

# The Battle Over the Populist Constitutional Coup in Israel

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On the night of March 26, 2023, the battle over the constitutional overhaul planned by Israel's Netanyahu government reached an apex moment: following Netanyahu's firing of Defense Minister Yoav Gallant, the first cabinet minister to speak out against the proposed legislation, and as the legislative process in the Knesset was nearing a crucial point, huge crowds took to the streets. This demonstration was spontaneous, beginning at 10 pm and lasting long into the night; crowds started bonfires on the Ayalon freeway in Tel Aviv and blocked roads. The police were unable to contain the situation until about 3 am.

Over the night there were rumors that this seeming loss of control would lead Netanyahu to halt the legislative process. The protest movement was feeling victorious. But after a long day of further demonstrations in Jerusalem, Netanyahu's announcement was limited to a "suspension" of the legislative process during the upcoming Knesset recess, for a period that would enable discussions between the coalition and the opposition with the purpose of reaching an agreement over the legislation. Following the exhilaration of the previous night, what might have otherwise been considered a victory for the protest movement instead created a sense of despair. But as I discuss below, it remains too early to know whether we are in the spring of hope or in the winter of despair. As the Knesset is about to recess on April 2<sup>nd</sup> for the Passover break, the suspension will grant the discussions at least a month, until the Knesset reconvenes on April 30<sup>th</sup>, and probably even more time, until the end of its summer session on July 30<sup>th</sup>.

This essay follows on from my [previous post](#) on the populist constitutional coup and outlines the developments that occurred since Netanyahu's coalition announced the proposed legislation. I focus on the current status of the legislative plan, assess the opposition to it, and consider what lies ahead and what interim lessons can be learned from the Israeli version of constitutional populism and the opposition to it. Yet before addressing the legislative changes, it is important to recall that they do not tell the whole story. A major feature of the government's policies is a harsher approach towards the Palestinians in the Occupied Palestinian Territory (OPT), who already suffer from an occupation that totally denies democracy and protection of rights, [and who are now even more deprived of protection than before](#).

## A Toxic Coalescence of Interests

Notably, the proposed changes reflect a coalescence of three major interests, driven respectively by three major actors in Netanyahu's coalition.

*The first* is the interest of the nationalist parties in maintaining their vision of the “Jewish state.” For the nationalist religious parties as well as for Netanyahu’s Likud party, this entails expansionist policies in the OPT that require even greater violations of Palestinian rights than ever before, including violation of private property rights that did receive some protection in the Israeli Supreme Court. Additionally, the often messianic version of religious Zionism held by the nationalist religious parties rejects much of the protections the courts accord to LGBT and women’s rights and seeks a free hand to curtail anti-discrimination laws. Supreme Court decisions protecting the rights of asylum seekers are also a *bête noire* for this camp.

*The second* is the interest of the ultra-Orthodox parties; in particular, their wish to override judgments holding that the exemptions accorded to religious seminary students from mandatory military service discriminate against other populations that are required to serve in the Israel Defense Forces (IDF).

*The third* is Netanyahu’s own interests regarding his ongoing criminal trial for corruption charges. Netanyahu’s interests may include influencing the composition of the Supreme Court that may eventually hear an appeal in his case; rescinding prosecution powers from the attorney general and appointing a prosecutor more favorable to him; advancing legislation that gives seated Prime Ministers immunity from prosecution; and changing the criminal code to abolish some of the offences he is accused of.

The combination of these three interests drove the legislative initiatives, which are argued for in populist terminology, using the language of democracy and returning decision-making to the people. As explained in my previous post, the paradox whereby “[Basic Laws](#)” enjoy constitutional status and supremacy over regular legislation but are legislated in the same forum and by the same procedure and majority as regular legislation makes Israeli constitutional law vulnerable to a majority coalition’s rather easy abuse of constitutional power.

## **The Status of the Proposed Changes to the Basic Laws**

So far, four major prongs of the [proposed constitutional changes](#) have been advancing through the Knesset’s legislative process. (Given the scope and rapid pace, [this tool by Haaretz](#) helps track the legislative process.)

(a) [An amendment to Basic Law: The Judiciary](#) entailing an overhaul of the judicial appointments committee, granting the ruling coalition a majority in this committee, which would allow it to appoint judges at will. This proposal underwent various changes but at its core assures coalition control over appointments to the Supreme Court. This is accomplished by abolishing the existing representation of the Bar from the committee and adding more politicians instead. The result is a committee where politicians from the coalition (from both the executive and the legislature) comprise six members, joined by two Members of the Knesset from the opposition and three judges. The required quorum for committee meetings is six – tailored to match the number of coalition members. This number would suffice to elect the President of the

Supreme Court and up to two Supreme Court Justices in each Knesset term. Further appointments would require broader agreement. De facto, given the average number of appointments per term and the control over the choice of the President (who is ex officio a member of the committee), the meaning is control of the coalition over the composition of the Court. This proposal is more advanced than any other; the first requisite vote already took place in the plenary, and the Knesset's Constitution, Law and Justice (CLJ) Committee, to which the legislation returns for further drafting after the first vote, voted on it on March 28. It is now ready for the requisite second and third votes in the plenary, after which it can become law.

(b) A reform to the process of judicial review of primary legislation that contradicts Basic Laws, [which would only allow a qualified majority of judges in the Supreme Court to strike down legislation. This proposal passed the first plenary hearing; hence, it is now within the jurisdiction of the CLJ Committee, which will hold discussions to prepare it for the second and third votes.](#)

(c) [An "override clause,"](#) meaning that a parliamentary majority can re-legislate a law struck down as unconstitutional, as long as the statute states explicitly that it is valid "notwithstanding" the Court's ruling. [This proposal also passed the first plenary hearing and is now in the hands of the CLJ Committee.](#)

(d) [A prohibition of judicial review regarding Basic Laws,](#) in a way that preempts the [nascent "unconstitutional constitutional amendment"](#) doctrine and the parallel doctrine concerning [abuse of constitutive power](#), is at the same legislative process stage as the two previously-mentioned proposals.

These changes are supplemented by two constitutional changes advanced for personal reasons. The first is [an amendment to the rules regarding the declaration of a Prime Minister as unfit to govern.](#) Whereas the previous legislation was silent about who can make such a declaration and on what grounds, the amendment to Basic Law: The Government adopted on March 13<sup>th</sup> holds that the Prime Minister can only be declared unfit to govern for physical or mental reasons, based on his own announcement approved by a parliamentary committee with a 2/3 majority, or by a cabinet decision made by a ¾ cabinet member majority. The purpose of this proposal is to preempt the (discussed) possibility that Netanyahu may be declared unfit to govern by the Attorney General or the Supreme Court based on circumstances relating to his own criminal trial, especially concerns regarding conflict of interest.

The second personally motivated [proposal](#), which passed most stages of legislation and is ready for the final votes in the plenary, seeks to negate the possibility of judicial review of cabinet appointments. The purpose of this bill is to allow the re-appointment of Aryeh Deri as cabinet minister, following the Supreme Court's January 18 [ruling](#) that he cannot serve in the cabinet given recent convictions.

Read together, the various legislative initiatives seek to create an unrestricted government, in terms of both the legislation it can pass and its personal composition.

## Opposition to the Legislative Process

While Netanyahu's coalition enjoys a solid 64-member majority in the 120-member Knesset, which at first seemed to enable it to pass whatever legislation it wants, it has met massive, unprecedented opposition. The official discussions of the proposals took place in the Knesset's CLJ Committee, which became a battleground between coalition and opposition. But much has been happening in other arenas, including the following:

Protests: The legislative plan was met with huge protests. Ever since it was announced, protests have been taking place throughout the country. These take the form of weekly demonstrations on Saturday nights, chanting slogans such as "democracy or rebellion," initially mainly in Tel Aviv but rapidly spreading nation-wide, attended by hundreds of thousands. In recent weeks, the Saturday demonstrations were complemented by an additional weekly "day of disruption." The protests are unprecedented, both in numbers of participants and in the persistence of huge crowds for 12 weeks straight. They became impossible to ignore. One of the most popular slogans in the protests is "you messed with the wrong generation." Indeed, the rising up of the younger generation to fight for democracy has been the most inspiring sign of hope in this period of near despair.

The protest movement is composed of a web of non-partisan organizations, some of which developed during the COVID-19 pandemic as part of the protests against Netanyahu during his previous term, when regular demonstrations were conducted against his continued tenure as Prime Minister while he stands trial for serious corruption charges. These were joined by numerous other organizations including student protests, the "Black Robes" lawyers' protests, LGBT groups, and others. A regular presence at the larger protests is the "Anti-Occupation Bloc," comprised of organizations supporting Palestinian rights, claiming that military occupation and democracy are mutually exclusive.

Letters, petitions and memorandums: Much attention was focused on various letters, opinions, and memorandums written by groups of experts in Israel and globally, warning against the so-called "reform" and its implications. In the legal field, writers included not only [former Israeli attorney generals and state attorneys](#), but also [retired judges](#). Letters decrying the plans were also signed by senior jurists from other countries, such as the [UK](#) and [Canada](#) – with particular significance, given the coalition's claim that the proposed changes would make judicial review in Israel akin to that existing in these countries. The newly formed [Israeli Law Professors' Forum for Democracy issued position papers dissecting and criticizing the various proposals and pointing to the detrimental](#) effects of the "reform" on many spheres. Letters warning of the implications of the proposed changes were also issued by [former senior officials in governmental offices, including 50 former general directors of government ministries; medical doctors](#) (who formed their own protest group); and many other groups.

Warnings of economic implications and the role of the tech industry: The proposals' economic implications became a major driver in their criticism. Three-hundred sixty-

seven [senior Israeli economists](#), [as well as senior international ones](#), warned about the financial implications of legislation that would weaken the Israeli legal system. Many actors have voiced significant warnings, including the international [credit rating agency Moody's Investors Service](#), [which warned](#) that if the plan proceeds, the country's sovereign rating outlook could be downgraded, given the weakening of the judiciary. The Finance Ministry's chief economist herself warned that the changes would [harm economic growth and investment in Israel](#). Some [Israeli companies announced they will be moving their money out of Israel](#) given the uncertainty the "reform" creates. Many leaders of tech industry, which plays a major role in Israel's economy, [signed a letter saying](#) that the proposed changes would distance international investors from Israel and damage the industry. The "[hi-tech protest](#)" became a major force in opposing the legal coup by expressing concerns about the country's future, threatening to take business elsewhere, and actively participating in physical protests.

Rifts within the military: Alongside the economic warnings from experts and the tech industry, probably the most influential opposition came from the military. The IDF relies heavily on reserve duty, and significant voices from elite units not only expressed opposition to the legislation but also announced their refusal to continue their reserve service if the legislation passes. For example, [1,197 Air Force officers signed a letter](#) protesting the legislation. Similar opposition was expressed by [139 winners of the Israel Security Prize](#). [In mid-March, 180 Air Force pilots and navigators announced they would not attend regular trainings; 650 special operations, intelligence, and cyber reservists announced their resignation from reserve duty; and reserve officers from the elite 8200 intelligence unit proclaimed likewise.](#) Underlying the Defense Minister's decision to speak out against the coalition's plans were these unprecedented expressions of refusal to serve by the IDF's elite. It was his sacking by Netanyahu, which was followed by the huge spontaneous protests, that finally led the Histadrut – the largest Israeli trade union – to announce a general strike and the public universities to shut down. But the strike only lasted one day, and stopped when Netanyahu announced the suspension of the legislative process.

International pressure: Finally, the role of international pressure cannot be overlooked. Serious concern about the legislative changes was expressed by the [President of the Venice Commission](#), [the United Nations Special Rapporteur on the Independence of Judges and Lawyers](#), and the [UN High Commissioner for Human Rights](#). Yet what really mattered were the remarks of foreign leaders; and, given Israel's close relationship with the US and its dependency on American aid and political support, especially of US President Joe Biden, [who pressured Netanyahu both publicly and privately](#).

## **Lessons and what Lies Ahead**

With the suspension of the legislative process, parties from both the coalition and opposition have formed teams that will start meeting under the auspices of Israel's President, Isaac Herzog. The President, whose main roles are ceremonial but who has spoken out against the legislative plan, has previously offered [his](#)

[own “compromise deal,”](#) aiming to find middle ground between the coalition and the opposition. However, this plan failed to gain support. It remains quite unclear whether the negotiations that he will now facilitate will create agreement.

Generally, the talk of “compromise” tends to take the government’s plan (rather than the status quo) as its starting point and assumes some curtailing of judicial power. Accordingly, much of the protest movement opposes talk of “compromise.”

Amongst opponents of the coalitions’ program from within the legal community, two major approaches are discernable. One sees some compromise as essential in order to avoid a constitutional crisis that some fear may deteriorate into a violent crisis; the other warns of a bad compromise that will hand the coalition most of what it wants, with the bonus of parliamentary support of the opposition. Proponents of the latter approach do not deny the risk of a constitutional crisis (for example, if the Supreme Court strikes down the legislation changing the structure of the judicial appointments committee, and the coalition does not obey Court orders). [The Polish constitutional crisis](#) looms and is often cited. However, they suggest that a bad “compromise” is worse than a constitutional crisis, and point to how such a “compromise” may serve to legitimize changes that will undermine democracy. This, they warn, may weaken the public opposition and also the legitimacy of a judicial decision to strike down the new legislation, if it passes. In any case, as mentioned, it remains unclear that a “compromise” can be reached. A main bone of contention is the judicial appointments committee, which the coalition insists on controlling.

The suspension of the legislative process may be seen as a victory for the protest movement. But on the other hand, it may backfire if its implication will be the delay of the legislation well into the summer: In October, Supreme Court President Ester Hayut, [a staunch critic of the “reform,”](#) is due to retire. While many expect a court led by Hayut to strike down legislation that gives the coalition control over judicial appointments, delaying the legislation to the fall may serve the government, which could in the meantime appoint a new Court President who will be much more favorable to the “reform.” Likewise looming is the risk that Netanyahu simply hopes to buy time by creating a delay during which the protest movement will lose its momentum. Moreover, Minister of National Security Itamar Ben-Gvir, who has been pressing the police to be more violent towards demonstrators, has secured Netanyahu’s promise to [advance a “National Guard” outside the police force,](#) under his command – a force that eventually may be used against demonstrators, bypassing the police. This development raises serious concern independently of the protests but may also be linked to them.

Much uncertainty lies ahead. What is clear is that a combination of massive protests, pressure by significant groups in Israeli society such as the tech industry and elite military reservists, and American pressure forced Netanyahu to suspend the legislative process. Whether this development will lead to the burial or the reemergence of the constitutional coup is yet to be seen. The road ahead is complicated, as rejection of the coalition’s plan, while seemingly a victory for the democracy movement, may also serve to feed the populist argument about elites (in this case not only legal but also economic and military ones) controlling things in a way that undermines popular will. The liberal forces must take note of this concern

as part of a broader evaluation of the liberal agenda after this deep crisis. Such an agenda must consider the shortcoming of the existing order in addressing issues such as social and economic justice and the inadequate inclusion of Mizrahi Jews (Jews of Middle Eastern and North African descent) and of Palestinian Arabs, who are citizens of Israel, into society, and specifically into the judicial system. Given these shortcomings and given the occupation, which continues to undermine Israeli democracy, the battle should not be a nostalgic one for a democracy that was, but one for the democracy we aspire to become.

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