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Reform or Revolution? A Brief Roadmap for Israel's Judicial Overhaul as a Constitutional Moment

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The Supreme Court of Israel, obtained via Wikimedia Commons

For an outsider, the images of hundreds of thousands of Israelis taking the streets to protest the proposed judicial overhaul championed by Prime Minister Benjamin Netanyahu may seem unlikely. Israel is a democracy under the constant threat of war with neighboring countries. It is at the height of an international campaign to prevent Iran, whose leaders are regularly threatening to wipe Israel off the world map, from developing a nuclear weapon. It maintains the occupation of the West Bank for over 50 years, with all the obvious military,

diplomatic, and moral implications. Why would an initiative to change the theoretical structures of judicial review, or rearrange the judicial selection procedure, be what divides the Israeli society?

Indeed, quite a few influential American publications doubted the warnings heard from various Israeli public figures, who claimed the newly announced judicial overhaul could effectively abolish the separation of powers in Israel. The Wall Street Journal, for example, backed the legislation, alleging that "Israel's Supreme Court has more power than America's but without the democratic checks." Newsweek used more explicit language, and claimed that the protests are reflecting a "full meltdown mode" of "armchair pundits [...] frantically slinging mud in all directions to mislead and scare the public."

This perspective, however, reflects a lack of knowledge of Israel's constitutional structure. The reform is aimed at effectively abolishing the Israeli checks and balances. A move by one branch of government to change the fundamental constitutional structure of a country to be free of any bounds of supervision has a name. It is not "reform"; it's revolution.

Shaking Israel's Constitutional Structure

A constitutional moment can be described as a political timeframe, in which the public or a large portion of it raises out of its political apathy and engages in the reframing of the social contract. Israel's "constitutional moments," to use the theoretical framework coined by Bruce Ackerman, are not always as distinct as those of other nations. Due to a historic political deal, Israel writes its constitution one article at a time. Each article is legislated as a separate "Basic Law". Over 75 years of independence, 13 Basic Laws have been legislated. The Supreme Court of Israel is authorized to overrule regular legislation that is strictly contradictory to some of these Basic Laws, and in particular, legislation that is in breach of Israel's Basic Law: Human Dignity and Liberty, the Israeli bill of rights. This Basic Law, legislated in 1992, states that it is superior to ordinary legislation. The Supreme Court interpreted that clause to grant it authority to overrule legislation it found contradictory to this Basic Law, in the well-known Bank Hamizrahi case of 1995, the Israeli equivalent of *Marbury v. Madison*.

Unlike the situation in the United States, however, there is no serious procedure of constitutional amendment in Israel. The Parliament can cancel many of these Basic Laws with a simple vote. That fact makes Israel's "constitutional moments," in which the most fundamental and basic terms of the social contract are determined, very fragile.

Thus far, constitutional literature found the Israeli example to be a hopeful one that demonstrates how stable democracy was able to emerge from a constitution-less constitutional structure. The Supreme Court was understood to be the main check and balance that protects civil and human rights. Thus far, it was a common political understanding that this fragile constitutional structure should not be dramatically shaken.

Arguably, it probably never was seriously shaken, despite the far-right's harsh criticism of the Court, until Prime Minister Benjamin Netanyahu formed his current Cabinet. The judicial overhaul was presented by Minister of Justice, Yariv Levin, who's considered Netanyahu's protégé, shortly after his appointment this January. The "reform," as he calls it, could be described as containing three main aspects.

First, it aims to limit the Supreme Court's ability to overrule unconstitutional laws. According to the proposed amendments, the Supreme Court will not be able to overrule legislation with a simple majority anymore. Instead, a majority of 12 out of the 15 Justices will be required to overrule an unconstitutional law. Furthermore, even if the Court found a law to be unconstitutional, Parliament could simply re-legislate it with a majority of 61 out of its 120 members. Israel has a parliamentary system, based on a mechanism of "Ruling Coalition," in which the Prime Minister is also the most influential legislator. Accordingly, the Cabinet practically always has, by definition, 61 votes in its favor.

Unlike the claim presented by some American news organizations, such as the Wall Street Journal, the Supreme Court of Israel currently cannot "strike down laws that it finds merely unreasonable, which can cover most anything." The Supreme Court can only strike down laws that are contradictory to the Basic Laws in an obvious and unjustified way. It did it only 22 times in the history of the nation, in extreme situations. For example, it overruled laws that allowed the State to expropriate private Palestinian lands if a Jewish settlement was established on them.

Second, the reform seeks to change the way judges, including Supreme Court Justices, are being appointed. Today, judges are appointed by a unique committee assembled of 9 members: 3 sitting Supreme Court Justices; 2 members of Cabinet; 2 members of Parliament, usually one from the Coalition and one from the Opposition; and 2 independent representatives of the Israeli Bar Association. Supreme Court Justices can only be appointed with a special majority of 7. This structure maintains a special need to negotiate and compromise. The Coalition cannot appoint a Justice without the support of at least one sitting Justice. Sitting Justices cannot appoint a candidate, too, without the support of the Coalition. The overhaul aims to reshape the committee, granting an automatic majority to the Coalition.

Third, the reform is aimed at stripping Israeli legal watchdogs of their enforcement authorities. Today, each Israeli ministry has a legal advisor that serves as a watchdog, preventing politicians from advancing illegal initiatives. These legal advisors are not expected to answer to politicians, but to the attorney general (AG), which in Israel is not a political figure. The reform is aimed to change that by allowing members of the Cabinet to fire and appoint their own legal advisors and watchdogs and stripping the AG of the authority to exclusively interpret the law for the Cabinet.

The combination of these three initiatives unearths that this is not a justice reform. These initiatives, if they are to be legislated, will allow the executive branch in Israel to be free of any checks and balances. The legislator in Israel is not really an independent branch, by design: the Prime Minister controls Parliament and holds the authority to enforce “Coalition discipline,” so that members of his Coalition are practically forced to vote according to his will, as long as they are interested in maintaining power. The Supreme Court and the AG are therefore the only mechanisms to limit the power of the executive branch. The reform is designed to strip them of any ability to mitigate the executive. Senior Cabinet members do not even really deny it. For example, when the Minister of Treasury, one of the greatest supporters of the legislation, was faced with the question “what will defend human rights after the reform,” he simply replied: “I will.”

What Happened?

Benjamin Netanyahu has been the Prime Minister for over 15 (nonconsecutive) years, and even though he undoubtedly promoted conservative policies, he never previously seriously threatened the constitutional structure of the country. In fact, just 10 years ago, Netanyahu himself said that "in Israel, the court is, and will remain, independent. Any attempt to harm the independence of the courts will be dismantled. I will personally dismantle any attempt to harm or limit the independence of the judiciary." What changed, then? I claim that Netanyahu went through personal radicalization; and that separately, Israeli society is getting more radicalized.

Netanyahu's own radicalization is rooted in the fact he is facing serious corruption charges. His trial for bribery, fraud, and breach of trust charges is being litigated nowadays at the Jerusalem District Court. The corruption charges against Netanyahu led some of his more moderate political allies to refuse to join his Coalition. That refusal led Israel to an electoral nightmare, in which no member of Parliament was able to form a Coalition. Accordingly, Israelis went to the polls and voted in 5 general elections within 4 years. Netanyahu was briefly voted out of office, by an unlikely Coalition of religious right parties, the Israeli political center, the Israeli political left, and an Islamist party. Soon enough, though, that Coalition collapsed, leading to yet another general election. Following the elections of November 2022, Netanyahu was finally able to form a Coalition. This administration made Netanyahu politically dependent on extreme, far-right, racist parties. Their demands, and his personal legal affairs, set the ground for the attack against the judiciary.

The radicalization of Israeli society is the product of different trends. To name two main explanations, one could mention domestic demographics and global trends of populism. As to demographics – conservative communities in Israel simply have more children. According to the Israeli Central Bureau of Statistics, the average ultra-orthodox Jewish family has 6.64 children; the average orthodox Jewish family has 3.92; the average secular Jewish family has 1.96 children; and the average Israeli-Arab family has 2.82 children. Ultra-orthodox and orthodox families tend to vote for conservative parties. The fact they simply give birth to more

children, slowly changes the political map in Israel, as studies show that younger generations vote far more conservatively. As to the global trends, populist leaders such as Donald Trump, Jair Bolsonaro, and Viktor Orbán are inspiring local politicians in Israel, too. Enhanced by social media, the international populist trend could have an influence over Israeli politics.

What Comes Next?

The introduction of the reform resulted in mass protests all around Israel. Following these protests, which eventually led a powerful association of unions to threaten with a general strike, the Prime Minister announced he will delay the final legislation of the reform to launch negotiations with the Opposition. Protests continue, while the major political parties are engaged in a tense negotiation. It is not clear how likely this negotiation is to lead to actual results, as Coalition leaders, including a Cabinet member, stated clearly that their intention is to finish the legislation process soon.

These negotiations are therefore infected with great hostility between different groups within the Israeli society. However, they could emerge into a fundamental constitutional moment, that will finally allow the legislator to make the Basic Laws into a less fragile constitutional structure, based on consensual understandings. This constitutional moment could define the Israeli social contract for decades to come. Accordingly, the debates behind the current struggle are, in many senses, much broader than just the judicial selection procedure. The questions at the root of the judicial overhaul are essentially about whether Israel's constitutional structure should ensure it will stay a liberal democracy, or whether its future could bear the threat of electoral authoritarianism. The legislation could bear serious financial consequences too on the local economy, as the governor of the central bank warned. Needless to say, it will have serious diplomatic implications, as President Biden said himself.

Israel could be facing a fundamental constitutional moment, then, as its Cabinet champions a judicial reform, aimed at effectively abolishing the separation of powers in the country. Unlike what some American papers have claimed, the threat to the separation of powers is not mere "mudslinging". The Israelis who take the streets; the tech companies pulling their money out of the country; the heads of state, ambassadors, and other world leaders warning Netanyahu of the consequences are not hysterical. They simply recognize the serious threat to the Israeli constitutional structure and act on it.

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