

AVI BELL

# Israel Is in Need of Judicial Reform



SI WRITE, in March 2023, Israel is in the throes of an intense debate about judicial reform. While the intensity is new, the debate itself has been going on for decades. Proponents of reform have demanded actions for nearly 30 years, since then–Justice Aharon Barak and his colleagues on the Supreme Court carried out a self-styled “revolution” to remake Israel’s law and governing principles.

To grasp the dynamics of judicial reform requires an understanding of two subjects, one arcane, and the second seemingly popular but rarely remarked upon. The arcane subject is the mid-1990s “constitutional revolution” that divides Israel’s history between the parliamentary democracy it was in its first decades and the juristocracy (the tutelary democracy subject to judicial aristocracy) that it has become. The seemingly popular subject is the dynamics of Israeli

public debate, hyperbolic and alarmist, tribally conformist, and conducted in a private language that is almost always misunderstood by non-Israelis.

Let's begin with the legal and constitutional. One can neatly divide Israel's legal history in two. From the founding of the country in 1948 until the ascension and presidency of Aharon Barak over Israel's Supreme Court from the 1980s to the early 2000s, Israel was a fairly typical Westminster parliamentary democracy. Israel's elected Knesset was supreme. Like Great Britain, Israel did not adopt a written constitution. Governments were approved by the Knesset and could last only for as long as they enjoyed the Knesset's approval. Courts were strong and independent.

Barak's Supreme Court upended the system. The justice was an unabashed revolutionary who changed every aspect of the law. He made substantive law vaguer, increasing the discretionary power of judges. He rewrote procedural rules, giving the court authority over even nonlegal matters. And he revamped the relationship between the courts and elected officials, making courts the last word on everything from appointments and policy to budgets. Although Barak has not served on the Court for nearly two decades, his successors, many handpicked by him, have continued in his path.



The Barak-era revolution vastly expanded the power of the Supreme Court at the expense of the democratic branches of government and of individual liberty. The Court shuttered radio stations, ordered television and radio programs off the air, denied political parties and individual politicians the right to run for office, blocked senior appointments, and fired elected officials, including the Speaker of the Knesset and government ministers. It canceled some kinds of

welfare payments and created others; blocked some military operations and ordered others; canceled some kinds of taxes and created others; canceled some government contracts and ordered others. It rewrote the authority of government lawyers, especially the attorney general, who was transformed into a legal commissar who could dictate policy to every elected official.

While the post-Barak Court is sometimes liberal, its ideological agenda has often led it to compromise human rights. The Court systematically eroded the rights of the criminally accused by authorizing the use of illegally obtained evidence, functionally approving unlawful surveillance, and eviscerating the presumption of innocence. It is singularly unimpressed with political rights such as the right to elect and to be elected. And its understanding of the freedom of political speech has an undeniable partisan tinge to it.

The result of the Barak revolution has been a Court (together with subordinate government lawyers) that is uniquely powerful in the democratic world. Israel is the only country in the democratic world in which a Supreme Court can cancel legislation without any legal or constitutional authority and, consequently, without any limitation on its power. Barak's revolution, which was never put before or approved by the voters, subordinated Israel's democratic governance to a judicial aristocracy.

There have been numerous efforts over the years to bring the Barak-era revolution to a vote, but none so serious as the judicial-reform package of Israel's newly elected government. The proposals made by Justice Minister Yariv Levin and Knesset Law and Constitution Committee Chairman Simcha Rothman differ in details—and both have changed as they have worked through the legislative process. But their essentials can be easily described.

With one exception, every piece of the proposals reverses or limits a controversial innovation of the Barak-era Court. One of the pro-

posals would limit the power that the Court invented for itself to nullify any Knesset legislation, by creating strict procedural guidelines and by restoring to the Knesset the last word. Another would terminate the commissar status of legal advisers, restoring them to the status of legal advisers elsewhere in the democratic world.

Alongside the cancellation or limitation of specific pieces of the Barak-era revolution, the proposals include a change in the system of appointing judges. Since 1953, Israeli judges have been appointed by a professional committee consisting of Supreme Court justices, lawyers, members of Parliament, and government ministers. During the Barak era, the Supreme Court president seized functional control of the judicial-appointments committee, ensuring ideological uniformity and loyalty. The judicial-reform proposals include a rebalancing of the committee to eliminate the judicial veto over appointments and give elected leaders the ability to appoint more ideologically diverse justices who are committed to democracy rather than judicial aristocracy.

Naturally, the justices and their deputized government lawyers have screamed bloody murder. It's not easy to come by unlimited power, and the judicial aristocracy is not ready to return to its former role as judges and lawyers in a parliamentary democracy. The current Supreme Court president called a prime-time press conference to join the parliamentary opposition's campaign against judicial reform and to lobby against the proposed legislation. Allies of the Court have threatened that the Court will discard any laws adopting any part of the judicial reform, restoring the Court's absolute authority notwithstanding the law. Former judges and government lawyers, including retired attorneys general, have warned that any return to the pre-Barak-era legal system will mark the end of Israeli democracy and the institution of an autocracy or a dictatorship that will trample Israel's basic values.



A broader mass of opponents to judicial reform resist the proposals because of their hostility toward and fears of democracy. They would much prefer to see a left-leaning judicial aristocracy manage the affairs of state than to have the Great Unwashed hold the reins. These opponents have gathered a host of ad hominem claims, arguing that the politicians who support judicial reform have partly political motives and that too much democracy will allow the “bad people” favored by the majority to exercise the powers of office. Yair Lapid, head of the opposition in Knesset, unsubtly calls the majority of Israelis the “forces of darkness.”

And, of course, many oppose judicial reform for basic partisan reasons. Lapid, for instance, strongly criticized judicial excesses as a journalist before he entered politics, and then as a member of Knesset before he took charge of the opposition to Prime Minister Benjamin Netanyahu. Many of those now leading demonstrations once called for the very same reforms they now denounce.

This brings us to the dynamics of Israeli political debate. Opponents to judicial reform have pulled no punches. Newspaper editors, journalistic opponents of Netanyahu, economists, fashion models, and schoolchildren and most of the academy, whether lawyers or chemists, have joined the fight to preserve judicial aristocracy, all in the name of “democracy.” Opponents have denounced the reform as fascistic, Nazi, and the end of civil rights in Israel, while warning that it will kill cancer patients, destroy the economy, put innocent Israeli soldiers on trial, and destroy nature itself.

These hyperbolic claims are obviously little more than political demagoguery. Yet all too many non-experts and non-Israelis have convinced themselves that they have heard honest descriptions of a dangerous reform. The distress of the opponents of reform is

real, of course: Many genuinely fear losing power to the *demos*, especially when they fear that most of the *demos* hold different political and ideological views. Some of the opponents have convinced themselves that they are the only liberals in Israel, and they refuse to see that the majority of Israel's Right, like the majority of Israel's Left, has always been liberal. Many of the opponents have wiped from their memory the fact that Israel was a democratic and liberal state for many decades before the Barak-era revolution, and that Israel does not need judicial aristocracy to be liberal.

But there are social dynamics to the opposition as well. As with, for instance, “resistance” to Donald Trump in America, some of opponents' political positions are dictated by the need to signal social class and values, rather than the particulars of the policy debate. The claim that parliamentary democracy is undemocratic, while judicial aristocracy is the true democracy, may be laughable on its face. But to say so out loud in Israel is to signal that one has lined up with “them” rather than us. All too many non-Israelis hear the passion and fail to understand that they are seeing signals of virtue rather than explications of truth.

None of this changes the bottom line. Opponents to judicial reform may continue to argue that Israel's judiciary must continue to enjoy unlimited power. But the reality is that it is judicial aristocracy, rather than judicial reform, that poses the greatest threat to Israel and its liberal democracy. \*

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