

Israel's Constitutional Counterrevolution

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COMMENTARY



POOL AFP

In the 1990s, then-Israeli Supreme Court President Aharon Barak led a constitutional revolution, arrogating to the judiciary virtually unchecked power to rule on an expansive array of public issues. Today, Prime Minister Benjamin Netanyahu's new coalition government is advancing proposals that promise to undo Barak's constitutional revolution. Even as Knesset Constitution, Law, and Justice Committee Chair Simcha Rothman has been conducting hearings to debate the proposed reforms, the Israeli left and center have proclaimed the end of democracy in Israel, taken to the streets in the tens of thousands to protest, and threatened civil disobedience.

Yet, as journalist Ben-Dror Yemini – who is not a conservative but speaks for those across the political spectrum committed to the rule of law and the separation of powers – argued last month in the Israeli daily Yedioth Ahronoth, reform of Israel's judiciary is necessary and long

overdue. The proper scope and pace of reform, however, are open to debate and must be carefully calibrated. Accordingly, the conservative-led constitutional counterrevolution presents challenges for the burgeoning conservative movement in Israel – and for the nation.

Two stand out. The first challenge consists in exercising prudence, which Edmund Burke celebrated as “the god of this lower world.” The virtue encompasses appreciation of the knowledge acquired through experience, the complexity of circumstances, the inevitability of unintended consequences, and the wisdom embodied in inherited beliefs, practices, and institutions, as well as of the unending need for incremental reform to adjust them to new developments. Prudence combines judgment and execution but does not involve a method or formula. It shines in the harmonization of competing considerations and balancing of multiple principles. The pressing need to fix flawed political institutions inflects prudence but does not suspend it.

A second challenge concerns democracy, the survival of which in the Jewish state, according to both left and right in Israel, is at stake in the struggle over the legal system. Conservatives contend that especially since Israel lacks a written constitution, judicial review – the court’s power to strike down legislation and disallow administrative actions on the grounds that they conflict with Israel’s quasi-constitutional Basic Laws or simply because they are unreasonable – must be severely circumscribed to ensure that justices do not substitute their preferences for the people’s will expressed by their elected representatives. Meanwhile, the left maintains that the court’s expansive powers must be preserved to safeguard what Justice Barak called “substantive democracy,” by which he meant a host of unwritten rights and rule-of-law principles that justify restricting momentary expressions of the people’s will to safeguard their long-term interests.

Both sides’ appeals to democracy occlude the Jewish state’s composite character as a specific form of democracy – a rights-protecting or liberal democracy. Like America’s 1776 Declaration of Independence, Israel’s 1948 Declaration of Independence puts a premium on freedom and individual rights. Although neither mentions the word “democracy,” America’s Declaration grounds just political power in the consent of the governed while Israel’s Declaration emphasizes the “full and equal citizenship” of all the country’s inhabitants “and due representation in all its provisional and permanent institutions.” Israel’s challenge is to fashion and preserve institutions that facilitate the expression of the people’s will while protecting individual rights, which entails setting limits on the people’s will.

Conservative friends of Israel have admirably leapt to the Netanyahu government’s defense in the face of a barrage of apocalyptic criticism. But more must be said about the imperatives of prudence in devising judicial reforms that harmonize democracy and freedom in the Jewish state.

For example, with characteristic vigor and vituperation, Newsweek Opinion Editor Josh Hammer compares critics of the Netanyahu government's legal reforms to "a dog returning to its own vomit" and dismisses doubts about the constitutional counterrevolution as "performative shrieks of hysteria." Among the government's prominent critics are retired Lieutenant General Ehud Barak, Israel's 10th prime minister and former defense minister under Netanyahu; retired Lieutenant General Moshe "Bogie" Ya'alon, who also served as defense minister under Netanyahu; and retired Lieutenant General Gadi Eizenkot, who served as IDF chief of general staff under Netanyahu. The decorated officers have a combined total of 114 years of military service. Barak's denunciation of the government as "legal, but clearly illegitimate" is reckless, but the generals' grave concerns, shared by many Israelis, should not be reduced to howling for attention.

In the Wall Street Journal, Eugene Kontorovich calmly enumerates several elements of the high court's original 1990s "power grab" while similarly concluding that opposition to the government's pursuit of far-reaching revisions of the relation between the court and the legislature are without merit. A professor at George Mason University's Scalia School of Law and a fellow at the Kohelet Policy Forum in Israel, Kontorovich stresses, for instance, that the government's proposal to "increase the Knesset's involvement in judicial appointments" would fall "far short of America's purely political appointment process." He doesn't mention that the division of labor between the U.S. president and Senate in the judicial appointment process, which often requires the cooperation of both major parties, imposes constraints absent from the government's proposal.

Kontorovich also maintains that the proposed "override clause," which would give a bare majority of 61 of the 120-member Knesset the power to invalidate judicial decisions, "would be less effective than proponents and critics think." Since the legislative process grinds slowly, he argues, the Knesset could overturn only a few of the thousands of annual supreme court decisions. That's true but beside the point. It's just those few especially controversial and significant cases – involving, say, the rights of dissenters and individuals who belong to unpopular groups, or conflicts of interest among members of the government – where the checks and balances provided by an independent judiciary are most needed.

Writing for Commentary, Elliott Abrams refrains from taking a stand on the judicial reforms but his explanation of American Jews' "hysterical reaction" to the new Netanyahu government obscures a crucial dimension of the controversy in Israel. Chairman of the Tikvah Fund and a board member of the Jewish People Policy Institute and of the Israeli Democracy Institute, Abrams is a seasoned and shrewd observer of Israeli politics and the American Jewish community. One source of American Jewish hysteria, he suggests, is simple ignorance of the reasons Israelis have for viewing the court as "deeply undemocratic and imperious."

But the deeper problem, Abrams contends, is that as American Jews grow more secular and progressive, they become increasingly incapable of appreciating an Israel that has evolved into a conservative country that puts a premium on maintaining its Jewish character in a dangerous neighborhood. To underscore the point, Abrams quotes Robert Kagan's memorable statement from the time of the U.S.-led 2003 invasion of Iraq: "On major strategic and international questions today, Americans are from Mars and Europeans are from Venus."

Kagan's witticism, however, misled 20 years ago and does so today in relation to American Jews and Israel. In 2003, as in 2023, plenty of Americans also were from Venus. Then as now, moreover, no small part of Europe – particularly in regions beyond the major metropolitan areas and in countries once subjugated by the Soviet dictatorship – understood, in the spirit of Mars, the harsh realities of war and conquest and the folly of supposing that bureaucrats, diplomats, and judges alone can ensure peace and prosperity.

While the vast majority of American non-Orthodox Jews may be progressives, the division between Mars and Venus, as Abrams knows, cuts through Israel. Netanyahu's bloc obtained a solid Knesset majority of 64 seats in the November 2022 election – the fifth in four years – but received only about 30,000 more votes than the anti-Netanyahu bloc. In short, a slender conservative majority – including the ultra-Orthodox (about 13% of the population) who receive enormous state subsidies while generally avoiding military service – backs the constitutional counterrevolution. Meanwhile, a large minority – much of it secular, progressive, and making vital contributions to Israel's economy and defense – opposes it. To preserve political cohesiveness, substantial changes to the structure of the Israeli regime must earn support that extends beyond these partisan divisions.

In a deft analysis of the conservative spirit in Israel, bestselling author Micah Goodman warns in the Hebrew language newspaper Makor Rishon that unintended consequences flowing from the constitutional counterrevolution are likely to intensify political instability. When a center-left coalition returns to power, Goodman points out, it may well repeal through a simple majority vote the major changes Netanyahu's right-wing coalition seeks to enact. Or it may use the legislature's expanded powers, say, to ram through laws that impair the religious liberty of the ultra-Orthodox. Either way, in a torn nation, constitutional counterrevolution amplifies division.

Conservatives make a compelling case that balance must be restored to the separation of powers in Israel. A prudent concern for the need to harmonize Israel's free, democratic, and Jewish character counsels deliberation in the pursuit of necessary constitutional reform.

Peter Berkowitz is the Tad and Dianne Taube senior fellow at the Hoover Institution, Stanford University. From 2019 to 2021, he served as director of the Policy Planning Staff at the U.S. State Department. His writings are posted at PeterBerkowitz.com and he can be followed on Twitter @BerkowitzPeter.

