

The 2023 Proposed Constitutional Putsch

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February and March, 2023 have seen hundreds of thousands of demonstrators protesting against new proposed constitutional amendments designed to transform the constitutional foundations of the State of Israel. This is an exceptional phenomenon. Israel has seen mass demonstrations in the past but it has never seen mass demonstrations on what may seem like issues which should concern at best lawyers or law professors.

But looked at more attentively, this reaction is not surprising: beneath the legalistic debate on the constitutional amendments lurk deeper issues: should Israel be more western or more Jewish? What is the status of Jewishness in the Jewish State? What should the status of Palestinians in a Jewish State be? Is Israel primarily a western state or is it a nationalist theocracy? A lot is therefore at stake for every Israeli citizen!

The proposed constitutional amendments are radical. This is why advocates and opponents cannot even agree on the title to be given to these amendments: is it a reform as the advocates argue or is it a putsch or legal rebellion as its opponents maintain? Irrespective of the title, the proposed amendments are designed to strengthen the powers of the executive (and legislative branch) and weaken dramatically the powers of the courts. The advocates of these amendments officially contend that under current circumstances, the Israeli government cannot govern effectively and execute its policies due to too great interference on the part of the courts. They also contend that the courts have too much powers and that they govern undemocratically. They wish therefore to “bring the power back to the people.” The opponents argue that the proposals threaten the liberal foundations of the State; they are likely to erode the fundamental liberties and, finally, they have far-reaching negative consequences on the economy of the state and its future. To fully understand the underlying considerations, let me first provide a (very) brief introduction to the Israeli legal system. Then I will describe the current proposals and evaluate their likely effects.

After the establishment of the State of Israel, there have been plans to establish a constitution as indeed has been done in many other newly-liberated colonies. Israel is exceptional in that no formal constitution was established. Instead, the Knesset endorsed in 1950 what is called the Harari compromise under which the constitution will be made of separate chapters, each of which will constitute a separate basic law. The Knesset has enacted several basic laws which may, in the future be incorporated into a formal written constitution. The basic laws are meant to establish the basic public institutions and also to entrench some basic rights. Beyond the operative provisions, there are also symbolic aspects that the basic laws convey; in particular, they are meant to entrench the identity of Israel as a “Jewish and democratic state.”

The Court in Israel at its origins was at least according to the standard description a relatively passive and primarily doctrinal court.¹ According to the standard account it is only in the

¹ See Menachem Mautner, *The Decline of Formalism and the Rise of Values* in Menachem Mautner *Law and Culture in Israel* chap. 4 (2011). This description however is not uncontroversial. See, eg., — Ron Harris, “The Imagined Past of Israel’s Supreme Court: The Use of Historical Narratives by the Court’s Right-wing Critics” *Tel Aviv University Law Review [Iyunei Mishpat]* 44 no. 1 (2021) (in Hebrew) 49-86.

1980's that the Court has become a major player in Israeli political life. This is largely due to the greater willingness of judges to intervene in order to protect individual rights. In 1995, after the enactment of two basic laws, the Court also declared that it has the power of judicial review. Since then, the Court has been consistently subjected to attacks as it is being depicted as too politicized and, in particular, too interventionist and liberal.

This process has been described often as a legal revolution. But, as I argued in the past there were in fact two legal revolutions in Israel: the judiciary-empowerment revolution (or the institutional revolution) and the liberal (or substantive revolution).²

The judiciary-empowerment revolution consists of a transformation in legal doctrine and legal reasoning which resulted in greater powers to judges. For instance, the requirement of standing which dictated that petitioners must have a direct interest has been weakened or even abolished. In addition to the traditional administrative grounds for annulling administrative decisions, Justice Barak added the concept of reasonableness. An administrative decision can be annulled if it is manifestly unreasonable. Further President Barak determined that the Court has the power to invalidate statutes. This power has been used very rarely but it was denounced by opponents of the Court.

The Court has used its new powers to promote what can be called a liberal revolution. The liberal revolution injected liberal values into judicial decision-making. More particularly, it used its power to protect more vigorously human rights; it entrenched the values of dignity, autonomy, and freedom in interpreting the law; and it also advanced the values of equality and broadened the scope of traditional liberal rights. While much of the criticism directed against the Israeli legal revolution is directed against the former revolution (the judiciary empowerment revolution) as a matter of fact the real aim of the opponents of the courts is to oppose the liberal revolution, ie, to make Israel more conservative, religious and nationalist.³ It is not surprising therefore that some of the opponents of the Court have visited Hungary and formed relationship with Hungarian political elites.

The current proposed amendments grow from the ambition to establish an illiberal democracy. The political instability provides an opportunity to realize this ambition. In recent years Israel faced a political crisis and no stable government could be formed. Yet, in the last elections which took place in November 1, 2022 Netanyahu succeeded in forming a coalition which consists of the Likud, the religious parties and the extreme nationalist right-wing parties. This coalition is formed by parties that are hostile to the court for three different reasons which can be summarized easily: corruption, fundamentalism and nationalism.

The Likud and the ultra-orthodox parties wish to weaken the control of the courts because courts are often effective in preventing corruption, nepotism and similar practices. Given the poverty of the ultra-orthodox community, this community is heavily subsidized by the state and is looking for mechanisms to increase this subsidy. Such mechanisms are sometimes illegal and, even if legal, they often violate basic principles of good governance. Weakening legal institutions is likely to facilitate therefore large-scale corruption. This is true also with respect

² See

<https://www.cambridge.org/core/books/towering-judges/baraks-legal-revolutions-and-what-remains-of-them-authoritarian-abuse-of-the-judiciaryempowerment-revolution-in-israel/2867D1AF9E98773F0163ADB77EBEB9DD>

³ *id*

to some of the members of the Likud party who are known for the use of their political power to appoint friends and political allies to prominent official positions.

The ultra-orthodox parties and the extreme right parties have also ideological interest in weakening the courts. The former are interested in strengthening the Jewish character of the state; they wish to close businesses on Shabbat, strengthen the powers of religious courts, promote religious education in schools, etc. The latter are interested in maintaining an apartheid system in the Occupied Territories, maintaining oppressive rules against the Palestinian minority in Israel and sustaining discriminatory practices against women, gays and lesbians and other minorities. Hence strengthening the executive at the expense of the judiciary promotes three ends: facilitating corruption and nepotism, promoting fundamentalist-religious policies and promoting nationalist-racist policies.

To achieve this end, Yariv Levin (the Minister of Justice) and Simcha Rothman (the head of the law and justice committee in the Knesset) proposed a radical constitutional reform which consists of four main elements: 1) Politicizing the system of appointing judges. Under their proposal, the coalition would have the power to appoint judges. 2) Endorsing a Notwithstanding (or an Override) clause which would enable the Knesset to override or supersede entrenched rights. 3) Granting absolute immunity to basic laws, namely the Court would not under their proposal be able to review basic laws. 4) transforming the way legal advisors operate in the ministries such that they would be appointed by the Ministers (rather than by the Attorney General) and would be required to defer to his/her decisions irrespective of their legality. This implies that the advice given by legal advisors will not be a professional one; it will be one that appeals to the political inclinations of the Minister.

Since this radical proposal was submitted, the Law and Justice Committee of the Knesset has convened many times. The chair Simcha Rothman has treated the opponents of the reform including public officials, legal and economic experts and members of the opposition with contempt. Attempts to reach a compromise have been made by the President and various NGO's. Large segments of the civil society have organized to protest against the proposals. Hundreds of thousands of citizens participated in mass demonstrations and also in acts of civil disobedience. Leading experts in many disciplines have publicly expressed their concerns including economists, lawyers, members of the medical profession and many others. Public law professors have organized and wrote numerous papers on various aspects of the legislative proposals. Some of these papers have been translated to English and can be found at <https://www.lawprofsforum.org/>

We are certainly at the edge of a constitutional moment. The atmosphere is intense and some have even predicted a civil war. Irrespective however of these concern, the real question which faces us all is not only whether the constitutional transformation will succeed or not. Recall that this transformation is only a means to an end and the end of its advocates is transforming the Israeli society as a whole. The prediction is that once this government frees itself from the legal limitations, it will use its new unlimited powers to promote fundamentalist, racist and oppressive laws.

And indeed various bills and proposals designed to limit freedoms and facilitate discrimination have already been submitted. These include a proposal to prohibit or limit the raising of Palestinian flags, to allow service providers to discriminate when discrimination is grounded

in religious rules and, most recently, the Minister of Internal Security has proposed to introduce capital punishment for Palestinian terrorists.

I think this is sufficient to establish that this is a very delicate moment for Israeli democracy. It may be the end of Israeli democracy but, so I hope, it may also be an opportunity to finally entrench a bill of rights and transform Israel into a full-fledged constitutional democracy. The glimmer of hope is the fact that hundreds of thousands of Israelis left their homes and work and join the demonstrations day after day and are often subjected to police violence. Tomorrow the 9th of March has been declared as the day of rage and it is intended to disrupt as much as possible the daily life in order to convey a clear message which is summarized in one of the most popular slogans: You encounter the wrong generation; Israel will not be Hungary; it is a democracy!