Steadying Israel by Recalibrating the Separation of Powers

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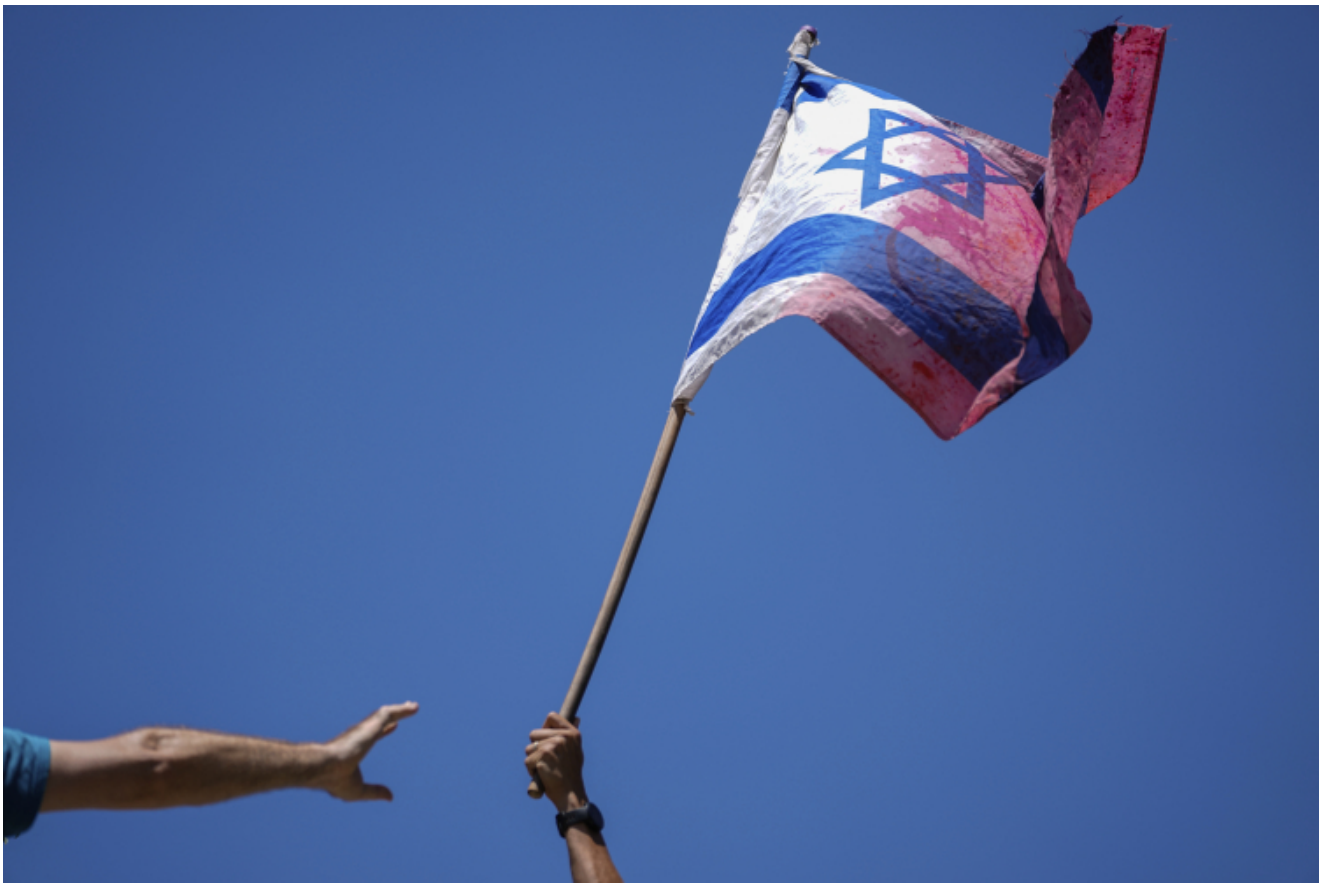

COMMENTARY

On Sept. 12, all 15 judges of Israel's supreme court – never before has the full complement of high-court judges sat as one body – are scheduled to hear challenges to the contentious legislation enacted in July by Prime Minister Benjamin Netanyahu's governing coalition. Of the judicial overhaul proposed by Justice Minister Yariv Levin in early January, the first and only part to have been passed by the Knesset amends Israel's Basic Law: The Judiciary by barring the court from invalidating ministerial and cabinet decisions on the grounds of the judicial standard of reasonableness. Netanyahu has declined to say whether he would obey what would be an extraordinary step by the high court, though on Sept. 7 he shared on social media Knesset Speaker Amir Ohana's speech from the day before declaring that the Knesset "won't submissively allow itself to be trampled." With large-scale protests throughout the country entering their ninth month, military reservists refusing to serve and the threat

mounting of draft-age Israelis declining to report for military service, and private investment in Israel – internal and from abroad – declining, the coming supreme court showdown may well drive Israel further into uncharted territory.

In August in the Hebrew daily newspaper Yediot Ahronot, attorney Raz Nizri provided a particularly sober account of the crisis's origins and character and offered judicious counsel on how to escape it. In "The Moment Before the Constitutional Chaos: The Approaching Nightmare Scenario and the Way to Prevent It," the former deputy attorney general observed that a high-court decision is unlikely until after the four weeks of celebration of Jewish holidays from mid-September to mid-October. But, Nizri warned, if in mid-autumn the supreme court issues a ruling invalidating the Knesset's restrictions on the court's use of the reasonableness doctrine – as, last week, Attorney General Gali Baharav Miara urged it to do in a formal legal opinion – the controversy that has engulfed the nation could spin out of control.

Nizri's nightmare scenario is all too realistic. The governing coalition would likely respond to a decision striking down or trimming the new law by enacting legislation that explicitly prohibits the court from reviewing Basic Laws. In response to the inevitable legal challenges, the supreme court could declare null and void the legislature's duly enacted prohibition on the court's considering the legality of Basic Laws. Who decides, then, who has the final word on the legal status of Basic Laws? Alternatively, the court might in defiance of the new law reject a decision by the governing coalition – say, to oust the head of the Bank of Israel – on the grounds of unreasonableness. Who then, would be responsible for determining who sets the interest rates on government loans?

In either case, says Nizri, furious Israelis will fill the streets. Some will pledge allegiance to the high court, others to the Knesset majority. The standoff will have no obvious resolution. "The source of the authority in the country will have become unclear," writes Nizri, "even as it will become doubtful whether a country remains in which we will be able to clarify and answer the question."

Such nightmare scenarios are avoidable, argues Nizri, but only if both the governing coalition and the high court face up to their roles in bringing the nation to the brink. To undertake a "conciliatory tango," the governing coalition must recognize that its judicial overhaul puts individual rights at risk in Israel by empowering the majority to govern as it pleases almost without limits. At the same time, the high court must acknowledge that it has weakened democracy in Israel by acting for decades as if it is authorized almost without limits to intervene in Israeli politics based on moral and political judgments masquerading as legal reasoning.

In Nizri's view, the coalition bears greater responsibility for the current crisis because it controls executive and legislative authority. While the pendulum had swung too far in the court's direction, he argues, Netanyahu's government proceeded recklessly, both in the

extremity of its proposals and in its hasty and heavy-handed efforts to ram them through. Impervious to separation of powers imperatives as well as to the need to maintain political cohesiveness in a divided nation, the coalition's judicial overhaul would swing the pendulum too far in the opposite direction. It would undercut in the name of majority rule the court's ability to serve as a serious check on the excesses to which all legislative and executive branches are prone, particularly when, as in Israel, they function in practice as a single branch of government.

The governing coalition's errors, however, do not absolve the supreme court from its share of responsibility for unleashing the forces that have been tearing the country apart. Nor does the indispensableness to Israel of a strong and independent judiciary – not least because recognition that Israel's military acts subject to the high court's review shields the nation's soldiers and diplomats from investigation and prosecution by international institutions – erase the court's culpability. Decades of judicial activism have seen the court expand the range of issues that it regards as justiciable and eliminate barriers to standing, allowing merely interested parties to bring challenges before it rather than only those directly harmed in a case or controversy. The court's sustained overreach coupled with its arrogant dismissal of criticism, argues Nizri, has impaired the rule of law in Israel by damaging the judicial branch's public legitimacy.

It is against this explosive combination of causes – the governing coalition's recklessness and imperviousness and the high court's overreach and arrogance – that this week all 15 supreme court judges will consider the fraught question of whether it has authority to review the Knesset's recent amendment to the Basic Law: The Judiciary.

At first glance, it seems that the court does not. It is settled law in Israel, according to Nizri, that the supreme court may invalidate regular legislation that conflicts with Basic Laws but lacks authority to review Basic Laws.

The puzzle is that Israel's Basic Laws both are and are not special. On the one hand, Basic Laws enjoy quasi-constitutional status because the Knesset enacts them pursuant to its "constitutive authority" to pass laws one at a time that will eventually form a written constitution. On the other hand, Israel's Basic Laws become law based not on a supermajority – in the United States, for example, constitutional amendments require proposals from two-thirds of both houses of Congress or from conventions in two-thirds of the states and ratification by three-quarters of the states – but, like regular laws, with the support of a simple majority.

In recent years, however, some Israeli high-court judges – following the lead of American law professors and courts around the world – have fashioned arguments, reports Nizri, according to which in exceptional circumstances the court may invalidate a Basic Law on the grounds that it represents an "unconstitutional constitutional amendment" – one, that is, that conflicts

with “fundamental values of the system” or involves a “misuse of the Knesset’s authority as a constitutive authority.” Such arguments in the Israeli context, maintains Nizri, are at best underdeveloped.

Were the high court to invoke such a novel constitutional theory to overturn the Knesset’s circumscription of judges’ authority to apply the reasonableness doctrine, it would divide the judges, according to Nizri, producing a split decision that “would be greeted with a sigh of relief from half the people and with horror from the other half” and would trigger “a constitutional and social earthquake” in the nation.

To prevent the chaos, concludes Nizri, both the governing coalition and the high court must exercise restraint on behalf of the public interest. The coalition must resist the voices on the street and in the government demanding that it barrel ahead with the whole package of judicial reforms. The court must resist other voices on the street and among protest leaders who “hope it will ‘save the country’ by using the doomsday weapon of nullifying a Basic Law.”

Nizri urged the coalition to inform the court of its intention to seek, in cooperation with the opposition, wide agreement on judicial reform, including on a less sweeping version of the recent revision of the reasonableness doctrine. If the sides agreed to further negotiations, Nizri called on the court to postpone its Sept. 12 hearing. That would give the coalition and the opposition time to reach a workable compromise.

President Herzog has undertaken a last ditch effort to bring together the coalition and opposition. At this late date, prospects seem remote.

Nevertheless, the short-term compromise that Nizri envisaged in August still represents the most promising path forward, not least because it would set the state stage for drafting and passing, at long last, “Basic Law: Legislation.” Nizri envisages legislation agreed to by the coalition and opposition that would entrench a definition of Basic Laws, the procedure for enacting them, and whether and under what circumstances the high court can invalidate or modify them.

Such desperately needed legislation would do more than legislate. By joining forces to recalibrate the separation of powers through deliberation and consensus, the coalition and opposition would provide a model for – and begin the long, hard work of – steadying the nation.

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