

Averting Constitutional Crisis in Israel

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COMMENTARY

The potential for the multi-dimensional crisis – social, political, economic, and military – that has been unfolding in Israel since early January to crystalize into a full-blown constitutional crisis has been steadily building. It may be realized in mid-September. The wonder is how an ostensibly conservative government could have provoked the greatest internal threat in the Jewish state's history to Israel's stability, security, and prosperity.

On Jan. 4, a few days after the swearing in of Prime Minister Benjamin Netanyahu's hard-right-wing governing coalition – half of which is composed of ultra-Orthodox and religious ultra-nationalist parties – Justice Minister Yariv Levin announced far-reaching judicial reforms. About half the country – comprising the center right, center, and left – viewed the proposed reforms as regime change.

Levin put forward his judicial restructuring in the name of democracy, by which he meant majority rule. The aim, argued coalition members, was to return to the people powers seized by a supreme court that has been widely viewed in and outside of Israel as exceptionally

activist.

The right was not alone in its criticism of the court's so-called constitutional revolution. Driven in the 1990s by justice – and then president – of the supreme court Aharon Barak, the court significantly expanded its authority to strike down legislation and to bar government action. Since then, several prominent center and center-left figures in Israel – among them the late Hebrew University law professor Rut Gavison and journalists Ari Shavit and Ben-Dror Yemini – advanced cogent criticism of the court's setting aside of the people's will, under the guise of impartial legal reasoning, in favor of progressive moral and political judgments.

The need for reform, however, does not prove the wisdom of this or that proposal. If they had been adopted as proposed, Levin's reforms would have transformed Israel's supreme court into one of the weakest among liberal democracies. The initial package included an override clause that gave a bare majority of 61 of the Knesset's 120 members the ability to nullify supreme court decisions. It called for a marked reduction in the court's authority to invalidate government actions it found not even minimally reasonable. And it placed responsibility for appointing judges firmly in the hands of the governing coalition.

Members of the opposition criticized the governing coalition's reforms in the name of democracy, by which they meant rights-protecting or liberal democracy. Many Israelis feared that the reforms would compromise the court's ability to safeguard citizens' basic rights and fundamental freedoms. Their fears were well-grounded in the structure of the Israel political system and in the realities of democratic regimes.

Checks and balances are scarce in the Israeli government. In contrast to the United States, Israel has no constitution, the executive branch effectively administers the legislative branch, the legislature is unicameral and, lacking state governments and federalism, power is centralized in the national government.

Democracy's checkered history, moreover, teaches that majorities unconstrained by a robust separation of powers impair individual rights and ride roughshod over the rule of law. Modern political philosophers such as James Madison and John Stuart Mill agree with Plato and Aristotle: Pure democracy amounts to tyranny of the majority.

Despite the protests that have rocked the country since mid-January, the governing coalition passed in late July the first plank of the judicial overhaul. The legislation eliminated the court's ability to invalidate government and ministerial decisions it determined to be altogether lacking in reasonableness. All 64 coalition members voted in favor; the other 56 Knesset members absented themselves from the hall.

Within a few days, seven petitions challenging the new law had been filed with the supreme court, which promptly agreed to address the controversy. The court will hear opening arguments Sept. 12. Given the gravity of the issue, Supreme Court President Esther Hayut decided to convene, for the first time in Israel's history, all 15 of the high court's judges.

Netanyahu was not mollified. In recent interviews conducted in English for the foreign press – for example, in a contentious conversation in late July with CNN's Wolf Blitzer – the prime minister has declined to commit to abiding by a supreme court ruling that would strike down the Knesset's curtailment of the reasonableness doctrine.

Nobody should pretend to know whether the court will invalidate, uphold, or trim the governing coalition's judicial reform. It should be recognized, however, that should the court rule against the reform, Israel faces the prospect of the executive and legislative branch refusing to obey.

In an open letter last Monday, Tel Aviv University President Ariel Porat declared that if the governing coalition refuses to comply with a supreme court ruling against it, Israelis in the private and public sectors should undertake a general strike to bring the economy to a halt. The next day, several prominent law firms endorsed Porat's drastic step in the event that the governing coalition ignores a high court holding.

General strike or no strike, security forces – the police, the Shabak (the internal security service), the Mossad (intelligence and special operations), and the Israel Defense Forces – as well as the bureaucracy and citizens from all walks of life would face the momentous decision of obeying either the court or the governing coalition.

Exacerbating the constitutional crisis would be the many dimensions of the crisis that already engulfs the nation. According to recent polls, roughly two thirds of Israelis believe that the country confronts the gravest crisis, or one of the gravest crises, in its history. Israelis have good reason for these beliefs in view of the convulsions that have shaken the nation since January, the fury and scorn for rival camps that have gripped Israeli citizens, and the long-festered wounds that have been ripped open wide.

For 32 consecutive weeks, tens of thousands of flag-waving citizens have gathered on Saturday night in downtown Tel Aviv – along with thousands of demonstrators in cities throughout the country – to protest the judicial overhaul. The Israeli shekel's value declined by about 10% versus the dollar since late January, high-tech investment plummeted in the first half of the year, and the Israeli stock market has lagged significantly behind the major global stock indices. Many medical students and young doctors are searching abroad for opportunities to practice medicine. With reserve pilots and reservists in other branches of national security declining to report to their bases, IDF officials have expressed mounting concerns about the military's readiness. Just two days ago, Commanders for Israel's Security posted on Facebook an announcement from 169 retired security officials – including those who had served as chief of staff, as heads of the police, the Shabak, and the Mossad, and as generals – warning that the governing coalition's defiance of the supreme court would tear the military apart, calling upon Prime Minister Netanyahu to announce that he will obey the

supreme court's rulings, and requesting that the heads of the security services clarify their commitment to respect the supreme court's decisions. Hezbollah in southern Lebanon and their patrons in Tehran can't help but observe the disarray in Israel.

Meanwhile, the governing coalition has taken steps that bolster the opposition's fears about the erosion of freedom and the sharing of responsibilities in Israel. Passed in May, Israel's two-year budget encourages the ultra-Orthodox – whose K-12 schools already receive sizeable state support despite omitting core subjects, whose young men and women enjoy an exemption from military service, and many of whose adult men devote themselves to state-subsidized religious study rather than gainful employment – to remain a community apart by substantially increasing state funding for draft-age yeshiva students. And Bezalel Smotrich, who serves as both finance minister and minister within the defense ministry, has slow-walked financial support for underserved Arab communities within Israel while backing illegal Israeli outposts in Judea and Samaria, which further entangle Israel with non-citizen West Bank Palestinians.

Right-wing though Netanyahu's government is, the country's widening and deepening crisis is not the consequence of conservative governance. Rather, it stems in significant measure from the Netanyahu government's departure from the principles of sound conservatism.

While there are as many different forms of conservatism as there are traditions to conserve, the modern conservatism that seeks to preserve rights-protecting democracies, as Maariv columnist Shmuel Rosner recently reminded, is marked by a distinctive sensibility. It teaches respect for established ways, prefers gradual reform to sweeping changes, favors the wisdom gleaned from experience to plans and projects dictated by theory, and prudently appreciates that even government measures undertaken with the best of intentions tend to generate unintended and counterproductive consequences.

Such a sensibility has been notably absent from the Netanyahu government's judicial overhaul. The governing coalition did not respect the established system but loathed it. It did not propose gradual reform but rather sought to ram through a fundamental alteration. It did not draw on experience but rather superimposed theories of the judiciary on the complexities of the Israeli political order. And the governing coalition did not prepare to address an array of possible reactions to its reform package, including stiff opposition, but instead was caught flat-footed by the massive protests its actions sparked.

These dramatic departures from sound conservatism conflict with the imperatives bequeathed to Israelis by their founding document. Above all, Israel's Declaration of Independence affirms the inseparableness of the nation's Jewish character, its rights-protecting character, and its democratic character. But driven by the interests of the ultra-Orthodox and the religious ultra-nationalists and by Netanyahu's own determination to hold his parliamentary majority together despite the enormous costs, the governing coalition has set the nation's Jewish and democratic character against its rights-protecting character.

Far from discrediting conservatism in Israel, Israel's multi-dimensional crisis underscores the need for a sound conservatism, one that averts constitutional crisis by conserving the balance of worthy principles inscribed in the nation's Declaration of Independence.

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