

OPINION

Israel is divided over judicial reform, can Tikvah help cool it down?

The current debate about judicial reform did not emerge suddenly from nowhere, and it is not the creation of the new Netanyahu government.

By ELLIOTT ABRAMS, ERIC COHEN Published: MARCH 23, 2023



Israelis gather to protest the judicial reform at the Knesset (photo credit: MARC ISRAEL SELLEM)

Israel's national debate over judicial reform and the powers of the Supreme Court is a crucial discussion on one of the great questions of democratic self-government. In every democracy, a balance must be struck between representative government through an elected parliament and executive and an independent judicial system that protects basic rights and preserves the rule of law.

Israel's constitutional system – or, more precisely, its lack of a constitution – created lacunae that the Supreme Court actively filled in the last few decades, initiated by former Supreme Court president Aharon Barak's so-called "judicial revolution" in the 1990s.

This revolution provoked serious arguments over whether the court had taken upon itself roles and powers that in a democracy should be filled by the elected organs of government.

Tikvah has been a forum for these debates – at the level of ideas – for many years, beginning

with essays that we sponsored in a journal called Azure in the late 1990s, and continuing through our publications more recently in Mosaic. (As a service to the current debate, we have collected some of that work here – including an original translation of a 1949 speech by David Ben-Gurion on why Israel has no constitution.)

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THE HIGH Court of Justice has been a paper tiger in everything concerning the Netanyahu bloc's interests, says the writer
(credit: YONATAN SINDEL/FLASH90)

The issues at stake – including how Supreme Court judges are appointed, the scope of judicial power and judicial review, the role of legal advisers in the political system and the overall separation of powers within Israeli democracy – have been discussed for decades.

The current system has long left many Israelis feeling that representative democracy in Israel did not represent them, and that the worldview of a narrow and largely self-appointed judicial elite was (and is) imposing its values on the nation.

A true democracy takes such concerns seriously. This does not determine the best answers – or the best process – for seeking reform. And just as the American, Canadian, British, Australian and other systems differ, so the Israeli outcome will always reflect its unique history, politics, and society.

Democracies will always include debates

While Israelis might draw upon the accumulated wisdom of other legal and political traditions and learn from wise jurists from around the world, the question of Israel's constitutional structure is a question for Israeli citizens alone.

A true democracy always includes different factions, different parties, and different interests clashing in the public square. America's debate over the ratification of our constitution was hardly serene, but the weight of the moment did press anti-Federalist opponents and Federalist defenders of the American Constitution to think politically and persuasively about the structures of American freedom.

Just as Adams clashed with Jefferson, and Jefferson clashed with Hamilton, so in Israel's early years did Ben-Gurion clash with Begin in the drama of political life in a healthy society.

A strong nation always unites these different factions around a higher loyalty: the nation-state itself. This is all the more essential in Israel – the still-young, miraculously re-born, and only nation-state of the Jewish people.

Israel must indeed be governed by Israelis alone, but all Jews have a stake in its future. As engaged supporters of Israel, we believe that prudent reforms are essential for restoring a more democratic balance of powers in Israeli society.

We are also profoundly saddened to see this urgent and important debate devolve into bitter divisions and a widespread sense of political crisis. The rhetoric being employed, including accusations of "blitzkrieg" and "fascism," to say nothing of reckless evocations of "civil war," should have no place in Israeli political discourse. This is a time for statesmanship and wise compromise, not callous and inflammatory accusations. It is also a time for centrist leaders to step up and step forward.

As leaders of Tikvah and as Diaspora Jews with lifelong commitments to Zionism and to the State of Israel, we have asked what our role in this debate should be. Surely it is not to heighten emotions and contribute to the deep divisions on display today. Rather, our view is that all Jews and all friends of Israel should cool the rhetoric and back away from words and actions whose only impact is to weaken the State of Israel.

In our view, a negotiated and broadly consensual agreement remains the best outcome, incorporating those reforms that have the broadest democratic majority and postponing those that do not.

This seems to demand that the leaders of the reform effort accept that some of their proposals require more time for deliberation, debate, and public persuasion; and it demands that the opposition to the reforms move now to replace demonstrations with negotiations and end the refusal to report for critical work (such as military reserve duty) that keeps Israel strong.

And we can only hope – as onlookers – that Israel might eventually move toward a true constitutional convention, deliberating with depth and civility about the fundamental structure of Israeli self-government.

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Natan Sharansky

Natan Sharansky, a great Jewish patriot and statesman, recently said it well: “The greatest threat we face today isn’t the approval or dismissal of the judiciary overhaul.... No, the true danger is that we will stop talking with each other, stop building our consensus, stop finding places where we can say “yes” to one another and to the values we yet share.”

We hope that this national debate in Israel may still produce an outcome that improves Israeli democracy and balances majority rule and representative government with the essential power of the judiciary to protect basic rights. That outcome is far more likely if all sides accept that principled compromise—achieved through the deliberative institutions of Israeli democracy—is what true leadership now demands.

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