The Status of Netanyahu’s Conflict of Interest Arrangement Amid the Judicial Overhaul

A 2020 conflict of interest arrangement, drawn up by then-Attorney General Avichai Mandelblit and upheld by the High Court of Justice, prevents Prime Minister Benjamin Netanyahu from involving himself in judicial appointments or legislation that could impact his ongoing corruption trial.

Netanyahu recently announced that he is no longer bound by the conflict of interest arrangement and would play an active role in overseeing his government’s ongoing overhaul of the country’s judicial system. Attorney General Gali Baharav-Miara rebuked the prime minister and announced that he was acting in violation of the law.

The issue of Netanyahu’s conflict of interest agreement is emerging as a significant fault line between Israel’s government and judicial system as the former moves forward with its efforts to disempower the latter. This is the first, and likely not the last, overhaul-related standoff between Israel’s branches of government in which one branch views the actions of the other as illegitimate.

Background

On November 21, 2019, Prime Minister Netanyahu was charged with bribery, fraud, and breach of trust. Then-Attorney General Avichai Mandelblit filed the cases with the Jerusalem District Court on January 28, 2020, initiating Netanyahu’s trial, which is still ongoing.

Netanyahu is standing trial in three cases:

- **Case 1000 (fraud, breach of trust)**: Netanyahu and his family members allegedly requested and accepted gifts from Israeli businessman Arnon Milchan and Australian businessman James Packer in exchange for favors.
- **Case 2000 (fraud, breach of trust)**: Netanyahu allegedly attempted to accept a bribery deal from Yediot Ahronot publisher Arnon Mozes, in which Netanyahu would try to limit the circulation of Israel Hayom, a rival publication, in exchange for favorable coverage in Yediot Ahronot.
Case 4000 (bribery, fraud, breach of trust): As communications minister, Netanyahu allegedly accepted a bribery deal from media mogul Shaul Elovitch in which he made regulatory decisions that financially benefited Elovitch in exchange for positive coverage on his Walla News site.

In July 2020, Mandelblit issued a legal opinion that Netanyahu’s criminal cases created a conflict of interest since his position as prime minister gave him power over issues that could impact his trial. In order to allow Netanyahu to continue serving as a sitting premier under indictment, an unprecedented scenario in Israeli history, Mandelblit wanted Netanyahu to sign a conflict of interest agreement barring him from involvement in law enforcement and judicial appointments.

After Netanyahu refused to agree to this arrangement, in November 2020 Mandelblit ruled that the prime minister was nevertheless banned from involving himself in or influencing issues that could impact his trial. This includes:

- Appointments to law enforcement agencies
- Appointments to the Supreme Court and Jerusalem District Court
- Legislation that could impact his legal proceedings
- Influencing ministers or officials who have authority over issues related to his trial

In March 2021, despite Netanyahu’s continual objections, the High Court ruled that Netanyahu was obligated to adhere to Mandelblit’s conflict of interest arrangement.

Back in Power: Netanyahu vs. Baharav-Miara

Following Netanyahu’s return to the premiership and newly minted Justice Minister Yariv Levin’s announcement of the government’s plans to overhaul the judiciary, Attorney General Gali Baharav-Miara filed a clarification with the High Court affirming that Netanyahu was still bound by the conflict of interest agreement drawn up by her predecessor.

On February 2, Attorney General Baharav-Miara sent a letter to Prime Minister Netanyahu instructing him to avoid “intervening in initiatives regarding changes to the judicial system” in order to avoid a conflict of interest relating to his ongoing corruption trial. She later clarified that Netanyahu was permitted to make public statements calling for calm amid the social upheaval caused by the overhaul. Netanyahu expressed contempt for the arrangement, referring to it as a “gag order.”

On Thursday, March 23, Prime Minister Benjamin Netanyahu announced that he would involve himself directly in the judicial overhaul and that his hands were no longer tied. He cited the recent passage of the incapacitation law, which prevents the High Court from declaring the prime minister unfit, as effectively canceling the conflict of interest agreement. The following day, Baharav-Miara sent a letter to Netanyahu informing him that his conflict of interest was indeed still in effect, and by flouting it he was acting illegally and violating a Supreme Court ruling.
Irrespective of Netanyahu’s recent announcement that the coalition would pause the judicial overhaul until after Passover to hold negotiations with the opposition, the prime minister’s direct involvement in reshaping the country’s judiciary remains a point of contention between him and the attorney general.

**Incapacitation Law: Legal and Practical Implications**

In the initial weeks following Netanyahu’s return to power, Attorney General Baharav-Miara reportedly held consultations with legal experts and Justice Ministry officials about declaring Netanyahu unfit to serve as prime minister and removing him from office due to his legal conflict of interest. In response to outcry from the government, Baharav-Miara denied that she would consider taking such an unprecedented step. During Netanyahu’s previous tenure, Mandelblit had also considered declaring Netanyahu unfit following his indictment, although ultimately concluded that doing so was not yet warranted.

The incapacitation law, an amendment to Basic Law: The Government, sought to preclude this possibility by specifying that a prime minister can be declared unfit for office only by himself or by three-quarters of the cabinet (or 80 MKs, if the prime minister does not allow the cabinet to vote on the matter). Prior to the passage of this Basic Law amendment on March 23, the attorney general’s grounds for declaring a prime minister incapacitated had stemmed from Clause 30 of Basic Law: The Government, which establishes procedures for when a prime minister is unable to carry out their duties due to mental or physical incapacitation. The Basic Law does not define what constitutes incapacitation, nor did it establish who held the power to declare the prime minister incapacitated. However, when rejecting a petition to declare then-Prime Minister Ehud Olmert incapacitated while under criminal investigation, the High Court explained that “should it become apparent in the future that a prime minister’s conduct does not allow criminal investigations to be carried out in an appropriate manner, there might then be room for the attorney general to declare the prime minister as temporarily incapacitated.”

Following the passage of the incapacitation law, Netanyahu claimed that he was no longer bound by his conflict of interest arrangement. Legally, this is not true; as Baharav-Miara clarified, Netanyahu’s conflict of interest arrangement is still in effect. Practically speaking, it does explicitly prevent the attorney general from declaring him incapacitated for violating it.

**Conclusion**

Benjamin Netanyahu’s conflict of interest arrangement drafted by Mandelblit and upheld by the High Court sought to provide a legitimate path for a person under criminal indictment to serve as prime minister without concern that he would privilege his personal legal interests over those of the public. Netanyahu’s announcement that he no longer views himself as bound by this arrangement marks a dramatic escalation in the government’s face-off with Israel’s legal establishment. At the moment, it does not appear that a constitutional crisis is imminent in response to this face-off, given that neither Baharav-Miara nor the High Court has suggested
they would pursue legal action against Netanyahu or freeze the implementation of the incapacitation law. As a result, Netanyahu will face no immediate legal recourse for the decision to flout his conflict of interest arrangement. But this situation, the immediate consequence of legislation significantly hampering the ability of the legal system to hold elected officials accountable to the law, is indicative of how the judicial overhaul is already reshaping Israel’s political system.