

ELNET-Israel's Monthly Newsletter

A Review of Activities and Analysis on Europe-Israel Related Matters

Policy Analysis

Israel's Legal System Needs Evolution, Not Revolution
Dr. Emmanuel Navon, CEO ELNET-Israel



Dear Friends,

The controversy around the constitutional overhaul proposed by the current Israeli coalition understandably leaves outside observers confused. As I wrote in ELNET-Israel's previous newsletter, our organization will not take a side in that political controversy; nevertheless we shall strive to explain it to our friends and supporters. This is what I did on [January 30](#) at one of our weekly Friends of ELNET Online Policy Exchange briefings, and this is what I would like to do now in this monthly briefing, with the intention of explaining the judicial controversy and proposing a constructive solution to Israel's constitutional crisis.

Read Full Analysis Below

ELNET Activities This Month



Czech Delegation visit to the Community Stress Prevention Center



Czech Delegation inside a Hezbollah tunnel



Czech Delegation Meet MKs at the Knesset



ELNET hosts event on Polish-Ukraine-Israeli cooperation for PTSD prevention



Screening of ELNET documentary on project to bring Israeli trauma expertise to Poland



Meeting with Italian Ambassador to Israel



Meeting with Albanian Ambassador to Israel



Meeting with Lithuanian Ambassador to Israel



ELNET partakes in Spain-Israel Conference

This month ELNET hosted for the first time ever a delegation of Members of Parliament from the Czech Republic. The 10-member delegation, led by MP Marek Ženíšek, Chair of the Foreign Affairs Committee, also included MP Pavel Žáček, Chair of the Internal Security Committee, and several members of the Israeli-Czech Friendship group. With the aim of strengthening security cooperation between the Czech Republic and Israel, the visit included meetings with high-level Israeli diplomats, the Jerusalem Police Commander, Chair of the Knesset Foreign Affairs and Defense Committee, and Martin Stropnický, Ambassador of the Czech Republic to Israel, among others. The delegation also placed an emphasis on Israel's crisis management and emergency response infrastructure, visiting Rambam Hospital's Fortified Underground Emergency Center and the Mashabim Center for Community Stress Prevention.

Elnet hosted a special event together with the Polish Embassy in Israel and the Ukraine Embassy in Israel, titled "We're in this Together". The event, which was held at the Ukrainian Cultural Center in Tel Aviv, was dedicated to Polish-Ukraine-Israeli cooperation in the field of war trauma and PTSD prevention in light of the war in Ukraine. The event included a screening of the documentary film on ELNET's program bringing Israeli trauma experts to

expertise on resilience, PTSD prevention, and crisis management to Europe in light of the war in Ukraine.

ELNET continued to have working meetings with European ambassadors to Israel to promote work together. This month ELNET met with the ambassadors of Albania, Italy, and Lithuania to Israel. Among the outcomes of these meetings, ELNET intends to host more delegations of policymakers from Italy. In addition, we are proud to announce that ELNET will soon be hosting a European Summit on Renewables and Energy Efficiency, to take place in Albania.

ELNET's GINSUM (German Israeli Network of Startups & Mittelstand) hosted a virtual event to discuss the [EnergyTech Briefing](#) release which analyzed which short- and medium-term cooperation potentials exist between German SMEs and Israeli startups regarding the transition to clean energy.

Latest Video Releases



Highlights of ELNET Activity from Last Year and Looking Forward to Year Ahead



ELNET hosted an Emergency Briefing with the Israeli rescue mission on the ground in Turkey helping save lives in the earthquake's immediate aftermath

EIPC Confirmed Speakers

ELNET's 3rd International Policy Conference

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INTERNATIONAL
POLICY CONFERENCE
2023 PARIS
MAY 8-10

**SPEAKER
CONFIRMED**

**THE IHRA
DEFINITION: STILL A
LONG WAY TO GO**

Dr. Felix Klein
Federal Government
Commissioner for Jewish
Life in Germany and the
Fight against Anti-Semitism

#EIPC23 #AskingTheRightQuestions

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**SPEAKER
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**ABRAHAM
ACCORDS - WHERE
IS EUROPE?**

Amb. Daniel Meron
Deputy Director General
for Europe, Israeli Ministry
of Foreign Affairs

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**SPEAKER
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**WHAT STRATEGY
FOR A THRESHOLD
IRAN?**

Dr. Ebtesam Al-Ketbi
President and Founder,
Emirates Policy Center (EPC)

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**SPEAKER
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**FROM BRAIN-DEAD
TO NO-BRAINER:
NATO REVIVAL
AND EXPANSION**

Dr. Bruno Tertrais
Deputy Director,
Foundation for Strategic
Research (FRS)

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**SPEAKER
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**CONSTITUTIONAL
DEBATES IN
EUROPE AND
ISRAEL**

Lord Tom Watson
Member, House of Lords;
former deputy leader of the
Labour Party

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**SPEAKER
CONFIRMED**

**ABRAHAM
ACCORDS - WHERE
IS EUROPE?**

MP Benjamin Haddad
Spokesperson for the
Majority Renaissance group,
French National Assembly

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Israel's Legal System Needs Evolution, Not Revolution

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controversy; nevertheless we shall strive to explain it to our friends and supporters. This is what I did on [January 30](#) at one of our weekly Friends of ELNET Online Policy Exchange briefings, and this is what I would like to do now in this monthly briefing, with the intention of explaining the judicial controversy and proposing a constructive solution to Israel's constitutional crisis.

1. Why is the Supreme Court Accused of Overreach?

In the absence of a written constitution, Israel's system of checks-and-balances between the three branches of government has evolved empirically. For the first three decades that followed Israel's independence in 1948, the Socialist *Mapai* party dominated Israeli politics. In the absence of a bicameral parliament, of a presidential veto to legislation, and of regional elections for the Knesset, the only counter-power to the government was (and still is) the Supreme Court. Menachem Begin was full of praise for the judiciary precisely because judges were a shield of last resort in a system controlled by his nemesis David Ben Gurion.

In contemporary Israeli politics, judicial activism is generally criticized by the right and defended by the left. But, five decades ago, the opposite was true. Indeed, Yitzhak Rabin resigned in 1977 because then-Attorney General Aharon Barak decided to prosecute him for holding an illegal bank account in the U.S. (Rabin's resignation paved the way for Likud's historical victory).

Israel's Supreme Court became more activist under the presidencies of Justices Meir Shamgar (1983-1995) and Aharon Barak (1995-2006). During that period, the Court made five profound changes to Israel's constitutional order by declaring that:

1. Israel's basic laws collectively constitute a de facto constitution, and that the Court has the authority to strike down unconstitutional legislation;
2. Everything is justiciable, meaning that the Court can rule on any matter, and not only on legal ones;
3. There should be no restriction to petitioning the Court, and therefore anyone can have legal standing before the Court;
4. The Attorney General's legal advice is binding and must be accepted as is by the government;
5. The Court can strike down government decisions not only for being illegal but also for being "unreasonable" in the Court's opinion.

Some of these principles are common in other democracies. However, in Israel they were not the result of legislation nor public debate. They were simply and unilaterally imposed by the Court itself. This judicial overreach went further yet after the Knesset passed a basic law in 2018 which officially defines Israel as a nation state.

Unsurprisingly, the Court was petitioned to strike down the law. According to its own doctrine (i.e., basic laws enjoy a constitutional status), the Court should have dismissed the petitioners out of hand. It did not. Rather, the Court argued that it was free to revise its own doctrine, and strike down basic laws as well. The new basic law was spared that fate only because the Court could not find anything wrong with it. This new constitutional order produced an imbalance because the Judiciary ends up having the last word on matters of policy, and because the Court is now used as a de facto second chamber by the opposition when it loses a vote in parliament. Add to that the fact that the Israeli left was dealt a fatal and lasting electoral blow by the Second Intifada, while it can count on sympathetic judges in the Court, and you understand why the Israeli right has been bemoaning for the past two decades that it keeps winning at the ballot box only to be struck down by the bench.

Hence has judicial activism become a right-left issue in Israeli politics. Having won a

majority after five consecutive inconclusive elections, and having formed a government eager to reshape Israel's constitutional order, the pro-Netanyahu right feels that it has hit the jackpot and that it cannot let go of a golden opportunity.

2. Why is the Proposed Reform too Radical?

The reforms proposed by Justice Minister Yariv Levin on January 4, 2023, include the following:

1. The government will handpick Supreme Court judges of its liking;
2. The Court will in effect lose its power to strike down unconstitutional legislation since the Knesset will be able to re-legislate it with a simple majority of 61;
3. The Court will no longer be able to use the principle of “unreasonableness” to strike down government decisions;
4. The ruling of government legal advisors will cease to be binding, and ministers will be entitled to hire and fire their ministry's legal advisor at will, without the involvement of the Ministry of Justice.

In effect, the government would become mostly unrestricted.

Altogether, those four reforms go too far, and they would replace one imbalance with another instead of fixing the imbalance produced by the Court over the years.

3. What Would be a Reasonable Compromise?

In order to improve the system of checks-and-balances and enjoy broad public support, the judicial reform should include the following five elements:

1. The principle of justiciability (i.e., the purview of the High Court) must be clearly delineated so as not to apply to all aspects of government policy and of Knesset legislation;
2. The principle of “unreasonableness” should be restricted, but not repealed altogether (as in fact proposed by Supreme Court Justice Noam Solberg);
3. Standing should be narrowed to include only petitioners who can prove that they are affected by a law or administrative decision;
4. Both judicial review of legislation and the override of the Court should require a special majority, not a simple one. Israel should adopt a charter of basic rights and freedoms if it is to add an override clause to its mechanism of checks-and-balances;
5. The override clause should not apply to the fundamental rights spelled out by the bill of rights. Basic laws should not be within the reach of judicial review, but the Knesset should not escape judicial review just by arbitrarily adding the adjective “basic” to any legislation.

Such reforms need to be discussed and have wide public support. The current coalition controls 53% of the Knesset, but only received 48.38% of the popular vote. It should not force radical reforms with the support of barely half of the electorate. Recent polls clearly show that most Israelis do not want an imbalanced and rushed reform.

As for the committee that appoints judges, it has already undergone a positive reform in 2008. The committee is composed of nine members: the Minister of Justice, another cabinet member, two members of Knesset, two members of the Israeli Bar Association, and three Supreme Court judges (including the president of the Court). The assertion that “judges appoint themselves” was mostly true before 2008 because the three justices would team up with the Bar Association to secure their nominations.

However, this is no longer the case. In 2008, the law was amended so as to require a majority of seven out of nine, thus breaking up the “automatic majority” of the judges.

All members of the committee now have no choice but to compromise. This mechanism, which enabled conservative ministers of justice such as Ayelet Shaked and Gideon Sa'ar to block overly activist judges and nominate more moderate ones, shows that piecemeal and constructive reforms are possible. That being said, there is still room to consider additional reform.

The compromise proposal of President Herzog, as a basis for discussion, is welcome. The State of Israel needs an agreed, clarified, and balanced constitutional order.

UPCOMING ACTIVITIES

- First Romania-Israel Mini Strategic Dialogue
- Special Event for European Ambassadors to Israel and supporters
- Delegation of French MPs from the Republican Party
- ELNET EU+NATO Lunch Series Event hosting Israeli senior policy analyst, Udi Dekel
- ELNET-Germany International Antisemitism Summit "Actions Matter"
- ELNET-France event screening documentary on Gaza in the French Senate

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