

The End of Israeli Democracy?

Netanyahu's Latest Reforms Come Straight From the Autocrat's Playbook

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In front of a picture of Israeli Prime Minister Benjamin Netanyahu in Tel Aviv, Israel, January 2023

After winning an unexpectedly large electoral victory in November 2022, Benjamin Netanyahu went on to form the most right-wing government in Israel's history. Its ultranationalist and ultra-Orthodox members don't agree on everything, but they are united on one objective: weakening Israel's judiciary and strengthening government control over both the courts and the civil service.

Last month, Netanyahu's government unveiled plans to do just that. Although they are couched in moderate terms, these planned changes would erode almost all institutional checks and balances, concentrating immense power in the hands of the executive. This would, in turn, enable further steps already agreed upon by the coalition to push the nation in the direction of authoritarianism—both in Israel and in the territories it occupies.

Netanyahu claims that these reforms are necessary to restore the balance of power between the legislature and the judiciary. Many Israelis disagree, and on January 21, over 130,000 people took to the streets of Tel Aviv and other cities to protest the proposed changes. Since then, there have been daily protests against what many Israelis fear is an impending dictatorship. Another demonstration on January 28 attracted a crowd of over 100,000 people. Following the populist playbook, Netanyahu and his allies have dismissed the protests as elitist, foreign funded, and radically left-wing. But students, academics, professionals, and members of civil society have all mobilized against the government's plan, which economists warn could harm the economy and affect Israel's ability to attract foreign investment for its high-tech sector.

Israeli politics have never been so polarized. Netanyahu's party has repeatedly attacked the judicial system, particularly as the charges against him have gathered steam. Netanyahu vehemently denies that the changes he is planning have anything to do with his trial. But if they are enacted, he will have the power to restructure the offices of the attorney general and chief prosecutor and appoint the officials who might review his cases. Asserting government control of judicial appointments could also enable Netanyahu to determine which judges hear his appeal.

For now, the reforms seem likely to pass. Netanyahu enjoys a stable majority in parliament, and his coalition has fast-tracked its assault on the judiciary in a blizzard of legislation that the opposition has criticized for flouting accepted procedures. There is a chance the Supreme Court could invalidate the reforms once they are approved, which would plunge the country into a full-fledged constitutional crisis. But either way, Netanyahu's government will have deepened Israel's divisions and weakened its democracy.

JUDICIAL WARS

Netanyahu's proposals will be relatively easy to enact because Israel, unlike the United States, does not have a rigid constitution. Plans to draft such a constitution were drawn up when Israel was founded in 1948, and in 1949, a constituent assembly was elected for this purpose. But the assembly reached a deadlock, and its members decided to convert the body into a legislature (the Knesset) that would retain the assembly's constituent power. Rather than adopting a completed constitution, the Knesset agreed that the constitution would be split into chapters, each comprising a "basic law," that would one day become part of a formal constitution.

From 1949 to 1992, the Supreme Court performed judicial reviews of administrative decisions, which meant that it considered the legality of executive actions but could not strike down legislation on the ground that it violated individual rights. In 1992, however, the Knesset passed two basic laws dealing with such rights—the Basic Law: Human Dignity and Liberty; and Basic Law: Freedom of Occupation. Those laws were novel not only because they protected certain rights, such as dignity, liberty, privacy, property, movement, and occupation, but also because they contained so-called limitation clauses specifying that the enumerated rights could be limited only if the derogation was compatible with the values of the state, enacted for a proper purpose, and to an extent no greater than is required. On this basis, three years later, the Supreme Court held that the basic laws were superior to ordinary legislation and that it therefore had the power to strike down any legislation violating them.

Since then, the Supreme Court has struck down 22 laws and provisions in matters including the imprisonment of asylum seekers, the privatization of prisons, and the expropriation of private Palestinian land to enable Jewish settlements in the West Bank. Over time, the Court has also interpreted the right to dignity enshrined in the basic law as encompassing a right to free speech and equality.

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Since 1953, Israel has selected its judges through a diverse committee composed of three Supreme Court justices, two government ministers, two members of the Knesset, and two members of the Israel Bar Association. To appoint a Supreme Court justice, a seven-vote majority of the nine-member committee is required, which means that no group can act alone. Judges can veto what the politicians want, and the politicians can veto what the judges want. This has led to a system of consensus-building and bargaining that produces judges who are for the most part perceived as centrists.

But the combination of its rulings in defense of the basic laws and its membership has made the Supreme Court a target for the Israeli right, which has increasingly accused the Court of being too liberal and overreaching its powers. Netanyahu and his allies argue that the basic laws did not explicitly empower the Court to

invalidate laws and that in any case, the Court has interpreted both its constitutional and administrative review powers in the broadest manner while expanding its standing rules. Right-wingers also allege that the Supreme Court has been exceedingly interventionist in matters of national security.

In fact, the Court has been quite deferential to the state, particularly on matters of national security and most explicitly when reviewing the government's actions in relation to the occupied territories. The Court has consistently refused to rule on the overall legality of Israel's settlements in the West Bank, which are considered unlawful under international law. It has also authorized the demolition of Palestinian militants' homes, which violates the laws of war. Indeed, beyond providing limited protection to private Palestinian property, the Court has authorized almost every policy related to settlements while providing a veneer of international legitimacy to the 55-year-old occupation.

For Netanyahu's new government, this is not enough. Determined to strip the Supreme Court of its powers to provide even the most meager protections, the far-right coalition has set about overhauling everything from the process by which judicial appointments are made to the status and powers of government legal advisers.

AN ALL-OUT ASSAULT

Under the government's proposed plan, the Supreme Court will only be able to strike down laws if all of its 15 judges consider the matter and 12 of them agree. Such a high bar would mean that very few laws, if any, would be struck down. Even if the Court did manage to invalidate a law, that would not be the end of it. The plan also includes an unlimited "notwithstanding clause," which would allow the Knesset to override any decision to strike down a law by a simple majority vote of all the body's members. In Israel's parliamentary system, every government possesses a majority. This clause would therefore allow any right to be overridden: fundamental basic rights, rights relating to political participation, even the right to vote. To ensure that the Court does not deviate from the government's agenda, the plan also seeks to transform the judicial appointments committee so that the government will enjoy an automatic majority.

Unlike many democratic countries, Israel has few checks on legislative and executive power. The government controls the Knesset, and the coalition usually votes as a bloc in accordance with decisions made by a ministerial committee,

meaning that several powerful ministers, led by the prime minister, control legislation. Consequently, the most important check on executive power is judicial review, which the government's plan would effectively end.

The Supreme Court would not be able to review basic laws at all under the proposed plan. Once basic laws are immune from review, extreme pieces of legislation could be recast as basic laws to circumvent judicial review. A far-reaching immigration bill that would allow the unlimited detention of asylum seekers has already been submitted as a basic law for precisely this reason.

The government insists that these reforms are in line with other countries' arrangements. Canada has a notwithstanding clause, for instance, and strictly speaking, the courts cannot strike down legislation in the United Kingdom. But these countries have checks and balances that do not exist in Israel, and the Israeli government has no intention of introducing them. If any international comparisons should be made, it should be to Hungary, which under Prime Minister Viktor Orbán has been transformed from a liberal democracy into an autocratic regime. The situation in Israel is potentially more perilous. Hungary is under the umbrella of the European Union, which has powers to slow down, if not reverse, this decline. Israel is under no comparable international oversight and is embroiled in an intractable and explosive conflict.

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Orbán entrenched his rule by changing the constitution, the composition and jurisdiction of the judiciary, and the rules governing elections. He also stuffed the civil service with party loyalists, tightened his grip on the press, and redirected government funding to pro-Orbán media outlets. Now, only 20 percent of Hungarian media outlets are independent, and they are under constant political, regulatory, and economic pressure. Dismantling the courts made this possible, which is why it is no coincidence that the Israeli government has chosen to target the judiciary first.

Once it overhauls the judiciary, Netanyahu's government wants to amend election laws to prohibit even sporadic statements in "support of terrorism"—which could be interpreted as including severe criticisms of Israel's occupation and even vague

encouragement of Palestinian resistance—will be prohibited, effectively barring many Arabs from running for election to the Knesset. If this law passes, it will likely cause a significant drop in voting turnout among Palestinian citizens of Israel, further strengthening Netanyahu’s government by making it more difficult for the opposition to achieve the minimum of 61 Knesset members needed to form a government.

Eliminating restraints on government power will appease religious fundamentalists and enable Netanyahu to keep his promises to his governing partners. In his coalition agreements, he pledged to amend the country’s anti-discrimination laws, allowing business owners to refuse service based on religious beliefs, which will affect the LGBTQ community and other minorities.

Netanyahu’s government has also announced plans to reform the media. Shlomo Karhi, the minister of communications, has declared his intention to privatize Israeli state-funded television and radio stations. The move is seen by most observers as an attempt to clamp down on critical press coverage and independent reporting. Indeed, Galit Distel Atbaryan, the minister of public diplomacy, wants to go further. She has expressed support for shutting down state-funded media altogether instead of privatizing it because, she said, “whenever you privatize, the left seeps in.” Meanwhile, Culture Minister Miki Zohar has announced his own plans to limit government spending on the arts, denying funding for works that “harm the image of the state.” This two-stage program of policy changes has a clear purpose: stifling expression by removing critical content from the public sphere and strengthening the government’s grip on power.

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The proposed media reforms have sparked a significant backlash, and in early February, the government announced that it was putting them on hold. The reason it gave for this U-turn was telling: judicial reforms are the government’s top priority, so there must be no distractions before it secures their approval. And in any case, once the judicial reforms are passed, dismantling public television and radio stations will be easier.

Finally, the government plans to take a harder approach in the occupied territories. In presenting his government's policy platform, Netanyahu stated that Jews have exclusive rights to all the land of Israel, including the West Bank. This effectively ended any pretense that Palestinians have rights in the territories. And in his coalition agreements, Netanyahu promised his far-right partners that his government would promote more settlements in the West Bank and lay the groundwork for its eventual annexation. He also declared that he intends to "regularize" settlement outposts established on private Palestinian land after a law seeking to do so was invalidated by the Supreme Court.

Netanyahu has appointed Bezalel Smotrich, a settler and one of the most extreme anti-Palestinian politicians in Israel, as a special minister within the Ministry of Defense tasked with supervising civilian affairs in the West Bank. By effectively taking this authority from the military and giving it to a political appointee, Netanyahu has signaled his government's annexationist intent.

Taken together, these proposed reforms amount to an assault on Israel's already flawed democracy. The government's agenda and the authoritarian turn it portends have already provoked a mass protest movement. They have also stirred broad concern outside Israel, prompting countries including France and the United States to express reservations about the impending changes. If Netanyahu and his coalition continue to drag Israel down the Hungarian route, they will threaten not just the country's democratic institutions but also its relationships with allies.

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