for those convicted of serious crimes: Three bills were submitted in the previous Knesset session, whose common denominator was the attempt to "punish" people convicted of crimes against state security by infringing upon their basic rights.

One bill, introduced by MKs David Rotem and Robert Ilatov (both from Yisrael Beiteinu) in May 2010, states that the courts will be authorized to revoke the citizenship of anyone convicted of espionage or terrorist activities. The government supported the bill, subject to certain amendments. The Knesset's Interior Committee already held a debate on the proposed bill, and hearings are expected to continue during this current session

in order to prepare the legislation for its first reading.

A similar proposed law, submitted in April 2010 by MK Moshe Matalon (Yisrael Beiteinu) was intended to change existing electoral law so that those convicted of certain crimes – murdering the prime minister or terrorist acts – would be denied the right to vote in Knesset elections. The bill was rejected in the Ministerial Committee for Legislation.

A third bill, submitted by MKs Rotem and Ilatov in May of this year, and which has yet to be advanced, seeks to amend the Criminal Code, so that people convicted of espionage and harming state security would be denied their Social Security rights.

Clearly these crimes are some of the most severe violations of law, but we must not confuse harsh punishment with an attack on basic human rights. Current criminal laws already contain numerous tools for dealing with criminals convicted of serious crimes including, of course, long prison sentences. The bills in question call for a form of punishment that is not only inappropriate and unnecessary, but one that injures the basic rights of citizens. Citizenship and the right to vote represent the most fundamental rights in a democratic state, and they must not be violated. The revocation of citizenship entails numerous violations of other fundamental rights that derive from it.

- Provided you're on our side: Amnesty for opponents of the Gaza disengagement: In January 2010, the Knesset passed a law granting amnesty to protesters against the Israeli disengagement from the Gaza Strip who faced criminal proceedings as a result of their activism. Except for limited exceptions, the law provides sweeping amnesty for all these activists, bringing a halt to all criminal proceedings and expunging the criminal records of those who were convicted.

Although legislation that makes it easier to exercise the right to political dissent is welcomed in principle, the current law is problematic in that it discriminates between political and ideological activists from different political camps. Instead of promoting general principles that would cultivate political activities and protest, this law was advanced by the political majority in the Knesset for the benefit of the population they represent or whom they favor. Currently, the law is debated in the High Court after a petition against the law was submitted on the grounds that it is a discriminatory.

- **Big Brother is watching: Biometric Database Law:** In December 2009 the Knesset passed the Biometric Database Law introduced by MK Meir Sheetrit (Kadima). According to the law, official identity cards and existing passports will be replaced in the coming years with "smart" certificates containing a microchip, enabling the biometric identification of Israeli citizens – i.e. the identification of individuals by physiological characteristics – according to their fingerprints and faceprints. The law further stipulates that in order to prevent forgeries, facial photographs and fingerprints of citizens will be stored in a central biometric database.

Following public criticism and an anti-biometric campaign led by ACRI and civil society activists, the law was altered so that during the first two years of implementation there would be a voluntary pilot program, in which citizens will be able to choose whether to be registered in the database and receive their smart cards, or to remain with their current certifications. After the trial period is concluded the Knesset will vote whether to continue implementation of the law and the database or whether to cancel it.

Despite this amendment, the law could still seriously infringe upon several important rights of Israeli citizens. First, the act of collecting biometric data on civilians constitutes a serious blow to individual privacy. Next, there is real concern that the database, the likes of which does not exist in any other Western country, will not be sufficiently secure and discreet to keep out hackers, and that information from leaks may reach third parties. Additionally, the distinction between citizens agreeing to be registered in the database and those who decline is liable to generate discrimination between the two groups, where those who do not cooperate with the authorities by registering are more likely to be denied certain public services.

B. Government v. Democracy and Knesset

1. "Laws of governance": More government, less opposition

In June of 2009 the government introduced a series of bills intended to strengthen the coalition's ability "to govern". These bills - all of which passed their first reading - were also aimed at limiting the activities of the opposition in Knesset.

- "The Mofaz Law": While presently, a new Knesset faction can be created if at least a third of a current faction's MKs break off from their party, this bill seeks to allow any seven MKs to leave their party and establish an independent faction whether or not they constitute a third of their faction. The motivation behind the bill is to make it easier for large opposition parties to be split up. It is worth noting that the bill has been sharply criticized, including by members of the ruling party. According to Knesset Speaker Reuven Rivlin, "this intervention of the majority in the affairs of the minority, this is a form of majorization [the tyranny of the majority], and I cannot lend it my support, neither morally nor publicly". Minister Michael Eitan (Likud) stated that, "anyone who makes use of legislation to promote narrow partisan interests is making a mockery of the Knesset and of our Basic Laws, ignoring the accepted rules of the game and basic parliamentary decency, and severely injuring democracy. How is it possible to attempt to amend a Basic Law for the sole purpose of destroying a rival political party? Political rivals must be defeated in elections at the ballot box, not through the manipulation of Israel's Basic Laws".
- A bill that would require any proposed legislation whose implementation would cost more than 5 million NIS to be approved in Knesset with the support of at least 55 MKs, instead of the 50 MKs as stipulated by law today. The proposal would make it harder for the opposition to promote private legislation.
- A bill according to which, should the opposition succeed in bringing down the government in a vote of no confidence, but its leader would fail to establish a new government in its place, the existing government would continue to rule instead of dissolving the standing government as required by law today.
- A bill, nicknamed the "Little Norwegian Law", would enable ministers to resign from Knesset and have their seat taken by another member of their party's list, while maintaining the resignation reversible so that the ministers would be able to return to serve in the Knesset plenum.

One cannot to overstate the importance of a strong and effective opposition in a democratic country. Just as the role of government, i.e. the majority, is to rule, it is the role of the opposition, representing the minority, to criticize the regime and challenge it, to represent the views of voters who gave their voices to the opposition, and to present a significant

alternative to the path offered by the ruling government.

Each of the above-mentioned bills is problematic enough on its own, but taken together as a whole they represent a serious attempt to harm and weaken the opposition. These restrictions on the opposition tip the balances, presenting the government with excessive power and undermining the democratic process itself. This view is shared by the Speaker of the Knesset, as quoted in the media: “The draconian governance laws that have recently been introduced in Knesset are dangerous. Their motivation is political, and they are liable to erode the very foundations of parliamentary democracy”.

2. Making a mockery of the legislative process: The budget and the Economic Arrangements Bill

Every year during the preparation of the state budget – every two years since 2009 – the government sits down to decide on a long list of policy changes and legislative amendments that are necessary, in its opinion, for implementing the budget. These changes and amendments give shape to the Economic Arrangements Bill. This bill, which includes a myriad of chapters and amendments, is presented before the Knesset for approval in an accelerated legislative process conducted in parallel to the votes on the budget law.

The government, in particular the Treasury Ministry, regularly use the proposed budget law and the Economic Arrangements Bill as a means for making policy changes and carrying out reforms, as well as for promoting a change in legislation. These sometimes entail highly significant changes with far-reaching consequences, which also affect human rights and society. This use of the Economic Arrangements Bill as a tool for implementing the budget is inappropriate, seeing as it presents a bundle of often unrelated laws that are hastily passed through Knesset, without in-depth discussion or public dialogue, and without enough time for Knesset members to carefully study the issues on which they will be voting. It violates the customary rules of honest governance as well as the principle of separation of powers, since in effect it is the officials of the Treasury who are legislating rather than the elected representatives of the public. All this damages the status of the Knesset and its ability to properly fulfill its role – namely to carry out a critical, detailed debate on government legislative initiatives, and to check and restrain the power of the executive.

The Economic Arrangements Bill suffers from additional flaws. Often, large portions of the law are wholly unrelated to the state budget, such that there is no reason to vote on them within this framework. At times, the law has included broad reforms that deserved a thorough and systematic public debate. In other cases, provisions in the law have effectively canceled existing laws that were passed in Knesset through proper legislation. The vast scope of the Economic Arrangements Bill over recent years highlights the illegitimate use of this statute by the government. It seems that the government prefers to take the easy way out, attempting to advance nearly every meaningful policy and reform that it seeks to carry out through this bill with its truncated legislative process.

Recently, a High Court petition was filed against the biannual approval of the budget , including within it the Economic Arrangements Bill, rather than annual approval previously in place. The petition claims that this change fundamentally alters the balance between the government and the Knesset, weakening the legislature's ability to monitor the actions of the executive. The petition will be heard in front of an expanded panel of Supreme Court justices.

On a positive note, it should be mentioned that over recent years there has been a procedural improvement in the legislation process of the Economic Arrangements Bill. For example, the various topics in the law are now sent in an orderly fashion to the relevant Knesset committees for discussion, and are no longer brought to the Finance Committee as a single package as was the case in the past. Additionally, during committee discussions, various provisions are now removed from the bill, especially those that entail far-reaching reforms with significant implications. Nevertheless, the forum for the cancellation of the Economic Arrangements Bill, of which ACRI is a member, is not satisfied with these changes. We believe that proper legislative process requires that:

- all relevant materials be given to Knesset members at an early date so that they can study the bill in depth;
- debates on portions of the bill be carried out in only the appropriate professional Knesset committees;
- the bill only include provisions that are relevant to the state budget;
- the bill not include reforms and structural changes that have far-reaching implications, which require an in-depth public discussion;

- the bill not include provisions that cancel legislation previously passed in Knesset.

Some MKs share our criticisms, including Knesset Speaker Reuven Rivlin. This August, in a discussion about putting a stop to the Economic Arrangements Bill in its current format, Rivlin stated that, “there are significant reforms here that require a thorough public debate”. He added that, “it is legitimate to try and introduce reforms through the Economic Arrangements Bill as long as their scale is appropriate and whilst ensuring that a public debate on the matter at hand was carried out. The Economic Arrangements Bill must not become a major tool for defining policy – that instead of aiding the passage of the budget law, it becomes a principle law itself. This law, which seeks to bypass the Knesset, is unacceptable and illegitimate at its very base. We must not lend a hand to such an anti-democratic measure. The government is exploiting the Arrangements Law in order to pass almost any of its legislative initiatives, even those that could pass in a regular Knesset debate [...] During this past year, I repeatedly asked the government to advance their reforms through the normative legislative process, but they refused since they figured it would be easier to pass it in the framework of the Arrangements Law, and thus the bill got bigger and bigger. I will not allow this”.

Recently we were notified that efforts against the Arrangements Law have yielded success. As a result of the initiative of the Speaker of the Knesset, a significant number of provisions in this year's bill have been removed, including those that aren't directly related to the budget and others entailing reform that require deeper public involvement. We are hopeful that this is a sign that the Arrangements Bill will be used more sparingly in the future.

3. Broadening enforcement and punitive measures

A number of government-sponsored bills seek to expand the powers of state in law enforcement and punishment, while in the process infringing upon basic civil rights. This expansion is disproportionate and often unnecessary, as the existing laws already provide security authorities with the needed measures.

- Return of the British Mandate: “War on Terror” Bill: Prepared by the Justice Ministry and soon to be brought for approval in the Ministerial Committee on Legislation, the bill seeks to provide the state with more powerful tools for dealing with the threat of terrorism. While no one disputes the importance of combating terror, this bill would

grant law enforcement authorities far-reaching powers that would violate the basic rights of individuals - including the use of administrative detention and imprisonment - without ensuring their right to due process, and all the while significantly expanding the grounds for which these measures could be implemented.

The new law is designed to replace some of the existing legislation concerning security measures allowed during "times of emergency", parts of which are remnants from the time of the British Mandate. Advancing an amendment to Israel's emergency martial legislation would be a welcomed change. However, instead of establishing new measures that are appropriate for a democratic state, the bill affixes in new legislation many of the same old draconian measures. Amongst other provisions, the new law significantly expands the definitions of "terrorist organizations", "acts of terrorism" and "member of a terrorist organization". As such, the law places the title "terrorist" over the heads of people and organizations whose connection to terrorist activity is extremely tangential or coincidental. It provides state authorities almost absolute discretion in determining "who is a terrorist" and thus invites possible exploitation and abuse. The law is also problematic in that the state can declare any body as a terrorist organization without providing it with the right to appeal and without effective judicial review.

The bill includes provisions that would cause grave harm to the basic right to due process. For example, it establishes that the state can use classified materials in the course of various administrative and legal proceedings without exposing those materials to the public eye or allowing the defense to view them. Existing laws already enable the state to rely on secret evidence in various proceedings, but rather than reforming this practice, the new law reinforces it. It also expands existing laws concerning the introduction of evidence. For example, it allows the use of hearsay, which is generally inadmissible in criminal law, to validate a confession given by a suspect under investigation. In addition, among the articles dealing with the financing of terrorism, there is a small clause that turns administrative detention - which today can only be implemented under a declared state of emergency - into part of the normative, established legislation of the State of Israel.

The bill thus seeks to take all the stern and draconian provisions from the laws concerning a "state of emergency" and from security measure carried over from the

British Mandate period and turn them into part and parcel of Israel's primary, normative law, all the while tremendous harming basic human rights and Israeli democracy. Of course the state must have effective tools in order to successfully combat terrorism and carry out its obligation to protect its citizens. Nevertheless, these tools and measures must not be unlimited. Because it is a democracy, Israel must fight terrorism in a manner consistent with the fundamental principles and basic rights that underlie its existence.

- "The Knife Law": Body searches in entertainment places: The Justice Ministry has introduced an amendment to the law⁴ that would allow police to carry out body searches on a civilian who is present in places considered likely to experience violent incidences – such as nightclubs, restaurants, sports stadiums and educational institutions – even when there is no suspicion that he or she had committed a crime. This practice contradicts one of the basic principles of democracy, namely that a police officer is allowed to invade the privacy of the individual and carry out searches only when there is a reasonable suspicion of a crime, and when a search is necessary to uncover relevant evidence.

The chosen rephrasing of the law raises the fear that it will lead to arbitrary police conduct and to a malicious employment of body searches in places of leisure. Experience has shown that in the absence of sensible criteria set for carrying out body searches, the first to be searched are those who seem “different” – whether because of the color of their skin, their accent, their religious head covering, or other traits.

Dr. Naama Carmi has written: "This bill is a clear example of how the authorities are trying to expand their powers simply because they can. Perhaps the metaphor of using a cannonball to kill a fly is inappropriate here, because violence is not a fly and the struggle to eradicate it is certainly a worthwhile goal. But in doing so, you have to take appropriate, proportionate measures. If you imposed a curfew on all Israeli citizens every night and prevented them from leaving their houses, you'd certainly reduce violence, yet no one would dare imagine that this would be an appropriate means to achieve that goal".

- Crossing the border: Imposing more severe penalties on "infiltrators" and those

⁴ Amendment to the Law of Authority for the Protection of Public Security 5765-2005

aiding them: The new government-sponsored bill establishes, among other penalties, long prison sentences of 5-7 years for anyone "infiltrating" Israel or providing illegal aliens with aid. The bill does not distinguish between "border infiltrators", "refugees" and "migrant workers". It imposes prison sentences for lengthy periods of time and would enable carrying out pointless administrative detentions without distinguishing between various individuals. As such, the bill ignores Israel's obligations towards asylum seekers and refugees.

The government has chosen at present not to advance the bill, thanks in part to pressure from human rights groups such as ACRI. Nevertheless, it appears that its key principles will be included in a new citizenship and immigration law that is currently being formulated in the Justice Ministry, or alternatively, included in an amendment to the existing law.

C. Knesset and Government v. Judiciary and Democracy

1. Non-compliance with Supreme Court rulings

"A court order requiring the state to take certain measures, whether it represents a temporary legal remedy or the final judgment in a case, places mandatory obligations upon the state. Compliance with court rulings is incumbent not only upon the residents of the state and those who enter its borders, but first and foremost upon the state itself."

Does this seem like an obvious statement, that such is the case in a democracy? Apparently not, for Israel's Attorney-General found it necessary to print these very words in the opening to his recently published directives. He then went on to list a series of steps that state authorities must take should the courts hand down a ruling against them, in order to insure state compliance. The need for such a directive arose from the numerous cases over recent years in which state authorities have ignored court rulings or failed to implement them in a timely manner.

In a democracy, where checks and balances between the branches of government are crucial, disregard for the judiciary is a sure recipe for the decline of democracy. It damages the authority and status of the courts, which are often the last resort for individuals who

suffered by the actions of the authorities. Disregard for court authority violates human rights and leads to a tyranny of the majority which, in the absence of an effective judiciary, can rule without restraint solely through the executive and legislative branches.

Last year, we examined the serious phenomenon of non-compliance with court rulings in our report "The State of Human Rights in Israel - 2009" (pp. 67-70), published in December 2009. At the beginning of 2010 Attorney Yehudit Karp, a former deputy attorney general, sent a detailed memorandum on the subject, based on cases handled by ACRI, Yesh Din and Adallah, to the Attorney General. Following receipt of the memorandum, the Attorney General saw fit to publish the directives mentioned above.

Among the recent High Court rulings that have not been implemented or were long-overdue when implemented are the following cases⁵:

- Cancellation of the arrangement binding migrant workers to their original employers (HCJ 4542/02 Kav LaOved v. Government of Israel)
- Eliminating the division of the state into national priority areas in education (HCJ 11163/03 Supreme Monitoring Committee for Arab Affairs in Israel v. Prime Minister)
- Dismantling sections of the separation barrier (HJC 2732/05 Hasin v. Government of Israel, HCJ 8414/05 Yassin v. Government of Israel, HCJ 1748/06 Kissiya v. IDF Commander in the West Bank)
- Protection of educational institutions in Sderot (HCJ 8397/06 Wasser v. Minister of Defense; HCJ 8619/06 Sderot Parents Committee v. Minister of Defense)
- Construction of new classrooms in East Jerusalem (HCJ 5185/01 Fadi v. Jerusalem Municipality, and other petitions)
- Construction of a new high school in the vicinity of the Abu Talul village in the Negev (HCJ 2848/05 Fatma Abu Sbeileh v. the Ministry of Education)

5 For more on these cases and examples of others see: ACRI's "The State of Human Rights in Israel and the Occupied Territories – 2009 Report" (p. 71-74) and the memorandum of Att. Yehudit Karp.

Chapter 3: Government Institutions

- Demolition of an illegally built structure at the Derech Avot outpost (HCJ 8255/08 'Ali Muhammad Issa Moussa v. Minister of Defense et al)
- Temporary injunction ordering the cessation of road construction of between the Eli settlement and the illegal outpost Ha-Yovel (HCJ 2759/09 Labum v. Minister of Defense)
- Integrating children with disabilities in the regular education system (HCJ 2599/00 Yated - Society for Parents of Children with Down Syndrome v. Ministry of Education)
- Establishment of a Committee to examine “targeted killings” (HCJ 769/02 Public Committee Against Torture in Israel v. Government of Israel)
- Making schools accessible to students with disabilities (HCJ 7081/93 Botzer v. the Maccabim-Re'ut Regional Council. It should be noted that in this case and the following one, the state did implement the specific ruling, but did not act in the spirit of the ruling in other similar cases that have arisen since)
- Appointment of Reform and Conservative representatives to local religious councils (HCJ 4733/94, 6028/94, 7105 /95 Naot v. Haifa Municipal Council; Shavit v. Kiryat Tivon Local Council, Meretz faction in the Jerusalem Municipality v. Jerusalem Municipal Council)

In August, along with the publication of the new directives by the Attorney-General, Adv. Karp received a reply from the Ministry of Justice addressing all the cases mentioned in her memorandum and explaining how they evolved and why implementation of these rulings was not carried out or was significantly delayed. In summary, the Justice Ministry explained that state's non-compliance with the court rulings was due to the "extreme complexity of these cases, some of which entail significant budget expense, some which have implications for third parties, some of which require the establishment of new procedures and various complex administrative actions. Because of their complexity, these court rulings require an extended period during which they can be implemented". Putting it simply, the state claimed that the rulings were not carried out or were significantly delayed because implementation was complicated and at times expensive.

These explanations are unsatisfactory. The state's conduct described in the letter – delays and postponements in implementing court rulings and repeated requests for deadline extensions – is precisely the sort of behavior that the court has criticized and sought to prevent. Moreover, the complexity and the cost of implementation were well known to the justices when they arrived at their conclusions and they nevertheless instructed the state to carry out a just resolution. And so, considerations of cost and complexity cannot serve as a justification for non-compliance, as the court had taken them into consideration and ruled that necessary steps need to be taken nonetheless.

"Indeed, situations can arise where there are obstacles or mishaps in implementation, but the phenomenon [of noncompliance] cannot be attributed to these," said Att. Karp in an interview with Ha'aretz in March 2010. "In my opinion, the increasing number of cases in which court rulings were implemented after long delays, partially implemented, or not implemented at all, cannot be regarded as chance bureaucratic failures; rather they've taken on the character of a dangerous phenomenon that strikes at the very heart of what is considered a proper governance culture." According to Karp, "the systematic and conscious disregard for carrying out court rulings represents a real and immediate danger to democracy, to the rule of law, and to the separation of powers in Israel. Where there is 'no judge, and no justice', where the government rules arbitrarily by force - the disintegration of social order in the country is soon to follow".

2. Interior Ministry ignores rulings of the administrative courts

The administrative courts have become the country's main venue for adjudicating matters of entry and immigration to Israel. Over the years it has become evident that the Ministry of the Interior does not hold the principled decisions of these courts in high regard, nor does it see itself as obligated to carry out their rulings. Rulings handed down by the administrative courts which defy existing policies of the Interior Ministry have been implemented only with regard to the concrete case discussed in court, and unfortunately have not resulted in a change of policy required to incorporate the ruling into the Interior Ministry's procedures. Moreover, in many cases the ministry chooses not to appeal these rulings, but nevertheless continues to conduct business-as-usual based on policies that have been found legally unacceptable by the courts. The Interior Ministry goes one step further to claim that these rulings - which the ministry declined to appeal - are incorrect and thus are

not considered abiding guidelines.

For example, three separate judgments of the administrative courts have established that for the purpose of granting residency status in Israel, applying the category of a “lone and elderly parent” of an Israeli citizen should be based upon the applicant's life situation and not just on the dry facts. For example, if the elderly parent has other children living abroad besides his children here, but he or she cannot rely on support from these other children, then the parent should be considered a lone parent and be granted residency status. The Interior Ministry has chosen not to appeal these court decisions, and yet it has ignored in practice the main principle in these rulings. According to the ministry, these rulings are not binding other than in the specific circumstances of the individual cases being adjudicated. Other lone and elderly parents with identical circumstances are being denied residency status when they apply for it at the Interior Ministry offices. ACRI has submitted a petition on the matter to the Be'er Sheva Administrative Court.

The ministry's disregard of the principled legal decisions made by the administrative courts makes it impossibility to eliminate the ministry's illegal conduct. For according to the ministry, it can choose whenever it wishes to refrain from appealing a court decision on an illegal conduct by simply continuing to carry out existing problematic policies. This severely damages the status of the courts, the principle of judicial oversight, the separation of powers, and the rule of law. In a democratic country, one of the judiciary's roles is to monitor the actions of the executive and to clarify the limits of its powers. The decisions of the court, if they are not appealed, have the force of law. If the executive authorities disagree with the court's decision they have the right to appeal it, but if they choose not to appeal then the ruling is binding upon them and they are obligated to adjust their policies so they are consistent with principles stipulated in the court ruling. Regarding this, we should take heed of the warning of Supreme Court Justice Ayala Procaccia: “A state where the ruling authority takes the law into its own hands, implementing court orders against it when it so desires and ignoring others when it so desires, is a state that is sowing the seeds of disaster and anarchy.”⁶

6 HCJ 4805/07 The Jewish Center for Pluralism – The Movement for Progressive Judaism in Israel v. The Ministry of Education

3. Legislative attempts to harm the status of the High Court

In addition to ample examples of state authorities ignoring court directives, we have also witnessed a series of attempts by Knesset members to limit the authority of the judiciary and to weaken its power. This has been carried out through legislation designed to circumvent explicit rulings of the court and thus make them irrelevant, and through bills designed to weaken the judicial branch as a whole. These attempts raise grave concern because they tilt the delicate balance of power between the branches of government – a balance that is essential to democracy, to the preservation of human rights, and to protection against a tyranny of the majority. The judiciary serves as a counterweight to those authorities chosen by the majority – the Knesset and the government – and at times it serves as the last bastion for safeguarding the rights of the individual, especially minority rights threatened by the majority. Therefore, weakening the power of the judiciary is liable to end up harming the civil rights of minorities.

Examples of legislation “bypassing” the High Court:

- Civil Damages Law: In 2005, the Knesset approved an amendment to the Civil Damages Law aimed at depriving residents of the Occupied Territories the right to receive compensation for damages caused to them by Israeli security forces, whether in the context of war actions or outside of that context. The amendment constitutes a severe blow to the most basic rights afforded to all individuals, chiefly the rights to life, equality, dignity, bodily integrity and property, and an individual's right to seek legal remedies through the courts.

In late 2006, following a petition submitted by nine human rights organizations including ACRI, the High Court, in an expanded panel of nine justices, ordered the cancellation of the amendment, as it contradicted the Basic Law: Human Dignity and Liberty. Nevertheless, six months after the ruling was handed down, the government prepared a bill to bypass the High Court ruling in order to re-enact the revoked amendment. The bill passed its first reading in the 17th Knesset. The continuity rule was applied to the bill in the 18th Knesset, and it was debated twice in the Knesset's Constitution Committee in order to prepare the bill for second and third readings.

- Extending the “Citizenship Law”: The Citizenship and Entry into Israel Law (Temporary Order), 2003, prevents the possibility of attaining a legal status in Israel by any Palestinian or resident of an Arab country who is the spouse of an Israeli citizen. The law, enacted as a temporary order for a limited time, violates the right to family life and the right to equality of Israel's citizens, principally its Arab citizens.

In May 2006, an expanded panel of the Supreme Court rejected a petition filed against the law in a 6-5 decision. However, six of the eleven justices ruled that the law itself was unconstitutional, due to its violation of the abovementioned rights. Five of the justices agreed that this was reason enough to have the law canceled within six months of the ruling. Despite this, the law has been renewed time and again, and remains in effect to date. During this time, Knesset members have made attempts to pass legislation that would limit the High Court's jurisdiction to consider the Citizenship Law or to cancel it, by giving the law constitutional status and enshrining it within the Basic Law: Human Dignity and Freedom. A bill in this vein was submitted to the Knesset at the end of 2009 by MK David Rotem (Yisrael Beiteinu) and 44 other MKs. The bill has not yet been advanced, in the absence of agreement within the coalition⁷.

- Preventing Palestinian movement on Route 443: At the end of 2009 the High Court accepted the petition filed by ACRI and the residents of six villages in the West Bank, and ordered the IDF to revoke its ban imposed on the travel of Palestinians on Route 443. The court accepted the argument that the prohibition on Palestinian travel denies them their right to freedom of movement, and represents harsh, sweeping discrimination between Arabs and Jews, whose free movement on the road is unrestricted.

Following the court ruling, a number of Knesset members decided to restore this discriminatory and unconstitutional practice, this time through the force of law. According to the bill submitted by MK Moshe Matalon (Yisrael Beiteinu) and others, the State of Israel would annex a section of the West Bank where the road passes, which would effectively enable the continued ban on Palestinian travel. Another bill, submitted by MK Danny Danon (Likud), suggests that the court's authority to determine travel arrangements on the road be “revoked”, and that authority would

⁷ See also the commentary of Prof. Uriel Procaccia regarding this bill and the harm it would cause to democracy.

be exclusively in the hands of security officials. The bill assumes that it is perfectly acceptable in a democracy to take a matter with significant legal and constitutional implications, and remove the court's jurisdiction over it. The bill was not advanced.

Examples of legislation that seek to weaken the Supreme Court:

- Increasing the number of Supreme Court justices: Unlike other attempts to increase the number of judges in various courts and tribunals to handle the growing caseload within the system, the stated goal of this bill, which was introduced by MKs Yariv Levin (Likud) and Michael Ben-Ari (National Union), is to allow the appointment of judges with certain political opinions and worldviews and to exclude others.

At the start of 2010 the Ministerial Committee on Legislation rejected the bill. However, there are still MKs seeking to promote measures aimed at weakening the authority of serving justices, for example by changing the process by which the justices are selected.

- Establishment of a constitutional court: The bill was initiated in April 2009 by MK David Rotem (Yisrael Beiteinu), but it is linked to an initiative that has been surfacing for several years. The aim of the legislation is to remove from the Supreme Court the authority vested in it today to determine whether laws passed by the Knesset are constitutional or not, and to cancel any such laws that contradict Israel's Basic Laws. This proposal seeks to significantly weaken the Supreme Court and to transfer its power of judicial review to another body, which would be less judicial and more political.

It is important to remember that in a democracy, where there is separation of powers between the branches of government, the court's role is to ensure the rule of law and to prevent human rights violations in general, and in particular, to prevent violations of constitutional rights, including when these violations are carried out through legislation. This is one reason why the judicial review of the laws passed by Knesset must be placed in the hands of justices who are independent of the political selection process. Only in this way can the political majority be restrained from oppressing the rights of the minority. For this reason, the proposed emptying of the court's powers through these bills would severely undermine the principle of

separation of powers, the ability to safeguard human rights, and the democratic system itself.

Conclusion

The winds currently blowing in Israel's corridors of power bode ill for its democracy. The institutions of state have been all too willing, with alarming ease, to concede many of the foundational elements of democratic rule; they obviously do not view the ground rules of democracy as something worthy of constant protection.

This alarming process negatively affects both sides of the equation: When the government promotes anti-democratic legislation, and when a populist Knesset conducts itself violently and through silencing the voices of others, it is no wonder that the public should lose its faith in democratic values and its respect for the institutions that are assumed to represent it. This creates a vicious cycle in which the government's contemptuous attitude toward democratic principles reinforces the public's deteriorating respect of the ruling authorities, and vice versa. The result is a severe blow to the stability and effectiveness of democratic rule in Israel.

Democracy is founded on the reciprocal relationship between the people and their representatives, whether direct or indirect, in the various institutions of government. For this relationship to work, government authorities must show their respect for citizens by respecting the democratic ground rules, the same rules that effectively link the people with their government. It also requires a populace that holds a fairly high degree of trust in the institutions of state, though not too high, since in any democracy trust must live side-by-side with skepticism and the watchful criticism of government actions.

It is the feelings of lack of trust, of disenfranchisement, and of an inability to influence government that pose the most serious dangers to the wellbeing and vigor of democracy. These feelings are manifested by a declining interest by citizens toward the rules of participatory democracy and by the waning of their political involvement. All these undermine the legitimacy of the democratic system of governance.

Indeed, recent surveys show a marked and continuing decrease in the level of trust and commitment that Israeli citizens feel toward various state institutions. For example, the

Israel Democracy Institute found that between 2000 and 2009 there was a significant decrease in public confidence toward almost every institution of government (except the presidency). Particularly troubling is the fact that the lowest level of public trust was afforded to the Knesset and the political parties that comprise it, i.e. to the very institution that is directly chosen by the public in elections, and which is meant to represent its opinions and positions. A study conducted by the University of Haifa found a drastic drop in public trust in the court system – the institution that is trusted with protecting citizens from the abuses of the ruling powers. Polls indicate a decline in the public's interest in politics, including a significant decrease in voter participation; public dissatisfaction with the services provided by the state; and a pervading sense that corruption within the system has increased.

To stop this erosion, to strengthen democracy, it is imperative that the ruling authorities – especially the Knesset and the government – will once again respect the democratic ground rules. They must prevent the promotion of legislation that harms democracy and civil rights; they must painstakingly ensure proper legislative and democratic processes; they must respect the decisions of the judiciary; and finally, they must cultivate and project, within the corridors of power and to the outside world, an atmosphere of democracy and pluralism, which will serve as a role model to all of its citizens.