INSS Insight No. 1167, May 19, 2019

The Proposed Changes to Judicial Oversight of Government Powers: Justified Measures or an Erosion of Democracy?

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Amid the coalition negotiations underway in Israel there is a heated debate over various proposals regarding significant changes to the legal oversight of governmental and parliamentary work. Remarkable throughout the debate of these proposals is the lack of regard to their impact on the preservation and promotion of the character of Israel as a Jewish and democratic state, and instead, there is a worrisome focus on political and personal motives. Against this background, it is possible to propose several recommendations. First, in the current debate, the Court is accused of "stealing democracy" and of being a political institution with a blatantly left wing agenda. This incorrect premise, which undermines the ability to conduct a public debate in constructive fashion and erodes the legitimacy of the Court and the public's faith in the Court, must be reversed. Second, there is room for discussion on appropriate constitutional changes. Democratic countries around the world have differing successful constitutional structures, and there is no "one right answer." Yet any future change must be carried out through a focused discussion that incorporates all relevant parties, including politicians, judges, and academics with expertise in the field. Finally, whatever the eventual constitutional changes, they must not undermine the basic principles of the separation of powers, the rule of law, and the power of the Court to practice effective oversight of the government. These are essential building blocks for proper democratic rule.

Amid the coalition negotiations underway in Israel there is a heated debate over various proposals regarding significant changes to the legal oversight of governmental and parliamentary work. These proposals reportedly fall into three main categories: measures to limit judicial intervention into government resolutions and Knesset legislation; political influence over the makeup of the Supreme Court; and the weakening of legal advisors vis-à-vis the government.

Critics of the proposals argue that they spell a weakening of the Court and an erosion of Israeli democracy. Others contend that these are legitimate steps aimed to rebuff a "judicial dictatorship" whereby judicial review that advances judges' leftist-liberal worldviews prevents the government from implementing its policy and the Knesset from legislating in accordance with the will of the voters. An appraisal of these positions must

be predicated on an evaluation of the actual conduct of the Court, and then an assessment of some of the proposed measures.

The Israeli Court, reflected in its rhetoric over the years, is indeed perceived as an activist body that does not hesitate to review government actions and Knesset laws. In the international arena, this is relied on as proof of the robustness of Israeli democracy and the importance of the rule of law in the country. That said, when it comes to actual intervention, the Court tends to approve the government's actions in a decisive majority of cases, especially when security grounds are cited. Similarly, in proceedings that deal with settlements in the West Bank – high on the ideological right agenda – the Court avoids ruling on the question of the settlements' legality, and in most cases where it has intervened, its position has been based on that of the government – for example, government undertakings to evacuate illegal outposts, whose implementation, in contempt of the Court, is then deferred time and again. As the official database of the Supreme Court shows, out of 3,612 Supreme Court proceedings that were designated as administrative or constitutional cases, only 298 (8.2 percent) were accepted fully or partially.

As for intervention in legislation, to this day the Court has struck down fewer than 20 laws, some on procedural grounds and some referring to the same matter brought before it repeatedly, for example that of illegal immigrants or conscription for yeshiva students. When compared to other courts in the democratic world, the Israeli Court is clearly far less activist. Thus, for example, a study by Dr. Guy Lurie found that while Israel's Supreme Court nullified an average of 0.72 laws (or sections of legislation) each year, the US Supreme Court nullified 2.01 (federal laws only; the number is significantly higher when it comes to state laws); Canada's Supreme Court nullified 1.6 federal laws; in Germany the Federal Constitutional Court nullified an average of 8.24 federal legislative items each year; in India the rate is 7.53; in South Africa, 3.72; and the Supreme Court of the United Kingdom has issued declarations of incompatibility at an annual average of 1.37. In addition, in other countries, parliamentary oversight of the government is more significant than in Israel, where the government has an automatic majority in the Knesset. European countries are also subject to judicial supervision and binding rulings by an external court, the European Court of Human Rights.

This is not to say that the Court cannot be legitimately criticized for excessive interference in governmental decisions by overruling policies that the Court deems improper. Moreover, Israel also has an excessive propensity to “legalistic.” This stems, inter alia, from the willingness of legal advisors and courts to employ legal tools in assessing matters of policy, and no less from the tendency of prime ministers and cabinet ministers to avoid rejecting initiatives, when this would not be popular in terms of

internal politics – even where they clearly clash with the national interest or are devoid of reason – and instead refer the matter to the legal advisors so that they object to the initiatives and are subsequently blamed for the stalled measures.

There is thus justification for holding a substantive and informed discussion of the limits of legal and judicial intervention in government decisions, and for assessing the relationship between the Knesset and the courts when it comes to legislation that raises constitutional questions. Within such discussion it is critical to bear in mind the important role of the courts in overseeing state authorities – a vital component of democratic governance, which entails not only majority rule but also the protection of minorities and the preservation of the principles of equality, freedom of expression, and respect for human rights. On the other hand, the government must be permitted to implement its policy within the limits of the law. There is nothing wrong in principle with amendments to the current situation. The question is whether the proposed measures, and the way they are presented, are the right way to do so.

Among the measures of the first category, i.e., reducing judicial intervention in government decisions and Knesset legislation, is a proposal to include an override clause in the Basic Law: Human Dignity and Liberty, which would allow legislation that has been struck down due to its incompatibility with the basic law to be legislated anew. Incorporating an override clause is not, in itself, unacceptable. In the past there was a proposal to include such an instruction in a Basic Law: Legislation, with the stipulation that such a measure requires a majority of 80 Knesset members. The idea at the heart of this proposal was that the legislature can have the final say, but only when there is sweeping consensus on the matter. The recent proposals call for a majority of merely 61 Knesset members, which means that any coalition would be able to pass laws that compromise basic rights without there being any way to void them. There is also reportedly a proposed bill to prevent intervention in administrative decisions by government officials. Such a proposal could spell a far reaching measure that grants the government immunity from oversight and nullifies the core role of courts in a democratic state.

Another proposal sounded is to limit *locus standi* rights in order to restrain the access of public petitioners, such as human rights groups, to the Supreme Court. Such a limitation would reduce, but not block, debate on matters that are in the public interest, because in general finding a concrete petitioner directly harmed would remain possible. Another proposal is to limit the use of lack of reasonableness as grounds for overturning administrative decisions (even today laws cannot be voided on such grounds). Such grounds permit broad intervention in government actions, for example where there is an

unreasonable balance of interests, and can admit considerations that are not clearly legal. Thus a discussion of the proper scope with which such grounds can be used is warranted.

Regarding proceedings to influence appointments to the bench, and specifically to the Supreme Court, several proposals have been discussed. One is to change the method for appointing judges, with control handed to the government and the inclusion of a hearing process for candidates. Judges are currently appointed by a committee that includes representatives of the government, Knesset, judges, and the Bar Association. This method is meant to ensure a professional bench and is considered a model of emulation abroad, as the court is perceived as having a strong professional character. The proposal spells a total politicization of the appointment process. Its advocates point to the United States, where appointments are political; however, the American model is itself a focus of intense criticism. Furthermore, in contrast to Israel, power in the United States regularly changes hands between the two main parties, which generally ultimately generates a politically balanced bench. It has also been proposed that the number of Supremee Court justices be increased from 15 to 17, and that their terms be limited to 12 years. This move is designed to bring about the immediate or imminent end of the terms of several sitting justices, including Chief Justice Esther Hayut. These proposals mean to enable the immediate addition of justices with a right wing agenda to the Supreme Court.

As for measures limiting the power of legal advisors in relation to the government, it has been proposed that ministry advisors be appointed based on the personal choice of ministers, rather than today's process of selection and promotion on the basis of professional qualifications. Another proposal is to designate a legal advisor as having adviser status only and thus being unable to prevent implementation of an action even if s/he deems it illegal. A third proposal would enable a minister to use private lawyers to argue his or her position before the High Court of Justice when the Attorney General and the Petitions Division refuse to argue for this position. The general trend is thus to weaken the power of the legal advisor vis-à-vis the political echelon.

There are reportedly additional proposals looming that do not directly impact on the justice system, such as altering the immunity law whereby Knesset members enjoy immunity from prosecution until the end of their terms, unless active measures are taken to suspend it; disbanding the appointments confirmation committees and transferring the power to appoint civil servants to exclusive government control; reducing the authority of the State Comptroller's Office and subordinating it to an oversight and review mechanism; cancelling the clause in the Basic Law: Knesset that bars candidates who incite racism and terror.

A debate on the scale of proper Court intervention in decisions of state and acts of legislation is appropriate and necessary. That said, the scope and number of the current initiatives and the rhetoric used to advance them arouse concern that this is not a matter of a welcome discussion of alleged "over-reach" of judicial intervention, but rather, a plan to force the pendulum entirely in the other direction on two levels – the radical and sweeping nullification of the court's ability to monitor the government and the Knesset, and the explicit politicization of the justice and judicial system. This concern is aggravated further by speculation about the personal interests involved in the initiative to weaken the law enforcement system, given the allegations against the Prime Minister. In other words, this is not a bid to correct an imbalance, but rather, to create, in a one-sided distortion, a court that is expressly political and powerless vis-à-vis the government. These two dimensions would appear to offset each other, but they actually complement each other – weakening the court is required in the immediate term, and the political change to it is meant for the long term.

Remarkable throughout the debate of the proposed initiatives is the lack of regard to their impact on the preservation and promotion of the character of Israel as a Jewish and democratic state. The focus on political and personal motives is worrisome. The weakening of the justice system and its ability to oversee the government is often a first step that paves the way to the rise of a non-democratic regime, without there being anyone to stop it. This has happened, and is happening now in Turkey, Hungary, and Poland. These countries first undercut the independence of the courts; later the freedom of journalists and those who monitor the government; and eventually the protection of human rights – including workers' rights. At the end of the day, the democratic order was depleted.

Israel is still far from that stage, but complacency in the face of the initiatives is dangerous. An erosion of democracy begins with small steps, none of which seem in themselves like threats to its foundations, until the moment comes where their collective power unleashes damage that cannot be rectified and reversed. If this is not what the emerging coalition intends, it behooves it to say so in a clear voice and take appropriate steps that would restore to the public at large the trust that those in power in Israel are truly committed to the preservation of Israeli democracy.

Against this background, it is possible to propose several recommendations. First, in the current debate, the Court is accused of "stealing democracy" and of being a political institution with a blatantly left wing agenda. This incorrect premise, which undermines the ability to conduct a public debate in constructive fashion and erodes the legitimacy of the Court and the public's faith in the Court, must be reversed.

Second, there is room for discussion on appropriate constitutional changes. Democratic countries around the world have differing successful constitutional structures, and there is no "one right answer." Yet any future change must be carried out through a focused discussion that incorporates all relevant parties, including politicians, judges, and academics with expertise in the field. A discussion held while in the throes of political fervor and during coalition negotiations does not contribute to a relevant and informed outcome.

Finally, whatever the eventual constitutional changes, they must not undermine the basic principles of the separation of powers, the rule of law, and the power of the Court to practice effective oversight of the government. These are essential building blocks for proper democratic rule.