

Battle over High Court exposes frailty of Israel's piecemeal system of government

The center-left's fears are reasonable, the right's arguments authentic; both sides should get past the current shrill debate and restructure a broken system of checks and balances

By [HAVIV RETTIG GUR](#) 11 January 2023



Israelis protest against the Israeli government, at Habima Square in Tel Aviv, on January 7, 2023. (Tomer Neuberger/Flash90)

Last week, Justice Minister Yariv Levin presented his ambitious plan for reforming the Israeli judiciary, and its critics have not minced words, labeling it a “political coup,” a “wrecking ball” for Israeli democracy, and worse.

Levin, however, is unfazed by the criticism and pushing the changes forward at breakneck speed. He announced the plan on Thursday and expects to pass it into law by March.

He has good reason to be in a hurry, as time may not be on his side. The measure is less popular than its supporters claim. According to reports from within Likud, Levin had to threaten to resign in order to win public backing from some Likud politicians, and had to buck pressure from Prime Minister Benjamin Netanyahu himself who wanted to tone down or slow the reform.

Those reports seem backed by opinion polls. One survey released last week by the Israel Democracy Institute specifically asked if the Supreme Court should have the power to revoke laws that contradict Israel’s semi-constitutional Basic Laws. The Israel Voice Index poll showed what everyone expected: public opinion divided almost perfectly along party lines, with one exception.

Voters for secular, opposition and anti-Netanyahu parties favored a more powerful court by vast majorities, with 85 percent among Yesh Atid voters. Voters for Netanyahu’s religious allies Shas, United Torah Judaism and Religious Zionism opposed by similar supermajorities (95% in Shas) letting the court repeal legislation.

Just one party was divided right down the middle: Likud itself, the party pushing the reform. Almost half of Likud voters in last November’s election, 47%, think the court should have the right to strike down laws; 42% think it should not.

With such tenuous support in his own party, Levin understands that if the reform is delayed long enough for the coalition to destabilize prematurely (as most Israeli coalitions do), Likud’s own campaign strategists, chief among them Netanyahu himself, may nix the idea altogether for fear of ballot-box

blowback.



Justice Minister Yariv Levin holds a press conference at the Knesset, in Jerusalem, January 4, 2023. (Olivier Fitoussi/Flash90)

Reasonable panic

Meanwhile, the center-left's response to the rushed reform has been unbridled panic. It has a point.

Israel's parliament is unicameral; no second house can veto or curtail its actions. Political parties are extremely centralized; most MKs are appointed by party leaders, not in a primary vote or by regional election. The executive and legislative are functionally a single body, since the government is established and manned by members of the parliamentary majority. There are, in other words, exceedingly few of those all-important checks and balances one hears about in civics classes in democratic countries.

If the court is weakened, the center-left is now asking, what will stand in the way of an aggressive majority should it seek to take away the rights of minorities?

The question isn't academic when one considers the makeup of Netanyahu's new government – not its policies or ideas per se, but its coherence and unity.

For most of Israel's history, one key feature of its politics served as the system's most important check on the over-concentration of power: the way Israeli voters and parties naturally subdivide into cultural and religious tribes at the ballot box. As a rule, Israeli coalitions are diverse, unruly and prone to collapse because they are composed of multiple sectoral parties all pulling in different directions.



MK Ahmad Tibi, right, with United Torah Judaism's MK Moshe Gafni, left, at a meeting of the Knesset opposition, March 9, 2014. (Tomer Neuberg/Flash90)

And within these coalitions, small communities usually protect each other, even across vast gulfs of politics or culture. Arab parties routinely vote against secularist measures that the Haredi parties deem anti-Haredi, and Haredi parties return the favor by stymieing right-wing proposals deemed anti-Arab by the Arab parties – an informal coalition of the marginalized that has long reined in the powerful on both left and right.

But that feature of Israeli democracy may be fading. The right-religious coalition built by Netanyahu over the past 44 months of political deadlock has proven too unified and faithful to act as a check on itself.

The court, the center-left believes, may be the last bastion checking unrestricted executive power, and that's why it's been targeted.

“Behind [Levin’s] idea lurks the government’s desire for unlimited power,” legal scholar Suzie Navot [charged](#) last week. “There isn’t any discussion here on checks and balances.”

Yet this very anxiety lays bare a larger problem. By arguing that the rights and freedoms of Israelis, and especially minorities, are sustained solely by a single vulnerable institution, the center-left is effectively declaring the battle already lost.

After all, even if Levin’s reforms are defeated this time around, they will surely return in a year or two or five. As long as the right retains its demographic advantage and newfound unity, it’s only a matter of time.



File: An ultra-Orthodox Jewish man walks near a billboard describing a picture late Shas spiritual leader Rabbi Ovadia Yosef, as part of Shas election campaign, in the northern Israeli city of Tzfat, February 28, 2020. (David Cohen/Flash90)

Either the threat isn't as great as the center-left now argues, or the sole focus on defending the court amounts to a vast expenditure of political capital to uphold an inherently flimsy edifice.

The right is determined to pass the reform. It is the court, they argue, that has upset the rules of democracy, and a corrective is needed to “restore constitutional balance.” That belief is real and entirely earnest.

‘You don’t cancel a law’

The distrust on the right and among Haredi parties of the activist bent of the court is longstanding and authentic.

In 1992, in the [Knesset debate](#) (Hebrew link) ahead of the final vote on the Basic Law: Human Dignity and Liberty – the rights-conferring law that the center-left now fears is endangered by the new reforms – an argument raged between Likud MKs. On one side stood Uriel Lynn, a fervent advocate of the law and one of its main champions as chairman of the Knesset Law, Constitution and Justice Committee. On the other stood Likud MK Michael Eitan.

The new law “won’t shift power to the Supreme Court,” Lynn assured Knesset members from the podium. “No constitutional court is being established with a special power to repeal laws.”



MK Michael Eitan speaks from the Knesset podium on November 24, 2008. (Michal Fattal/Flash90)

Eitan vehemently disagreed. The new law, he shouted from his plenum seat, would inevitably lead to the repeal of laws. It prohibited the passage of future laws that didn't abide "by the values of the State of Israel" as a "Jewish and democratic state." Who gets to decide, Eitan demanded, if a future law violated those values, or indeed, what those values were in the first place?

"That's a political question," he said, "not a legal one."

Lynn was undeterred. "The legislator decides *and* the court decides," he shot back. "That's the system we have and you have no other system. The court can interpret laws today too."

"But it can't repeal them," insisted Eitan.

"There's no need to repeal laws. You don't repeal a law," Lynn replied, a prediction about the court's future behavior that would prove incorrect.

The Haredi distrust of the court is equally genuine and enduring.

In that same debate, Avraham Ravitz of the Haredi faction Degel Hatorah explained the Haredi anxiety over the law. It was about the court.



A vote in the plenum session at the assembly hall of the Knesset, the Israeli parliament in Jerusalem, on December 20, 2022. (Yonatan Sindel/Flash90)

“We are concerned that in the future, the judges of Israel will offer radical interpretations of the [concept of] liberty expressed in this law that its authors never dreamed of and will unleash a liberty that is unconcerned with the feelings of religious Jews or other groups.”

That warning proved prescient. In the years since, the court has repeatedly overturned or challenged laws and decisions that Haredi society sees as vital to its character and way of life, including legislation that would release Haredi yeshiva students from military service.

UTJ MK Moshe Gafni, a rabbi who has served in the Knesset since 1988, once quipped that he'd vote against the Ten Commandments if it was proposed as a Basic Law. It didn't matter what the bill contained; what mattered, in the Haredi view, is how an activist liberal court would interpret it.

That rightist distrust of the court has been shaping Israeli legislation for years, the most recent and prominent example being the contentious Basic Law: Israel as the Nation-State of the Jewish People that was passed in 2018. The law's basic purpose, one of its authors explained, was to “make sure the court understands what is meant by the ‘Jewish’ half of ‘Jewish and democratic.’”

The right sees a court that has grown overly powerful and ideologically compromised: to which nearly anyone can appeal in real time, that believes it can weigh in on nearly any act of government, and that holds a de facto veto over future appointments to its ranks.

The upshot: Validated by its election victory, the right will now not be dissuaded from finally reining in the court by liberal keening and street protests.



Activists lock arms in Tel Aviv to protest the government, January 7, 2023. (AP/Tsafrir Abayov)

If the center-left is right, and this reform amounts to a dangerous attempt to leave just one institution with all the power, then the left needs more than panic. It needs an alternative, an institutional vision that shifts some of the democratic eggs out of a single vulnerable basket and spreads them around.

It needs a constitution.

The anti-constitutional left

The forebears of the Israeli center-left once thought carefully about a constitution, about placing limits on majority rule and establishing institutions to counterbalance the Knesset. They thought about it – and said no.

In January 1950, as the Knesset considered the question, David Ben-Gurion offered an [impassioned defense](#) of unrestrained majority rule.

“Would our people agree,” he wondered, “to a situation in which seven judges ... can cancel laws that the people desire? Only the nation determines the constitution; that is, a constitution is what the people want and decide after an open inquiry and a vote.”

A lifelong socialist, Ben-Gurion was certain that the future was progressive. Hard-to-amend constitutions and powerful courts, he believed, served elites and reactionaries and preserved inequalities.



Israel's first prime minister David Ben-Gurion stands at attention as the national anthem, Hatikva, is played at the Knesset opening ceremony in 1949. (GPO/Hugo Mendelson)

Taking the example of contemporary (i.e., 1950) America, he argued that the US Constitution, by then a century and a half old and exceedingly difficult to amend, was holding the superpower back. Under its authority, America's top court had stood in the way of Roosevelt's income tax, overturned child labor laws, and so on.

"Every law is a product of its time," he told the Knesset. "There's nothing eternal in law. What authority do we have to shackle the hands of those who will be elected to the Knesset in a year or in five?... We don't have more wisdom than those who will come after us. Why should we be afraid that those who come after us won't share our loyalties, won't understand as we do the needs of the nation?"

Ben-Gurion's political descendants are now worried about precisely that. Their future is shaping up conservative and religious. His suggestion that majorities should have free rein to rule as they see fit, that constitutional

rules should change easily with trends in public opinion, and that future generations shouldn't be bound by their predecessors' views is now deemed the "collapse of democracy."

The Israeli left would never end up writing that constitution, never limit the powers of the Knesset, never take seriously the problem of majority rule – until, of course, it suddenly found itself in the minority.

The land of opportunity

The center-left's fears are real and reasonable, the right's arguments authentic and longstanding. And both share responsibility for a system of government that relied too long on fragile and informal internal checks and one very powerful court.



Supreme Court President Esther Hayut and other justices arrive for a hearing on petitions against the appointment of Shas party leader Aryeh Deri as a minister due to his recent conviction for tax offenses, at the Supreme Court in Jerusalem, on January 5, 2023. (Yonatan Sindel/Flash90)

Defending Levin's judicial overhaul plan [in the Wall Street Journal](#), far-right Religious Zionism chief Bezalel Smotrich argued that it would bring Israel "closer to the American political model.... We seek to appoint judges in Israel in a process similar to America's; to define the attorney general's scope of

authority and relation to elected representatives in a manner similar to what's set down in America," and so on.

He's partly right. Letting politicians more easily appoint justices and expanding the powers of parliament relative to the court would indeed make Israel's judiciary a bit more like America's.

But America's weaker court is a small cog in a much larger machine that's wholly missing in Israel. It sits alongside two houses of parliament with mutual vetoes and a veto-wielding executive, with each body elected by a different cross-sectioning of the electorate and on different two-, four- or six-year schedules – all to prevent the greatest fear of America's Founders as they embarked on their democratic experiment: that a majority may form at the ballot box that will oppress the minorities in its midst. By dividing the electorate again and again by geography and time and institution, the Founders hoped to prevent a majority from ever forming in the first place.

Smotrich wants America; the center-left would do well to take him up on that challenge. Only a desperate dearth of political imagination on both sides would leave this debate on its current terms as a pitched battle over the court – or at least, as *only* that.

The right claims to be fighting for more democracy. That claim is a lever of influence for the opposition, a door that opens onto an American-style debate about the present-day weaknesses of Israeli democracy. Would a second house of parliament elected by a different sectioning of the electorate and bearing a veto over the first house offer better and more resilient protections? What about a president with a veto on legislation, an idea proposed in Ben-Gurion's day and rejected partly on the grounds that progressive majorities should rule unrestrained?



Religious Zionism party head MK Bezael Smotrich after coalition talks at a hotel in Jerusalem, December 5, 2022. (Yonatan Sindel/Flash90)

The details of such an expanded debate are not the point here. The point is only the insufficiency of relying on the tenuous informalities of yesteryear, which are starting to show their age in a more populous and more complex Israel than the one Ben-Gurion led. The right owes Israelis more than a Ben-Gurion-esque reliance on majority rule, the center-left more than panic-stricken keening. In a larger constitutional expansion, a weakened court is no longer a bug but a feature. If the left believes its own claim that nothing now protects minorities except that unelected court, then even a victory that preserves the court's powers for one more election cycle isn't enough.

It seems too optimistic to hope that the current agitation may spark the larger debate the country needs. Then again, Israel has a long history of repairing itself only after a collapse. It took nearly a decade of runaway triple-digit inflation and two devalued currencies (the lira in 1980 and the shekel in 1985) to create the remarkably well-run and fiscally responsible country Israelis live in today. It took the intelligence cataclysm that led to the 1973 war to produce the astounding espionage apparatus on display in the Israel-Iran shadow war of recent years.

Israel needs for this crisis, too, to end in more than mere division or political implosion. It needs the sides to take their own arguments seriously enough to realize this fight is about more than the court. It's a larger crisis of governance, of a system of government pieced together haphazardly in another age that is proving insufficient to the needs of the present day. It is also a profound crisis of vision, of a country that hasn't yet decided what it means by the word "democracy."

And a crisis, as those ever-wise Americans are fond of saying, is a terrible thing to waste.