

Israel Averts Disaster but Enmities Hinder Enduring Reform

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COMMENTARY



TEL AVIV—Prime Minister Benjamin Netanyahu acted in the nick of time. In an early-evening televised speech last Monday, he announced temporary suspension of the legislative process aimed at passing his governing coalition’s proposed judicial overhaul. He forestalled, in his words, “civil war.” However, the vital task of healing wounds and building the trust on which enduring reform of Israel’s political institutions depends has scarcely begun.

Since mid-January, hundreds of thousands of flag-waving citizens have filled streets and thoroughfares throughout the Jewish state. Mostly left and center and with many coming from the middle and upper-middle classes, the protesters have been of all ages and encompassed most political persuasions and religious sensibilities. Their principal demand has been that Netanyahu’s hard right-wing government cease and desist from ramming through legislation substantially transforming the regime’s structure by subordinating the judiciary to the executive and the legislature.

Many on both sides fervently believe that the other side seeks to destroy democracy in Israel. The opposition warns of the establishment of dictatorship. Netanyahu's coalition members – encouraged by the prime minister's vituperative and Twitter-happy son Yair – denounce protesters as anarchists, traitors, and Nazis.

Over the last 10 days, the country's multiplying fractures and fissures have opened into a cavernous rift. Netanyahu's televised primetime address on Thursday, March 23, sought conciliation but inflamed the crisis. He stated that the government would proceed with legislation to shift control over judicial appointments to the governing coalition, and that he would intervene to ensure that the other proposals for weakening the high court would preserve a reasonable balance between the judiciary and the political branches. Such intervention, Netanyahu acknowledged, contravened the government legal adviser's ruling that the prime minister must recuse himself from the debate over judicial reform because the criminal trial in which he is fighting charges of bribery, fraud, and breach of public trust creates a conflict of interest.

On Saturday evening March 25, Minister of Defense Yoav Galant gave his own televised primetime speech. Emphasizing that he was a man of the right and insisting on the importance of judicial reform, Galant called for a stop to the legislative process to examine the issues more carefully and to reach a national consensus. The haste with which the coalition pursued the legitimate goal of reform, Galant said, eroded national unity, harmed Israel Defense Forces' morale, and undercut the country's security.

On Sunday evening, Netanyahu fired Galant.

Coming at a moment of mounting peril – Iran is closing in on a nuclear weapon, Palestinians living in the disputed territories of Judea and Samaria are restive, and Lebanon-based Hezbollah, with its massive arsenal of rockets and missiles, contemplates with glee Israel's internal disarray – Netanyahu's abrupt dismissal of the defense minister provoked midnight protests in Tel Aviv, which continued until dawn on Monday, March 27. The morning hours brought a general strike throughout the country including hospitals and Ben Gurion International Airport. Throngs of demonstrators converged on Jerusalem and clogged the streets leading to the Knesset, where coalition leaders hoped by the week's end to enact changes to the judicial-appointments process. Behind the scenes, Netanyahu consulted and bargained throughout the day with party members and coalition partners. His speech that evening, which informed the public that he would pause the legislation and initiate face-to-face negotiations over judicial reform with the opposition, brought Israel back from the brink of paralysis and worse.

Neither those who voted for Netanyahu last November or against him expected that his government would, within days of taking office in late December, undertake a drastic overhaul of the judicial system. As prime minister from 2009 to 2021, he did not pursue judicial reform. In none of the five elections that Israel has held in the last four years did

Netanyahu campaign to substantially alter Israel's judiciary. In the immediate aftermath of the victory that returned him to the prime minister's office five months ago, he identified four priorities: prevent Iran from acquiring nuclear weapons; enhance citizens' personal security by reducing crime; strengthen the economy by addressing Israel's soaring cost of living and persistent housing shortage; and anchor the Abraham Accords by normalizing relations with Saudi Arabia. The unanticipated judicial-reform crisis has dealt devastating setbacks to his agenda.

The brainchild of Minister of Justice Yariv Levin from Netanyahu's Likud party and Constitution, Law, and Justice Committee Chair Simcha Rothman from the Religious Zionist party, the coalition's proposals aim to rein in Israel's activist supreme court. Like all rights-protecting democracies, Israel depends on an independent judiciary to keep the political branches within the boundaries of the law. But over the last 30 years, the high court has gone beyond upholding the written law to enforcing, contrary in many cases to majority will, progressive public policy and left-wing political preferences. It has done this through an expansive doctrine of standing that allows those not directly harmed by a law or an administrative decision to bring legal challenges against the government, and by a remarkably broad and aggressive concept of judicial review that brings virtually all government action within the court's purview.

Instead of establishing balance among the branches, Levin's and Rothman's reform proposals tilt heavily toward the legislature and the executive. As Israeli journalist Ben-Dror Yemini observed, opponents of the government's reform package rightly contend that "The coalition forgot that democracy is not only rule of the majority." But for decades, Yemini stresses, most of Israel's left and center "forgot that democracy is also rule of the majority."

Contrary to an impression that has gained credence among American conservatives that the protests of the last three months owe their influence to left-wing demagoguery within Israel and progressive financing from abroad, opposition to the government's proposals reflects authentic grassroots energy and organization and extends well beyond Israel's left-wing elites. For example, Oded Revivi, longtime mayor of Efrat and a leading figure in Judea and Samaria, has urged compromise. Former Supreme Court Justice Elyakim Rubenstein, a moderate religious Zionist, has warned that the proposed reforms will dangerously concentrate power in the governing coalition. Former commanders of Israeli military branches and intelligence services – some religious and to the right – have expressed to me deep concerns about the damage to Israeli political cohesion done by the lightning push to transform the structure of government.

Proponents maintain that the proposal that has progressed furthest within the Knesset, which gives the coalition decisive say in judicial appointments, follows the American system. In his March 25 speech, Netanyahu himself emphasized that "in all democracies including in

the United States, elected representatives of the people choose judges, with very few exceptions.” However, reform proponents, including the prime minister, overlook crucial differences between the Israeli and American regimes.

Several checks and balances built into the U.S. constitutional order constrain America’s executive and legislative branches’ ability to politicize judicial appointments while facilitating compromise between the parties. First, the United States has a written constitution. Israel does not. Second, the U.S. has a regime of “few and defined” powers, in which the Constitution enumerates the limited purposes for which Congress may legislate and the president may act. Israel’s government is not so restricted. Third, the U.S. possesses a federal system that divides power not only among the central government’s three branches but also between Washington and the 50 states’ 50 separate governments. Israel does not similarly disperse and blend powers. Fourth, the U.S. Congress is divided into the House of Representatives and the Senate. In Israel, the Knesset consists of a single legislative chamber. Fifth, U.S. senators and members of the House of Representatives are elected directly by the people of their states. In contrast, Israeli voters choose party lists, which increases Knesset members’ dependence on party leaders. Sixth, the U.S. president, who nominates judges, and the Senate, which confirms or rejects them, represent separate and distinct branches of government. The situation is very different in Israel, where the prime minister in practice heads both the executive branch and the legislative branch, which effectively concentrates power in a single political unit.

The American political tradition and the ideas about individual freedom and limited government that undergird it teach that a supple and sturdy separation of powers is essential to combining democratic self-government with the protection of individual rights. Israeli efforts to translate the experience of liberal democracy in America into lessons for liberal democracy in Israel – with the Jewish state’s distinctive regime, political history, and norms – requires specialized knowledge and sympathetic understanding of both nations. Such efforts are no replacement for – though they can contribute to – the vital task in Israel of healing wounds and building the trust on which enduring reform of the nation’s political institutions depends.

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