

ISRAEL'S JUDICIAL RECKONING

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Israel's court is abnormally powerful and has caused half the nation to lose faith in its government. Reform will help, as long as it doesn't cause the other half to do the same.

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Anyone reading the press out of Israel these days would probably conclude that the country will soon cease being a democracy.

In January 2023, less than a month after taking office, Israel's government unveiled a sweeping package of reforms to reduce the power of the nation's Supreme Court, on the grounds that the court has undermined democracy by encroaching on traditional executive and legislative functions. The opposition, claiming that the reforms, not the court, are the true threat to democracy, responded almost immediately with massive protests. As the weeks have passed, the protests have intensified and spread beyond traditional opposition circles, and Israel has begun descending into chaos.



Israeli gather in front of the Knesset in Jerusalem to protest judicial reform on February 13, 2023. *Mostafa Alkharouf/Anadolu Agency via Getty Images.*

Where did this issue come from? Who is right? And what should Israel do now?

As someone who has written about the need to restrain the court's excessive activism for three decades now—long before this became a partisan voting issue for many Israelis—in several major essays and dozens of shorter pieces, I consider most of these reforms not only within the bounds of normal democratic practice but in fact essential to bolstering Israel's democracy. The current situation, in which half the public profoundly distrusts the Supreme Court, is clearly untenable for any country that wants to remain a democracy; because courts are a crucial

mechanism for resolving disputes peacefully rather than through force, if they are widely distrusted, resorting to force becomes more likely. Yet at the same time, some of the concerns raised by opponents are valid and deserve to be taken seriously. Given the universal conviction that Israeli society is at a breaking point, balancing these two imperatives is an urgent task.

There are two packages of reforms being mooted by the governing coalition. One package was written by Yariv Levin, a member of Knesset from the Likud party who is currently the justice minister, and another by Simcha Rothman, a member of Knesset from the Religious Zionist party who currently chairs the Knesset's Constitution, Law, and Justice Committee. (Levin's proposal was supposed to be the only one, but as a cabinet minister, he is barred from submitting legislation before it has been reviewed by the attorney general's office, which has yet to approve it. To speed the process, Rothman began submitting his own similar but not identical legislation on behalf of his committee, since a Knesset committee can submit bills without the attorney general's approval. Both men plan to negotiate a mutually agreed version during hearings by Rothman's committee.)

Both packages are composed of seven elements. Each element is meant to address a specific problem created by Israel's judicial revolution of the 1980s and 1990s; together, the reforms are largely meant to restore the legal situation to what it was during Israel's first several decades of existence (a time when no one questioned the country's democratic credentials). Consequently, to understand the reform, and what opinion to hold of it, it's first necessary to understand that revolution, and how it happened.

I. The Judicial Revolution

Israel, famously, is a nation without a constitution. This does not make it unique; a few other democracies, like the United Kingdom, also lack written constitutions. But Israel is unique in the role played by its court. In nations without written constitutions, supreme courts typically have less power than they do in countries with constitutions. But over the last three decades, Israel's Supreme Court has exploited the absence of a constitution to steadily increase its intervention in policy and value judgments and its encroachment on the prerogatives of the legislature and the executive. As a result, public trust in the court has split sharply along political and religious lines. According to the Israel Democracy Institute's annual Israeli Democracy Index, trust in the court now ranges from 84 percent among leftists to just 26 percent among rightists, and from 63 percent among secular Jews to just 6 percent among the ultra-Orthodox.

The judicial revolution began in the 1980s, when the court unilaterally abolished two key restrictions on its power to hear cases: standing, meaning who is entitled to petition the court, and justiciability, meaning what issues are within the court's purview. The accepted norms until then—as is still the case today in many countries, including America—were that only someone directly affected by a given executive-branch decision had standing to go to court, and that most

political issues were nonjusticiable, meaning the court could not rule on them because they were properly the province of the elected branches of government. The new policy allowed anyone at all, including organizations or individuals who weren't directly affected by a policy but disliked it, to petition the court on any issue whatsoever. The result, as the revolution's chief ideologue, former Supreme Court President Aharon Barak, famously said, is that today "everything is justiciable." Virtually every controversial policy question, and a great many trivial ones as well, now reach the court, and the court rules on all of them. (For more on Barak's motivations for this and subsequent stages of the judicial revolution, see [this essay](#) from back in 1998 or this one from [2016](#).)

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But rather than merely judging whether policies comply with existing law, the court also asserted that government decisions could be "so unreasonable as to be illegal" even if they violated no law. This was the second crucial part of the revolution. Reasonability was originally a standard used to protect individual rights by determining whether a given official's or agency's handling of a particular case was a reasonable interpretation of their legally mandated authority. But overturning general policies rather than individual decisions on the grounds that they are "unreasonable" was a novel interpretation of this doctrine; courts in other democracies generally confine themselves to determining whether policies violate existing laws or the constitution.

Since then, the court has used this expanded reasonability doctrine to overturn policies on a wide range of issues at the very heart of the government's responsibilities. To cite just a few examples: it essentially stripped ministers of the right to appoint officials who share their views by barring the appointment of party colleagues or friends even if they are completely qualified; this resulted, for instance, in one of Israel's top criminal lawyers being disqualified as a candidate for attorney general merely because he was friends with the justice minister. It forced a massive budgetary outlay by ordering the state to rocket-proof all classrooms within a certain distance of Gaza, overriding the government's view that older children would have time to run to safe rooms. It forbade the detention of senior commanders in two terrorist organizations as a means of obtaining information about an Israeli soldier missing in action, even though both men were personally involved in his disappearance. It barred the government from revoking the Israeli residency permits of two Palestinians serving in the Palestinian legislature, a foreign government, on behalf of Hamas, a terrorist organization. It has paralyzed caretaker governments by deeming it unreasonable for them to take even trivial steps like appointing midlevel officials lest they bind future governments, yet found it reasonable for a caretaker government to offer the Palestinians a sweeping final-status deal after its coalition had collapsed over that very issue.

This is a problem both in principle and in practice. First, in a democratic country, deciding whether a given policy is or isn't reasonable is not the court's business. Setting policy is the

elected government's core responsibility, and deciding whether a government's policies are reasonable is the voters' job. If voters deem the government's policies unreasonable, they can and will kick it out in the next election. Moreover, whether a given policy is reasonable is a matter on which reasonable people can disagree. In the missing-soldier ruling, for instance, two of the five justices considered the conclusion of the other three extremely unreasonable. And while judges have specialized expertise in interpreting the law, they are no more qualified than anyone else to decide whether a policy is reasonable. In fact, they are arguably less so, given their lack of expertise in many crucial policy fields (defense, economics, etc.).

Moreover, on a practical level, it's hard for a government to satisfy its voters if its flagship policies are repeatedly overturned because a handful of justices deem them "unreasonable." That's a major reason why rightist and religious voters have complained for decades that they keep "voting right but getting left," and also why "governability" has become a catchword on the right. Consider, for instance, the case of Moshe Kahlon, a vocal opponent of judicial reform who headed a center-right party called Kulanu and became finance minister in 2015. Kulanu was a single-issue party; its mandate was lowering the cost of living, and especially housing prices. But the court repeatedly nixed Kahlon's policies, including his flagship legislation on housing prices (a tax on multiple homes), which it overturned on the ludicrous grounds that the Knesset's hasty debate—which is standard practice for omnibus budget bills—was "unreasonable" in this particular case (and like most tax hikes, it was too unpopular to pass outside the omnibus bill). Four years later, Kahlon told a reporter he was no longer willing to block legal reform; governing becomes impossible when governments are repeatedly prevented from setting policy.

The third stage of the judicial revolution occurred in 1995, when the court unilaterally decided that the two 1992 Basic Laws—the first two Basic Laws to address individual rights rather than institutional arrangements—were a constitution empowering them to overturn ordinary legislation, even though the Knesset never intended them as such. Pursuant to the first Knesset's decision in 1950 to postpone drafting a constitution and instead to enact it piecemeal, Basic Laws were meant to be building blocks for a future constitution. But all Knessets and all Supreme Courts until 1995 had treated them as devoid of any constitutional status until the constitution is completed and ratified. This was partly because the existing Basic Laws were and still are a patchwork lacking certain vital pieces. Though various Basic Laws were passed over the years addressing institutional arrangements, including laws on the Knesset, the government, and the judiciary, some key institutional issues remain unaddressed, as do many crucial rights like freedom of expression. Moreover, one of the key institutional lacunae is that there is still no stringent process for adopting or ratifying Basic Laws, which is the second reason why they were never previously considered an actual constitution: absent such a process, Basic Laws can be passed without reflecting the broad social consensus constitutions are supposed to represent.

A more rigorous adoption process for Basic Laws was supposed to be set through a Basic Law for legislation, but while various drafts have been discussed over the past 75 years, none ever passed, due to disagreements about both what the process for adopting Basic Laws should entail and what powers the court should have to overturn legislation.

Thus, when the Knesset approved the 1992 laws, it was expecting them to be treated like all the previous Basic Laws: as part of a future constitution, but not an existing one. That the Knesset had no inkling it was passing an actual constitution is clear not only from the content of its debates—the chairman of the Knesset committee that prepared the 1992 laws explicitly told his fellow MKs that they would not empower the court to nullify other laws—but from the very fact that more than half the MKs didn't bother showing up for the votes. When MKs understand a vote to be important, the whole house turns out. But the Basic Law: Human Dignity and Liberty passed by a vote of 32-21 and the Basic Law: Freedom of Occupation passed 23-0. In other words, they were approved by about quarter or less of the 120-seat legislature.

The result is that Israel became the only democracy anywhere to have a “constitution” passed by such a small proportion of the legislature and through a process that was “almost clandestine,” as Barak famously wrote. Precisely because constitutions are supposed to reflect a broad social consensus, they are supposed to be adopted by large majorities through a process where everyone involved knows that this is what they are doing.

Moreover, since 1995, the court has steadily expanded its self-created constitution by repeatedly adding rights to the Basic Law: Human Dignity and Liberty that the Knesset had explicitly considered but rejected. A particularly blatant example is its ruling that the right to “dignity” includes economic rights like the right to welfare, giving it the power to order the government to raise welfare allowances. In 1992, when the Knesset passed Human Dignity and Liberty, it also discussed a Basic Law on social rights such as employment and welfare. Since it considered both bills simultaneously, it clearly did not think “social rights” were included under “dignity.” And since it rejected the social rights bill, just as it has the 14 other times some version of it came up, it clearly did not want these rights enshrined, precisely to prevent the court from doing what it did—intruding on one of the government's most fundamental prerogatives, the right to decide how much to spend on competing budgetary priorities. Yet the court ignored the Knesset's crystal-clear views, asserted that these “rights” were part of the right to dignity and then used them to overrule cabinet and Knesset decisions.

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On top of all this, the court has also repeatedly asserted the right to overturn Basic Laws, though it has never yet done so. (It has struck down ordinary laws, in part or in full, 22 times.) Given its own claim that the Basic Laws are Israel's constitution, this means the court has asserted the right to overturn the constitution itself. Though this would not be a global precedent—India's court has overturned constitutional amendments—it is virtually unparalleled in the democratic West. Precisely because constitutions are supposed to reflect broad social consensus about the basic rules of the democratic game, all democracies adopt and ratify them through some kind of democratic process (the legislature or a special constitutional convention); the role of the judiciary is intentionally limited to interpreting the constitution and determining how it applies

in concrete cases. But in asserting the right to strike down Basic Laws, Israel's court has claimed the power not only to interpret the constitution, but also, in effect, to write it.

Adding insult to injury, Israel's court can overturn laws far more easily than courts in other democracies. In most democracies, only a majority of the full court can overturn laws, because decisions by the people's elected representatives shouldn't be overruled lightly. In Israel, any three of the fifteen justices can hear such cases, meaning laws can in principle be overturned by a vote of 2-1. In practice, three-justice benches are rare on such cases. But such cases are never heard by the full court and are frequently heard by less than half of it. Benches have ranged from five justices to (once) thirteen. Indeed, a five-justice bench made the seminal 1995 ruling in which the court first overturned a law. Thus, laws can be and are overturned by as little as a fifth of the court—three members of a five-justice panel. Moreover, since cases are never heard by the full court, the court president (Israel's term for the chief justice) can effectively determine the outcome of any case by choosing which justices will hear it. Usually, court presidents let cases be assigned randomly. But in high-profile cases—which cases involving government policy or legislation generally are—they often choose the bench themselves.

The final element of the judicial revolution was unique in that it enhanced the power not of the courts but of the government's own lawyers—the attorney general and other government legal advisers. As the names themselves imply in both English and Hebrew—the Hebrew term for attorney general is “the government's legal adviser”—attorneys general and other legal advisers were originally, well, attorneys and advisers. Their job was to advise the government as a whole and individual ministries on how to carry out policies within the confines of the law, which obviously includes telling them when a given policy would violate the law. But since there is often more than one way to interpret the law, no one during the state's early decades would have dreamed of saying a legal adviser's opinion must be taken as the final word. It was just advice, and a minister who disagreed with his adviser's interpretation could enact his policy and let it be tested in court.

This began changing in 1968, when Attorney General Meir Shamgar, in a novel interpretation of his own position, asserted that his role was not advisory but “of a judicial nature.” (For a fuller explanation of his decision and the evolution of the attorney general's role, see [here](#).) In other words, he was no longer the government's attorney, but a judge determining the legality of its decisions. Yet only in 1993 did this power become absolute, when Shamgar and Barak, then the Supreme Court's president and deputy president, respectively, ruled that an attorney general's decision is binding on the government. This turned the government into the only entity in Israel deprived of the basic right to go to court; challenging an attorney general's decision in court would be pointless, because the court, having declared the attorney general's authority binding, would automatically uphold it.

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Moreover, any government that did try to do so would be deprived of the basic right of legal representation, since, under the court’s ruling, an attorney general could not only refuse to represent the government’s position but could even bar it from hiring an outside lawyer to do so. As if this weren’t absurd enough, the government also has limited ability to hire or fire the attorney general. Attorneys general serve fixed six-year terms (a government’s term is four years or less), and candidates require approval from a five-member committee dominated by the legal establishment (three members are chosen, respectively, by the Supreme Court president, the Bar Association and the deans of the country’s law schools; the cabinet and Knesset choose the other two). Both the government and committee members can submit nominees, but the committee can force the government to choose one of the committee members’ nominees by vetoing all the government’s candidates—something that has in fact happened.

Of course, since ministry legal advisers are career civil servants who answer to the attorney general’s office rather than their ministers, this change in the attorney general’s status affected them, too. If the attorney general’s decisions bind the government, then by implication, ministry legal advisers have the same binding authority over their ministries, because they are the attorney general’s representatives in those ministries. And since they are civil servants who are not chosen by the minister, legal advisers and ministers often have with very different worldviews, leading the adviser to nix policies that other legal experts with different perspectives might well uphold. This puts the government in a stranglehold that seems absurd when looked at from the outside.

Because the judicial revolution gave the court such broad powers over government policy, it also made one previously uncontroversial institution, the Judicial Appointments Committee, highly controversial. The committee has nine members—the justice minister and another minister chosen by the cabinet; two Knesset members chosen by the Knesset, usually but not always one coalition and one opposition MK; two lawyers chosen by the Israel Bar Association; and three sitting Supreme Court justices chosen by the Supreme Court president. A simple majority of the panel can appoint an ordinary judge, while seven are needed to appoint a Supreme Court justice; this means that both the sitting justices and the governing coalition have veto power.

In practice, however, the justices command an absolute majority, because the Bar representatives almost always side with them. Israel’s court system has only three levels—magistrate’s, district and supreme—and a mandatory right of appeal. Consequently, any case that begins in the district courts ends up in the Supreme Court, meaning any lawyer of sufficient stature to be on the appointments committee regularly appears before the Supreme Court and would therefore be reluctant to antagonize the justices. Thus far from being “balanced,” the committee is heavily tilted toward one side—whichever side the justices favor, in this case the liberal one. When a liberal government is in power, it can team up with the justices and lawyers

to appoint liberal justices. But when a conservative government is in power, the justices generally veto conservative candidates, so except in rare cases, it can at best appoint moderates.

When the court routinely rules on major ideological and policy controversies, this system is problematic for several reasons.

Virtually no other democracy lets sitting justices be involved in choosing their own successors, much less have veto power over the choice, and for good reason. Giving sitting justices' veto power quickly creates a court with almost no ideological diversity, because justices, like all human beings, will naturally prefer people who share their worldview to people whose views appall them—and in Israel's case, this has meant an activist liberal worldview. If you're a liberal, imagine a situation in which the current U.S. Supreme Court majority could ensure the appointment of likeminded justices in perpetuity by vetoing any liberal candidate any Democratic president proposed. How long would it take before all liberals distrusted and despised the court? If you're a conservative, try the same experiment with an ultraliberal court in mind. Either way, you wind up with a court that half the country—and it doesn't matter which half—distrusts and despises, which is exactly what you have in Israel today.

II. The Reforms

The breadth and depth of the changes wrought by the judicial revolution are a key reason why the battle over the current government's proposed reform seems existential to much of the country. The left, which ruled the country for the first three decades of Israel's existence, lost power in 1977; since then, while power has changed hands many times, the right has won more often than the left, and especially over the last fifteen years. Thus, for the left, the Supreme Court has become the key guarantor that liberal values and policies will continue even under a rightist government. For the right, the court is the key reason why its own values and policies have been repeatedly thwarted no matter how many elections it wins. Neither view is completely accurate, but both have quite a bit of truth to them. And it's easy to see why these beliefs would fuel such passions. In short, it's the very magnitude of the court's power that is driving both the reform and the opposition to it.

What may be less obvious is why the reform has suddenly erupted now, three decades after the judicial revolution occurred. The answer is that this is merely the culmination of a very long process. Though conservative legal experts vocally opposed the revolution from the start, as did some politicians, most voters aren't interested in the abstract issue of how the division of power among different branches of government comports with democratic theory. It took a slow accumulation of ruling after ruling, year after year, on issues they cared about for rightist voters to realize that this abstract issue concretely affected national life and had to be addressed. It took more time for this issue to move from being one among many to a top priority, the kind of voting issue that affects political outcomes, as the onetime reform opponent Kahlon discovered. After

his party lost six of its ten seats in the 2019 election, he told journalists that his voters repeatedly cited one main reason for their desertion: he thwarted legal reform.

Yet even once the desire for reform was cemented, it took time for a political opportunity to emerge. Though Netanyahu has been in office almost continuously since 2009, the current government is the first in which every party supports judicial reform, because he has always prioritized foreign affairs and defense over domestic issues and therefore preferred his governments to include at least one party to his left to give him more maneuvering room on those issues. And since coalition agreements routinely give individual parties veto power over certain issues, these left-leaning parties could and did veto reform. This time, because all the parties to his left are boycotting him over his criminal indictments, Netanyahu had no choice but to form an exclusively rightist/religious coalition. This also explains why coalition MKs are treating the reform as a matter of such urgency: they recognize this as a political opportunity that may not soon return.

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In an effort to keep the reforms from being overturned by the court, which has vocally opposed them, most are being submitted as amendments to the Basic Law: The Judiciary. This means the court will be able to overturn them only if, for the first time, it strikes down a Basic Law rather than merely asserting its power to do so. Whether it would actually do so, thereby sparking an unprecedented constitutional crisis, is anyone's guess.

With all this in mind, it's time to examine each reform individually, including any concerns specific to it, before moving on to considering objections to the package as a whole.

1)

Let's start with the provision I consider most self-evident: barring the court from overturning Basic Laws. As noted, it was the court itself that decided the Basic Laws are a constitution. This makes its repeated assertion that it is entitled to overturn Basic Laws completely absurd. In democracies, courts don't strike down the constitution; they are subordinate to it. This seems so obvious that explicit legislation forbidding it should have been unnecessary.

The one serious objection to instantiating this point in law is that because Basic Laws can be passed by a bare majority of the Knesset—which every governing coalition has by definition—governments could grant any law immunity from judicial review just by calling it a Basic Law. Yet the court can't have it both ways. If Basic Laws are too easily passed to be considered a constitution immune from judicial review, then they also can't empower the court to overturn ordinary laws often passed by much larger majorities. Either they're a constitution or they aren't; they can't be a constitution only sometimes, whenever the court deems it convenient. Consequently, the right solution to this problem isn't empowering the court to strike down Basic

Laws, but finally enacting stringent procedures for passing Basic Laws—something Justice Minister Yariv Levin reportedly plans to do later on. Moreover, the fact that such procedures are needed is a rare point of agreement between the governing coalition and the opposition. The government might therefore be able to ease concerns over this issue by unveiling Levin's proposed Basic Law: Legislation now, seeking input from the opposition and trying to secure bipartisan support for an agreed version.

2)

This leads directly to what is prima facie the reform's most outrageous element: giving 61 of the Knesset's 120 members the power to override Supreme Court rulings. In democracies with formal constitutions, it's generally considered the court's prerogative to interpret that constitution and determine how it applies, including by overturning laws. But this provision effectively voids the court's power to overturn legislation by allowing any government to overturn any Supreme Court ruling, since all governments typically command 61 MKs.

Thus, if Israel actually had a formal constitution, I would consider this provision unacceptable. And there's a good argument to be made in any case for requiring a larger majority of MKs than 61 for an override, as even many conservative legal scholars have noted. But the general idea makes sense. As noted above, the Knesset never intended the 1992 Basic Laws to be a constitution and the laws themselves were approved by a mere fraction of the legislature. Consequently, the court was never justified in asserting that the laws gave it the power to overturn ordinary Knesset legislation. Moreover, by so doing, it violated the Knesset's fundamental prerogative to enact—or in this case, not enact—a constitution and determine what it contains. The override law would essentially restore the situation to what it was until 1995, when the court could not overturn legislation. And while most democracies do have constitutions that enable courts to overturn laws, this situation is hardly unprecedented. Britain also has no constitution that allows its highest court to overturn laws but is universally considered a democracy; Israel itself was similarly considered a democracy during the five decades before its court began striking down laws.

Here, too, one possible alternative would be for the Knesset finally to set stringent requirements for adopting Basic Laws and then to declare that any law which doesn't satisfy these requirements cannot be a Basic Law.

But there's a good reason why Levin and Rothman both opted for the override route now. Enacting stringent procedural requirements would instantly strip Israel's two main human-rights laws of their status as Basic Laws. Consequently, as Levin has acknowledged, passing a Basic Law: Legislation would require simultaneously passing new human-rights laws with the requisite majorities to make them Basic Laws. Unfortunately, this will be very difficult to do, because the court's very expansive interpretations of the existing Basic Laws have made many MKs leery of giving it such broad language to work with ever again.

This, counterintuitively, makes the override law the best way to protect human rights while also upholding the vital principle that in a democracy, constitutions are not passed clandestinely by

legislative minorities or imposed by judicial fiat but must be written by the people's representatives and openly adopted through a process that ensures broad support. The override law would leave the Basic Laws intact, enabling the court to continue reviewing both government decisions and laws based on their provisions. And except in rare cases where the Knesset chooses to exercise its override powers by passing legislation to reinstate a given law or decision, these rulings will stand.

3)

The third reform also attempts to make it harder for the judiciary to overturn laws. It specifies that the full court and not a smaller panel of its members would have to hear such cases, and that a supermajority of that full court would have to agree to strike down the law. That proposed supermajority currently sits at twelve of the fifteen justices (Rothman originally proposed fifteen, but later adopted Levin's position). This goes well beyond the simple majority most other democracies require, and I think it sets the bar too high. On an ideologically diverse court—which is what another part of the reform package, a revised Judicial Appointments Committee, is intended to create—achieving a majority that large would be almost impossible. Nor is it necessary if the goal is simply to ensure that laws aren't overturned by narrow majorities of the court; a smaller percentage—say, two-thirds—would suffice for that.

Why not a simple majority? Because legal interpretation isn't an exact science; there is rarely only one possible answer to the question of how any law or constitution applies to any given case, and even top legal experts often disagree about the correct interpretation. That's exactly why split decisions are common on supreme courts worldwide.

If the justices themselves are narrowly divided, I would argue that the court should defer to the Knesset, for two reasons. First, elected legislatures should have maximum freedom of action within the bounds of the constitution, so if even the country's top legal experts are divided on whether a law is constitutional or not, they should defer to the elected legislature's judgment. Second, overturning laws is always politically controversial, because it always upsets a sizable number of legislators and voters. It's therefore crucial that the decision at least be *legally* uncontroversial; otherwise, the court risks being viewed as politicized. And legal incontrovertibility is easier to achieve when the justices are not narrowly split; narrow Supreme Court rulings everywhere are the most likely to be seen as politicized, and therefore to generate public distrust of the court's impartiality. Such distrust, as noted, is a huge problem in Israel today, with potentially grave consequences for democracy. Thus, requiring a supermajority isn't meant only to protect the Knesset's ability to pass laws; it would also protect the court's status as a legal authority whose decisions are widely accepted by both sides, thereby bolstering Israel's democracy.

4)

Restoring due deference for the elected legislature is also the reason for barring the court from overturning government decisions it deems unreasonable as opposed to in violation of a specific law. Here, the government shot itself in the foot by making the court's recent disqualification of

the disgraced Shas party leader Aryeh Deri's cabinet appointments the poster child for this issue. Deri was slated to serve first as both health and interior minister and later as finance minister in the current coalition until the court precluded that agreement. It's hard to imagine a decision more unreasonable than putting a serial financial criminal in charge of three of the government's most important ministries, all of which control enormous budgets. Had the court limited its use of the reasonability argument to issues as egregious as the Deri case, few Israelis would ever have objected to it (and abolishing reasonability wouldn't actually help Deri, since as several justices noted, there were other legal grounds for disqualifying him).

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But as noted earlier, the court hasn't limited itself to egregious cases like Deri's; it has used the reasonability doctrine to overturn government policies on a wide range of issues at the core of the government's responsibilities, including many policies that most Israelis considered eminently reasonable. By substituting its own judgment for the elected government's, the court has deprived the government of its core prerogative of setting policy and voters of their core prerogative of deciding for themselves whether the government is acting reasonably.

The main fear that has been voiced about abolishing reasonability is that it would reduce protections for human rights, since this doctrine is also used to overturn decisions by particular bureaucrats that affect particular individuals. Indeed, that was its original purpose, and how it was used prior to the judicial revolution. In this sense, the reasonability problem is a direct outgrowth of the abolition of restrictions on standing and justiciability, since abolishing those restrictions is what allowed the court to start applying reasonability to policy issues. Consequently, restoring the status quo ante on standing and justiciability—which would bring them more in line with foreign norms—might be a viable alternative to scrapping reasonability.

Nevertheless, abolishing reasonability doesn't abolish the courts' power to protect individuals from bureaucratic abuse. All the laws guaranteeing Israelis' rights—from the wide-ranging Basic Law: Human Dignity and Liberty to narrower laws like the Patients' Rights Law and the Students' Rights Law—remain in place, leaving courts free to overturn decisions that violate these rights. Many decisions harming specific individuals will fall into this category.

It's also worth noting that this change may well bolster one particular human right: the right to a speedy trial. Civil and criminal cases in Israel frequently drag out for years because the courts at all levels are overburdened. And one reason they are overburdened is that the courts spend too much time considering the reasonability of government policies at the expense of hearing criminal and civil cases. Reducing their deep involvement in policy minutiae would free up time for other cases.

The proposed change in the legal advisers' role is a mixture of old and new. It makes decisions by ministry legal advisers nonbinding, thereby restoring the pre-judicial revolution status quo ante. But it would also let ministers choose their own legal advisers rather than being assigned them from the cohort of civil servants. Some might argue that either change would suffice without the other; I think both are needed. Making decisions nonbinding is important to restoring legal advisers to their proper role as advisers rather than arbiters; letting ministers choose their own advisers makes it more likely that the adviser will seek to further the minister's agenda rather than thwart it. In any case, it ought to be obvious that neither change would enable ministers to violate the law. If a policy is actually illegal—as opposed to merely unreasonable in the view of either the adviser or the court—courts will still be able to overturn it. And they will almost certainly have a chance to do so, since the reform isn't reinstating restrictions on either standing or justiciability.

6)

This brings us to one of the few provisions that is a complete innovation rather than a restoration of norms upended by the judicial revolution. That is the change in the Judicial Appointments Committee's composition. Under Levin's proposal, the nine-member committee would be expanded to eleven members: the justice minister plus two other sitting ministers; three sitting justices as before; the heads of three Knesset committees, two of which are always controlled by the coalition and one by the opposition; and two public representatives chosen by the justice minister. Rothman has proposed keeping the committee at nine, but comprising three ministers, two coalition MKs, one opposition MK, the Supreme Court president, and two retired judges jointly chosen by the court president and the justice minister.

Either way, this gives the governing coalition a clear majority on the panel, rather the current situation where one side—the liberal one—almost always has a majority regardless of which parties are in power. The Bar Association representatives will be out, and while justices will still be able to opine on candidates' suitability, they will no longer have veto power. (That's one reason why the Bar representatives were removed; had they remained, then combined with the one opposition MK, the justices' bloc would still have had a majority. The other is that letting lawyers promote lower-court judges before whom they appear creates an inherent conflict of interests, because it gives judges an incentive to favor those lawyers' clients.) Whichever government is in power will be able to appoint likeminded justices—and since in democracies power changes hands periodically, the court will soon have both liberal and conservative justices. At any given moment, there will be more of one than the other, but the balance will change as new governments appoint new justices, so both sides will spend some time in the majority and some in the minority. Indeed, this is precisely why almost all democracies have some combination of the executive and legislature appoint Supreme Court justices—it's the best way to ensure that courts which wield great power over controversial issues contain a range of views rather than reflecting the views of only one side.

Would the political appointment of justices interfere with the separation of powers, or strip justices of their independence, as some reform opponents fear? That's unlikely, because once

appointed, justices can only be removed for egregious misconduct or, in Israel's case, once they reach the mandatory retirement age of 70. This allows them to rule as they please without fear, as is amply proven by other countries' experience: many U.S. justices, for instance, have disappointed the politicians who nominated them. It's true that lower-court judges will have to please the committee to get promoted, but that is true today as well, since judges who don't conform to the court's liberal activist mold have little chance of promotion. Consequently, the reform may actually increase judicial independence: with promotion open to both liberals and conservatives depending on which government is in power, they will feel freer to rule as they see fit.

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Supporters of the current system argue that it ensures only the most qualified people become justices, whereas politicians will choose inferior candidates. But historically, neither half of that statement has been true. In 2005, for instance, the justices vetoed the candidacy of the late Ruth Gavison, who was widely acknowledged both in Israel and abroad as one of the country's finest legal minds as well as a leading champion of human rights. Despite being on the left politically, she thought the court had greatly overstepped its bounds by intervening so frequently in political issues, and she was vetoed explicitly because of that "agenda," as the court's then-president, Aharon Barak, termed it. This blatant example of justices placing their own liberal activist agenda above the candidate's qualifications played a major role in convincing conservatives that the current system is rigged against them. In contrast, other countries' experience shows that politicians frequently do nominate top legal minds, because that offers the best hope of advancing their own legal agenda, whether liberal or conservative. For instance, while many Americans dislike the current U.S. Supreme Court, few would argue that justices like John Roberts or Amy Coney Barrett aren't first-rate legal experts.

A more serious argument is that since the reform's other provisions will significantly reduce the court's power over policy, the justices' views won't matter nearly as much, making changes to the appointments committee unnecessary. But in the long run, judicial review is clearly here to stay; even Levin says his planned Basic Law: Legislation will authorize the court to overturn laws. And in the short run, after decades of dominance, a court accustomed to activism won't suddenly fade into the woodwork; its role will be smaller than it is now, but there's a limit to how far one can turn back the clock. Consequently, diversifying the court's composition is essential, and that requires changing the appointments committee's composition.

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The final reform would let the appointments committee choose the Supreme Court president, either from among the sitting justices or by bringing in an outside candidate. This, however, is the wrong solution to the problem of the president's excessive power. Court presidents simply

should not have the power to determine the outcome of cases by choosing which justices hear them, regardless of how they are appointed. It would be much better to continue the current practice of appointing presidents by seniority but require all cases to be assigned randomly to sub-panels of the court.

III. The Opposition

Assuming the details are worked out in a reasonable way, and given that these provisions largely just restore the situation to what it was before the judicial revolution, given that many are standard democratic practice, and given that they are intended to fix an undemocratic situation in which unelected justices have almost unchecked power to overrule the elected government, I think the reform's individual components—aside from the change in how Supreme Court presidents are appointed—are reasonable. But a whole is often greater than the sum of its parts, and taken together, these changes are substantial. Consequently, several objections that have been raised to the package as a whole deserve consideration.

To start with, many Israelis, including senior economists and businesspeople, are very worried that the reform will endanger Israel's economy. There is no good reason why it should; courts will still have full power to hear suits between businesses and government agencies, enforce contracts and do all the other things courts do to protect the business environment. True, they will no longer be able to overturn government policies, but that is at least as likely to increase stability as to undermine it. Just consider the government's 2015 deal with the natural-gas companies, which the Supreme Court overturned, forcing the companies to postpone the start of gas production. The real risk is that this could become a self-fulfilling prophecy. If enough businesspeople and investors worry that Israel's economic environment is being destabilized, they may withdraw their money and business regardless of whether those worries are well-founded. Yet many would return if those worries proved baseless; as long as the actual business climate isn't affected, few investors or businesses will pass up good opportunities merely out of ideological opposition to the reform. It's also not clear how much these fears are related to the specific reforms and how much to the general chaos of the current coalition.

Second, some opponents fear the reform would leave Israel vulnerable to the International Criminal Court; this has become a real concern among army reservists. The ICC's charter denies it the right to investigate and try alleged crimes if a country has an independent legal system capable of conducting its own investigations and trials; opponents argue that a weaker court wouldn't meet this standard. That might be a serious concern had the ICC ever showed any deference for Israel's current court. But it hasn't. Its former chief prosecutor, Fatou Bensouda, opened an investigation into alleged war crimes during the 2014 war with Hamas in Gaza even though these allegations were exhaustively investigated by Israel's own legal system (and several Western countries urged her not to). And an ICC pretrial chamber of judges twice demanded that

Bensouda reconsider her decision not to investigate Israel's 2010 raid on a flotilla to Gaza despite the Israeli legal system's exhaustive investigations of that incident.

Third, the case for reform has also been understandably damaged by fears that Netanyahu is pushing it solely to escape his criminal trial. Given that he quashed every previous effort at legal reform in previous prime ministerial terms, that's hardly an unreasonable conclusion. And though none of the reform's provisions would alter the court's role in criminal or civil cases, restricting its role in overturning laws and policies could, for instance, enable legislation that would give prime ministers immunity from prosecution while in office. Nevertheless, most of the rest of the governing coalition's MKs—including the reform's main architects, Levin and Rothman—were pushing legal reform long before Netanyahu's cases began. More importantly, so were their voters, as noted previously. Thus, even if his legal problems are motivating Netanyahu personally, they are not what is motivating the reform as a whole. It would be more accurate to say that other coalition MKs are taking advantage of those problems to do what they have long wanted to do anyway.

A far more serious concern than these three is that the proposal would destroy Israel's system of checks and balances. Even though many of today's critics voiced no concern about a lack of checks and balances during all the years when the judiciary was amassing excessive power, it would be wrong to dismiss this concern as mere hypocrisy; indeed, even some longtime conservative critics of the court fear the reform package goes too far. And the truth is that Israel's parliamentary system does lack crucial checks on the executive that most other democracies have.

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For one, there's that lack of a formal constitution. For another, there's the fact that Israel only has one legislative chamber—it has no Senate, for instance. On top of this, the Knesset is virtually the only democracy where legislators aren't directly elected by voters in some fashion. Israelis vote for a party ticket, not individual MKs, and in most parties, the party leadership has sole authority over who is on those tickets. This means MKs are rarely willing to oppose party leaders, almost all of whom sit in the cabinet, and are therefore not an effective check on the executive. That is why many Israelis deem a strong court essential.

These are serious points. But after 30 years of experience, it seems clear that simply doing nothing and leaving an imperialist court in place isn't the right answer; all that has achieved is making half the country loathe and distrust it. A better solution, as I have argued for decades, would be bolstering the legislature's independence by letting voters directly elect specific MKs in some fashion, so that instead of needing to satisfy their party leaders to win reelection, MKs would have to satisfy their voters. This would empower MKs to defy their party leaders when the

leaders' interests diverge from those of their voters, as they not infrequently do. Of course, every previous effort to introduce direct elections of MKs has failed, largely because those proposals tried to introduce an Anglo-American first-past-the-post model that is incompatible with Israel's current system of proportional representation. Yet other methods of direct election are compatible with proportional representation; most European countries use these. And since most Israelis want to retain proportional representation, Israel needs to start seriously exploring these models. This isn't a process that can happen overnight, and there's no guarantee that it will happen at all. But I think its chances will improve once the court is restored to its proper dimensions, since at that point anyone concerned about an overly powerful executive will be forced to look beyond the court for solutions.

Yet even if this doesn't happen, it's important to recall that Israel's system also has a check many other democracies lack: its multiplicity of small parties—the current Knesset contains ten electoral slates representing fifteen different parties—means that even when one bloc has enough MKs for a governing coalition, it is usually too small to be stable without at least one party from the rival bloc. The current government is the first in decades to lack such a party, and it would probably have one as well were the opposition parties not boycotting Netanyahu. Moreover, all parties routinely demand veto power over issues of importance to them as part of the coalition agreements, and this frequently prevents governments from veering too far from the center on contentious issues. This, incidentally, is another reason why many rightists often feel they “voted right but got left,” but in this case, leftists may well feel equally stymied when they are in power.

Another nontrivial objection is that while the reform would largely restore the pre-judicial revolution status quo, Knesset members have changed radically since then: they have lost their self-restraint, and now frequently raise proposals that would have been unthinkable three decades ago. This, too, is true; where I differ from the reform's opponents is that I think irresponsible legislators are an inevitable and pernicious consequence of the judicial revolution. For 30 years, MKs have grown accustomed to the idea that what they propose matters very little, because the court will overturn any idea it dislikes in any case. Consequently, many legislative proposals have become nothing more than press releases to garner headlines. It's a grown-up version of children never learning to take responsibility because their parents always protect them from the consequences of their actions.

But once consequences are restored, both politicians and voters tend to sober up very quickly. As an example, consider what happened in America within seven months of the Supreme Court ruling that abortion isn't a constitutional right. As the *New York Times* reported in January, abortion rights won ballot victories in six states in November, including the “red states” of Kansas, Kentucky, and Montana; Democrats did better than expected in the midterm elections, fueled in part by anxiety over abortion; and many Republican politicians who had vocally supported abortion bans began backtracking. That's because most Americans are in the middle, supporting limits but not bans—and once the court was out of the way, politicians' support for blanket bans could no longer be dismissed as irrelevant. Voters began acting accordingly, and politicians responded, as they usually do in democracies.

Here, too, with the court out of the way, the governing coalition will be forced to consider the consequences of its actions. One of those is pressure from allies, especially America. But even more important is the likelihood of losing the next election if its policies are too radical. That, for instance, is why Culture Minister Miki Zohar quickly backtracked when his promise to end funding for cultural events on Shabbat proved deeply unpopular, even among his own base.

In last November's election, rightist parties won just 30,000 more votes than their opponents, out of almost 4.8 million valid votes cast. (Their lopsided Knesset margin is because three parties in the Knesset last time failed to get in, wasting hundreds of thousands of votes, and most of the wasted votes were for leftist parties.) Consequently, it wouldn't take much to tip the balance in the other direction, especially since coalition parties won many votes from center-rightists and religious moderates deeply uncomfortable with many of the government's positions—particularly on issues of religion and state, but also on the legal reforms themselves. Repeated polls have shown from the start that sizable minorities of voters for coalition parties have concerns about the reforms, and the numbers appear to have grown over time due to fears of economic damage and a societal schism.

And this brings us to one of the deepest concerns about the reform: the fear that it will destroy Israel's social cohesion. Indeed, it would be grossly irresponsible to make light of the current tension, which is running extraordinarily high. Aside from the mass demonstrations, which have taken place weekly for the last two months, growing numbers of army reservists are threatening not to report for duty, and concerns have spread beyond the circles that always favored a powerful court willing and able to impose liberal values and policies. Many Israelis genuinely fear that the reforms will undermine Israel's democracy by creating an unchecked executive; that the current government has shown few signs of self-restraint on any issue has exacerbated this fear.

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To this, the first thing to say is that Israel's social cohesion was already in tatters; the side represented by the current government has been bitterly unhappy for years. Perhaps reform opponents simply missed conservatives' unhappiness, because there have been few mass demonstrations against judicial activism. (The right largely gave up on mass demonstrations after they signally failed to stop either the Oslo Accords or the unilateral pullout from Gaza.) Mainstream rightists have also never threatened to shirk reserve duty (refusal to serve during the Gaza pullout, for instance, was negligible), nor have they ever threatened civil war, as some reform opponents are regrettably doing now (which may explain why a shocking 60 percent of Israelis from across the political and religious spectrum recently told pollsters they fear the battle will turn violent). Instead, the right has focused on electing MKs who support legal reform.

Restoring social cohesion will therefore be impossible in the long run without serious legal reform.

Yet it will be equally impossible if reform is rammed through in a way that leaves opponents feeling like they have lost their country. And that is directly related to another very serious objection—that major systemic changes should be made with broad consent rather than rammed through by a government that won election by the slimmest of margins. I couldn't agree more, both as a matter of principle and for the very practical reason that absent buy-in from the other side, a subsequent government might well reverse all these measures. Broad consent would also reduce the likelihood of the court sparking an unprecedented constitutional crisis by overturning the reforms; while that may be unavoidable, it would clearly be better to avoid it if possible.

Compromise is undoubtedly complicated by the fact that the left has spent the last three decades adamantly rejecting every conceivable change, even proposals far more modest than the current one, as anti-democratic. Indeed, until recently, most refused even to admit that there is anything wrong with the current system, and many still do. Moreover, while some reform opponents are now calling for dialogue, few among the court's longtime defenders (as opposed to longtime opponents who disagree with certain elements of this reform) have mentioned any specific change they would be willing to make.

President Isaac Herzog, who unveiled his own compromise framework in mid-February, is a potentially influential exception. He proposed enacting a Basic Law: Legislation that would include three elements: setting procedures for enacting Basic Laws; empowering the court to overturn ordinary legislation but not Basic Laws; and creating a procedure by which the Knesset could override court decisions in certain cases. He also called for revamping the Judicial Appointments Committee to give all three branches of government equal representation and ensure that no side has an automatic majority, limiting but not abolishing the reasonableness doctrine, and taking steps to reduce delays of justice in ordinary cases (for instance, appointing more judges). This proposal clearly resonated with much of the public; in one poll, 72 percent of respondents favored a dialogue leading to compromise, including 60 percent of those who voted for coalition parties and 84 percent of those who voted for opposition parties.

But the response to Herzog's proposal from the political arena has been less than encouraging, doubtless influenced by very vocal voices in both camps that reject any compromise. Opposition leaders insisted dialogue was impossible if the legislation wasn't frozen before its first Knesset vote, because that would be equivalent to negotiating "with a gun on the table"; coalition leaders said dialogue was impossible if the legislation was frozen, because they fear the opposition seeks to bury the legislation in never-ending discussions. Both positions are so absurd that they clearly aren't the real story. The first vote (which most of the reforms have now passed) is a very early stage of the process; it is followed by committee hearings and then two more votes by the full parliament, and legislation frequently undergoes extensive revision in committee. Consequently, the opposition is not yet "under the gun"; it can afford to devote some time to exploring the coalition's willingness to compromise. And the coalition, having already proven its

ability to pass the bills, can afford to suspend the process for a defined period to see whether the opposition is serious about compromise or merely stalling.

Right now, both sides believe they can win. The government has the votes to pass its own plan as is; the opposition believes that the protests and pressure will force the government to fold.

What's more likely behind the reluctance to negotiate is that right now, both sides believe they can win. The government has the votes to pass its own plan as is; the opposition believes that the protests' momentum, the nonstop warnings of economic disaster, the growing numbers of reservists threatening not to serve and the increasing international pressure will force the government to fold. Moreover, neither side believes a satisfactory compromise is possible, and both see dialogue as a risk, because they could wind up being blamed for the talks' collapse. Herzog's proposal is vague on details, and many of those details are potential deal-breakers. For instance, there's a huge difference between a 61-MK override and, say, a 70- or 80-MK override; the former will frequently be achievable, the latter almost never will. Nor did Herzog specify whether the justices' veto on the Judicial Appointments Committee would remain intact, a crucial issue on which neither side feels it can concede.

I think it's nevertheless worth making the effort; despite having argued that the government's proposed reform is not only defensible but necessary, the advantages of a reform that enjoys broad support would justify some compromises. But even if no compromise is achievable, the government could seek to ease opponents' concerns by proposing other checks on executive power to compensate for a weaker court. Israel is still too divided to be able to draft a full-fledged constitution, just as it was when the first Knesset decided not to do so in 1950, and there are important measures like direct election of MKs for which public support must first be built. But a narrow version of a Basic Law on legislation—one that sets stringent procedures for adopting Basic Laws without addressing the issues of judicial review and Knesset overrides—should be achievable, since both sides agree on its necessity. Moreover, existing Basic Laws leave many basic rights, like freedom of expression and assembly, unprotected; Rothman himself recently said he could list “30 to 40 constitutional rights that I think the Knesset should anchor and protect.” Proposing Basic Laws on some of these issues might help convince the opposition that the government is not seeking untrammelled power to suppress human rights.

Perhaps the most serious concern about the reform is that, as the Israeli philosopher Micah Goodman noted recently, any big change often has unforeseen and unintended consequences. That's a real danger, especially with a reform with so many moving pieces, and I don't take it lightly. For this reason, too, it would be best to have as much of Israeli society on board with such a change as possible.

Yet despite all the genuine risks, judicial reform is a long-overdue response to the real and decades-long problem of judicial overreach. As long as it's calibrated properly, far from undermining Israel's democracy, such reform would bolster it. Removing the court from disputes

over policy and values would force both sides to fight those battles in the public arena, where they belong. And making the court more ideologically diverse would likely result in the left coming to share the right's skepticism of judicial power, just as is now happening in the U.S.; that would be far healthier than the current situation, in which such skepticism is confined to one side of the political spectrum. If half the country feels that its values, beliefs, concerns, and policies are being summarily dismissed by an unelected court no matter how many elections it wins, that half may eventually despair of democracy itself. And that is an untenable situation for any country that wants to remain democratic.