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Proposed Legal Reforms in Israel: Are Israel's "Constitutional Conventions" in Jeopardy?

BY PETER KAHN AND
DOV WEISSGLAS

Israel Prime Minister Benjamin Netanyahu's proposal to overhaul the Israel judiciary, first introduced in January 2023, has been met with unprecedented international protests. At the forefront of his proposal are to give the Knesset, Israel's congressional body, the power to overturn rulings with a simple majority vote, to reduce the number of justices on the court, and to change the judicial appointment process. These proposed changes could upend Israel's "constitution of conventions" — a vast body of legal precedent that serves in place of a formal constitution to protect citizens' basic rights and the rights of ethnic and religious minorities. In response to widespread protest, Netanyahu announced in March 2023 a pause on implementing changes to the judiciary, although it remains unclear what effect the delay will have on the future of the Supreme Court of Israel and the independence of Israel's judiciary more broadly.

Given these developments, **Peter Kahn**, chair of the Advisory Board of the Bolch Judicial Institute of Duke

Law School, which publishes *Judicature International*, invited his longtime friend and prominent Israeli attorney **Dov Weissglas** to Duke Law School for a conversation to put Prime Minister Netanyahu's recent proposals in the context of Israel's complex legal and political history. Weissglas underscored the importance of an independent judiciary — and especially an independent apex court — in the absence of a codified constitution. The following is an edited transcript of their discussion, which occurred before a standing room only audience at Duke Law School on March 29, 2023.

PETER KAHN: **What a pleasure to be here with you and to be with my good friend and colleague, Dov Weissglas. We couldn't have asked for a timelier discussion of this topic. First, because our judicial systems are somewhat different, we need a bit of a primer. So, I'm going to ask Dov — I call him "Dubi" — to give us a primer on Israel's judicial system.**

DOV WEISSGLAS: First of all, I would like to thank you very much for this opportunity to be at Duke Law School. The last time I was here was five years ago, also due to my good friendship with Peter. When you look into the structure of a legal system, there is a difference between countries or localities that have enjoyed continuous periods of peace and security and stability, and those in contrast, like Israel, that have had waves on top of waves of invasion. What I mean is that the United States created its legal structure towards the end of the 18th century, and more or less, it has been pretty stable. The same applies for most of the Western European countries, like France, which established its legal structure towards the end of the French Revolution. In contrast, the land of Israel — Palestine — from the middle of the 15th century up to the middle of World War I was under Turkish occupation. At the beginning, the governing law of the country was the Sharia, traditionally Islamic law. On top of that, in the middle of the 19th century, the Turks dropped the Sharia version of Turkish

law and more or less copied the Code Napoléon. Then on top of that were some elements from the German Civil Code.

In 1918, the British army conquered Palestine, and the British brought their own legal system. But the transition between one system to the other was done through sort of a legal safety valve: a British law saying that the law that was in effect in Palestine at the beginning of the British occupation will remain in effect so long as it was not amended or abolished by British law. And that's how, on top of the Turkish law, some British laws came in.

When the state of Israel was declared on May 15, 1948, the same method was used. One of the first laws that the provisional government of Israel enacted was the Law of Transition. It said that the law in effect in Palestine on May 15, 1948, will remain in effect so long as it was not changed, etc. So, the poor lawyer in Israel in the '50s had to have a good knowledge of Turkish law, needless to say; a good knowledge of English law; and Hebrew law to a certain extent. Pieces of Turkish law were interpreted according to recurring decisions of Turkish courts. Pieces from this legislation that were imported into the system from the UK were governed by a British interpretation, and then, of course, the legislation of the Israel Parliament created an original Israel law. Life was pretty complicated.

The legal system being based on bits and pieces taken from such different, even conflicting systems like the European, Turkish, French, and the British governments, created instability that prevented our founding fathers from creating any sort of constitution, or constitution-like instrument. Furthermore, Israel is a pretty artificial creation — and I'm speaking about the early country — socially and politically.

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For example, in 1955 we had 46 different newspapers. When I say “different” I mean, 46 newspapers printed in different languages which appeared daily. It was a place in which people from 88 different countries came. On both sides of the street you could find a Nobel laureate from Germany and illiterate people. To try to integrate the human mosaic into a working, effective society was difficult and of course affected the legal realities.

Given the gaps in culture and in political perception of those groups, a constitution — when I say constitution, I mean a formal constitution, one that has this beautiful preamble, section 1, section 2, etc. — was impossible because there's no way to bring around the same table so many people from such different backgrounds and somehow to make them agree on the same legal or political platforms, like issues related to church and state that are still not resolved.

Issues pertaining to minorities, such as the status of Israeli-Arabs, have been persistent and difficult to resolve. The Arab-Israeli War of 1948 resulted

in the death of about 2 percent of the Jewish population after 100 years of continuing violence with the Arab community in Israel. The subsequent task of granting Israeli citizenship to the defeated Arabs posed a significant challenge. As a result, in the early years of Israel, Israeli-Arabs were made citizens but placed under military governance. This approach seemed reasonable at the time although it contradicted basic democratic principles. It was and remains controversial under international law, and the conflict made reaching necessary consensus to adopt a constitution virtually impossible.

Later on, our Supreme Court essentially substituted a written formal constitution with its judgments and opinions that altogether created a set of what we call a “constitution of conventions.” To a certain extent, it's pretty similar to the British system, which is based partially on the statutory law, partially on law made by the British Parliament, but mostly on decisions made by the British high courts, mainly the House of Lords. We imitated the British system, and the judicial practice replaced the role of a formal written constitution.

I tried to sum up 150 years in 10 minutes, and it sounds like it! But the current attempt by Mr. Netanyahu, for political reasons, which I will address later on, is to try and cancel this package of constitutional conventions that has been slowly but carefully built up over many years in order to maintain a legal democracy in Israel.

PETER KAHN: We have seen the press here in the United States referring to the existence of “fundamental laws” in Israel in place of a written constitution. Is that what you are talking about here, these basic principles?

DOV WEISSGLAS: Yes and no. In 1948, it was the intention of the provisional government to form an election for a Constitutional Assembly, like what happened in the United States in the 18th century. The election took place, and 120 people were elected as members of the Constitutional Assembly. That was February 1949. It took them four meetings to understand that it's simply impossible to reach any agreement on the fundamental issues of life. As I said, how do you relate to the minorities? When I say minorities, I mean mainly the Israeli-Arab community, and the relationship between state and church. Many, many people migrated to Israel because they define themselves as Jews, and they wanted to live a Jewish life. But most of the Israel population is totally secular and non-practicing.

Now, to define a state as a Jewish state, what does it mean? It means that people who like good bacon in their omelet cannot have it. Sorry for the example. Or when on Shabbat, on Saturday, everything is shut down. And soon enough, the least of issues became so controversial that any agreement with the constitution became impossible. As I say, this hole was filled slowly by the Supreme Court with a long list of decisions. In parallel, Parliament, in the absence of one formal constitution slowly would start to regulate some fundamental issues of life by law, which were called "basic laws" or "fundamental laws."

There was no clear definition what a "basic law" means, whether it requires a simple majority to enact because in our system, in every instance, the majority prevails. If there are only three members of Knesset present in the room — which in many instances

is the case, especially when there is an important basketball or football match, — then if two vote against one, the law passes. One of the requirements was that a basic law should be enacted only with support from an absolute majority of the Knesset, or 61 votes.

But some basic laws were enacted. They deal with freedom of profession, freedom of speech, how the government operates, how the Knesset operates, how the judiciary operate, but that's it. But that's it. One hundred different, very critical aspects of day-to-day life are regulated by the decisions made by our Knesset, say specifically in matters of religion, state, individual freedom, freedom of occupation, etc.

PETER KAHN: Let's talk then about the changes that have been proposed by the Netanyahu coalition government that are alleged will cause a rupture in Israel's democratic system. Can you describe a few of these proposed changes?

DOV WEISSGLAS: Okay, so I first want to say a few words just to portray Mr. Netanyahu. Mr. Netanyahu was indicted two years ago on severe charges, including bribery. This is the beginning of our tragedy. The fate of one individual, no matter how important this individual, can affect the life of a nation, sometimes positively or sometimes so destructively, in the way that's happening in Israel now.

After he was indicted, there was public demand that he resign. It didn't even cross his mind. Apparently, our laws do not call for the resignation of a prime minister who is indicted. Other members of the executive branch, like ministers, high-ranked officials, etc., cannot serve under pending legal pro-

ceedings. But this law doesn't apply to a prime minister. The logic behind this is that a resignation of a prime minister in our system means an immediate election. A resignation of a minister or other senior official of the government doesn't mean any political change. The legislative branch thought that this would invest too much power in the hands of the attorney general, as the attorney general has the power to submit an indictment. In effect, the attorney general would have the power to cause a change of the government, and it might be too much. Therefore, the prime minister's term of office will cease only after a conviction, in contrast with other officials where the submission of indictment will cause them to leave office.

So, Netanyahu remained prime minister, but most of the political factions in Israel — parties allocated in the mainstream or what we call "left" or even "soft right" — refused to build a coalition with him because of his legal situation. So he turned to the marginal extremists who gladly formed a coalition. And he did so because his overriding consideration is to remain Prime Minister.

As you all know, in 1967 Israel occupied the West Bank from Jordan. It's an area which is populated by about 3 to 3.5 million Palestinians. There is a group of Israelis living in the West Bank who strongly believe that Israel should annex major parts of the West Bank. They consider the Bible as literally a binding document, and, for them, the promise made by The Almighty to Abraham regarding the land from the sea to the river is a divine promise. For them, as I say, it's a contractual obligation. In reality, the issue of annexation of the West Bank was never seriously considered because it might constitute a violation of international law.

Netanyahu made the West Bank settlers a prominent party of his coalition, and consequently they are now politically very powerful.

In 1969, our Supreme Court ruled that our presence in the West Bank is a military occupation. Therefore, the international law, which regulates occupation and restrictions on the military forces, applies to our presence in Jerusalem. It means that the local population has certain rights. One of the prohibitions of international law in this context is what is known as “ethnic cleansing.” Ethnic cleansing means to deport a population, and, generally speaking, it means prohibiting change or interference within the current demographic structure of the occupied area. Therefore, around 100,000 Israelis who settled in the West Bank — and, in a way, started to change the ethnic demographic structure of the area — is an act of violation of international law, so ruled our Supreme Court.

In parallel, our Supreme Court was always a barrier to protect other religious denominations and factions on issues such as the Saturday requirement that everything shut down. When I say everything, I mean businesses, restaurants, public transportation, etc. The fact that El Al, our national carrier, doesn’t fly on Saturday means the carrier loses heavily. In flying to this country — for example, which takes about 12 to 14 hours — in order not to fly on Saturday, they have to shut down on Thursday. For practical purposes, they are losing three business days. An airline which loses three business days has no right to exist. How does it exist?

It was always a Supreme Court who stood firmly against those kinds of regulations. Now, given this very exceptional political formula we entered when Mr. Netanyahu formed a coalition that needed the extrem-

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ist factions, as I said, he is now kept hostage by them. And for them, it is a once-in-a-lifetime opportunity, finally, to destroy an institution toward which they have developed an animosity in the last 75 years.

PETER KAHN: So, what are the specific elements of Netanyahu’s quote-unquote “reform”?

DOV WEISSGLAS: I think the more appropriate word is a “pogrom.” The first and most immediate one is to change the process of a judge’s nomination. Here’s a short explanation. With such a diversified society, who the judge is — for example, his background, education, social economic

status, etc. — plays a very significant role in his way of thinking when it comes to issues that are related to political and public life. In contrast, a judge dealing with the effect of a mortgage, whether it concerns someone religious, secular, a Jew, an Arab, a settler, or someone who lives in Tel Aviv, who the judge is does not matter. Clearly, when the issue is not purely legal — but as I said, issues regarding minorities, further occupation of the West Bank, how Saturday should look like in public, etc. — then the judges’ background, their tradition, their family, their heritage, their beliefs, play a very significant role. So far, most of the judges in our Supreme Court are more or less well-educated and liberal. Most of them have graduated from good law schools all over the world. Aharon Barak, for example, who was president of our Supreme Court for many years was a teacher in Yale for many, many years. So, these people are very much affected by Western liberal, progressive democratic ideas.

The conservative factions that support Netanyahu want to change this and bring people who tend towards conservative religion and nationalism. We are familiar with the same impulses in the United States and elsewhere in Europe. They very much look at the Polish and Hungarian model for how free European democracies can turn into conservative states. Presently the judges in Israel are nominated by a committee of three Supreme Court justices, two members of the executive branch, two ministers, two representatives of the bar association, and two members of Parliament. And again, given the diversification of people, unless there is a consensus between those factions, there is no nomination.

So, the fact that the nominating system is so diversified guarantees either a complete paralysis or an agreement, a consensus by the majority — like the ancient Roman system of governance that was based on two equally empowered rulers, where presumably, if they weren't in agreement, if they didn't operate harmonically and reach consensus, they wouldn't be able to move forward, and this forced them to work together and reach an agreement. That, more or less, was the rationale behind our committee.

Netanyahu's first demand is to replace members of this nominating committee and to get rid of the two representatives of the bar. The proposal is to have a committee of nine people, of which six are representatives of the coalition. But since a coalition is at least 61 members of the Knesset and is fully controlled by the government or by the prime minister, it means that the government will nominate the judges.

There can be no comparison to the system in the United States, neither in the U.S. Senate nor the U.S. Congress, where people are more or less independent. They think independently, and they're not necessarily obedient to their party leaders if they find obedience in this case to be wrong. In our system, a member of Parliament wouldn't vote against the coalition and the party discipline. If he speaks against it, then he is sanctioned. It's called "coalition management." A sanction can range from depriving his right, for instance, to deliver a speech, to prohibiting him from submitting new bills. Having six representatives of the coalition on the commission means that the prime minister, through the minister of justice, (who in today's government is one of the most radical political figures), will be the one nomi-

nating the judges. This would mean the end of our Supreme Court in the role of lawmaker and protector.

The second proposed change involves the attorney general. In the United States, the attorney general serves essentially as the minister of justice. But in our system, the attorney general is the legal advisor of the government. In 1961, Mr. Ben-Gurion, our prime minister, was in disagreement with the attorney general regarding the question of his indictment. In that case, somebody wanted to indict Mr. Ben-Gurion, and the attorney general refused. As a result, Supreme Court Justice Shimon Aggranat, a very distinguished judge, came up with the opinion that in our system — like in the UK — the attorney general is the supreme interpreter of the law and his opinion on a matter of law binds the government in any branch of the executive, subject, of course, to a later decision of the court.

The attorney general, as the government, if he says "no," then that's the end of the story. Therefore, when the government is taken to court by a petitioner, the attorney general represents the government. But if the attorney general finds that in that particular petition the position proposed by the government is wrong or illegal or unreasonable, he refuses to represent the government, which means that the petition is sustained.

The proposal at issue is to cancel the Israel attorney general's special status as the supreme interpreter of the law for the purpose of forming the government's legal position. The intention is to give him instead the status of an advisor, where namely the government can either listen to him or not. And they wish to allow the ministers to bring whatever legal counsel they want, which will be a mess. But as I

said, the main proposal is to deprive and destroy the special status of the attorney general from forming, in most cases, his position as the final position of the government.

PETER KAHN: As I understand it, Netanyahu also proposes allowing the Knesset to override Supreme Court decisions.

DOV WEISSGLAS: Yes, this is true. Now one of the demands is to empower the Knesset to override a Supreme Court opinion at a simple majority of 61. It should be remembered that 61 is the minimal number required to form a coalition, and therefore, any coalition will automatically be capable of reversing the Supreme Court's opinion.

PETER KAHN: And finally, Netanyahu seeks to limit the Supreme Court's ability to review certain decisions.

DOV WEISSGLAS: Yes. Again, in the absence of a formal constitution, the statutory law, the laws of the Knesset, don't cover 100 percent of the situations people are confronted with in daily life. Therefore, our Supreme Court developed a practice that if an administrative decision is within the executive authority, but yet so stupid or brutal or exceptionally unreasonable, the Supreme Court may intervene. This is a very effective tool that enables the Supreme Court to overview and control the government's executive policy and decisions.

In my practice, I held many petitions against the government, out of which in only very few cases the Supreme Court went all the way and said, "Listen, what you have decided

is by the law, but it's exceptionally wrong." I told Peter a story of when this happened. A friend of mine's wife was diagnosed with ALS. He found a worker to aid his wife, a young girl from the Philippines. Due to good health care and the assistant, his wife lived for another 27 years, which is very rare in these cases. After 27 years she passed away. This young girl who joined the family when she was 37, was now in her 60s. But according to the immigration regulation, a foreign employee who is employed in personal assistance for chronic illness must

leave the country one month after the patient is gone. And, very accurately, a month after his wife's passing, she got a note that she must leave the country. Nothing helped. He pleaded at the immigration office explaining the situation, how she joined them when she was 37 years old and she's now almost 60, has nobody back in her old country and belongs here. He said, "I'm willing to carry all her expenses, we ask no social security benefits, nothing. I will provide her needs for the rest of her life." But nothing helped. So he went to court. The court's decision

was four sentences that apparently said: "The commissioner of immigration has acted within his authority, but his decision seems to be so brutal and exceptionally unreasonable, so it is null and void."

Now part of the reform, as I say, is to deprive the ability to define an executive decision as exceptionally unreasonable. Once a decision is made within the authority, even the cruelest decision in the world, the Supreme Court of Israel would have no jurisdiction.

PETER KAHN is senior counsel at the firm Williams & Connolly LLP in Washington, D.C. where he specializes in complex civil and criminal litigation both in the United States and internationally. Starting with his representation of the Israelis in the Jonathan Pollard spy case in the 1980s, Kahn has handled numerous cases for American clients with interests in Israel, and for Israeli clients with matters pending in the United States, including, among others, the family of the late Israeli Prime Minister Yitzhak Rabin. Kahn is a Duke Law School alumnus and currently serves as chair of the Advisory Board of the Bolch Judicial Institute of Duke Law School, which publishes *Judicature* and *Judicature International*.

DOV WEISSGLAS is a prominent lawyer and business leader in Israel who served for many years as Prime Minister Ariel Sharon's personal attorney and was appointed as Sharon's chief of staff in 2002. In that role, he served as Israel's principal negotiator with U.S. National Security Advisor Condoleezza Rice and U.S. Secretary of State Colin Powell in the George W. Bush administration's Roadmap for Peace Initiative in the Middle East. He also was one of the key architects of the Israeli disengagement from Gaza. He has worked in several prominent Israeli law firms, including his own, Moritz, Weissglas, Almagor and Company. Weissglas retired from practice in 2015 and now serves as a consultant for individuals and companies around the world on a wide variety of subjects, especially those dealing with regulation and governance.