



Israel's Constitutional Crisis

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[00:00:00] Jeffrey Rosen: Earlier this year, the Netanyahu administration in Israel proposed a series of judicial reforms, setting off a constitutional crisis. The proposals would empower the Israeli legislature, known as the Knesset, to override decisions of the Supreme Court of Israel and to control the appointment of judges to the court. The proposal was met with large-scale protests across Israel by hundreds of thousands of demonstrators who argue that they undermine judicial independence.

[00:00:30] Jeffrey Rosen: Hello, friends. I'm Jeffrey Rosen, President and CEO of the National Constitution Center, and welcome to *We the People*, a weekly show of constitutional debate. The National Constitution Center's a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

[00:00:47] Jeffrey Rosen: To help us understand the debate over judicial reform in Israel and the similarities and differences between the American and Israeli constitutions, we're joined by two leading scholars of comparative constitutional law, and it's an honor to have them both. Professor Yuval Shany is the Hersch Lauterpacht Chair in International Law and former dean of the Law Faculty of the Hebrew University of Jerusalem. He has written about the constitutional crisis on the legal blog *Lawfare* and elsewhere.

[00:01:17] Jeffrey Rosen: Welcome, Professor Shany, to *We the People*.

[00:01:19] Yuval Shany: Thank you. Nice being here.

[00:01:21] Jeffrey Rosen: And Professor Tom Ginsburg is the Leo Spitz Distinguished Service Professor of International Law at the University of Chicago Law School. His latest book is *Democracies and International Law*, and his earlier books include *How to Save a Constitutional Democracy*.

[00:01:35] Jeffrey Rosen: Professor Ginsburg, it's an honor to welcome you back to *We the People*.

[00:01:39] Tom Ginsburg: Great to be here, Jeff. Thanks for having me.

[00:01:42] Jeffrey Rosen: Professor Shany, in the face of mass protests, the Prime Minister Netanyahu has temporarily put his proposals on hold. Where are we at this moment in the crisis, and what does it say about this moment in Israeli constitutional history?

[00:01:58] Professor Yuval Shany: Yes, we have heard in January, the government, uh, introduced a very comprehensive reform package, which, uh, looks at, uh, radically changing the balance of power, you could say, between the judiciary and the other two branches, which are, uh, incidentally or not incidentally, controlled by the same coalition government, the j-, the executive branch and the legislative branch. Uh, from this package, only one bill is ready for passage before the Knesset, which is the bill, uh, which is designed to change the way in which judges are elected in Israel. We will talk a little bit about that, uh, more further down.

[00:02:39] Yuval Shany: That bill is currently waiting to be passed. It can be passed by a vote essentially any time in the Knesset. They would need 24 hours or 36 hours just, uh, between the announcement of the vote and the actual vote. But given the, uh, the degree of pressure that this government has, uh, encountered, uh, the protests and many other, uh, manifestations of domestic and international pressure, the prime minister has, uh, announced earlier this week that the coalition would not, uh, try to pass the vote this parliamentary session but rather would deal with it in the next session, which starts, uh, in about a month.

[00:03:22] Yuval Shany: In the interim, uh, the parties, uh, the coalition and opposition parties, uh, have already started meeting, uh, under the auspices of the Israeli president, who in Israel is, uh, is essentially, uh, a ceremonial figure, which has some, uh, moral authority but very little legal authority. And they are trying to negotiate, uh, a settled bill, I mean, uh, a proposal that would be acceptable both to the coalition and the opposition.

[00:03:53] Yuval Shany: The prospects of this, uh, currently do not appear to be very high that this would succeed, so we may end, uh... We may find ourselves, uh, in one month in exactly the same spot we have been this, uh... Earlier, uh, this week. So this is where we're at.

[00:04:12] Jeffrey Rosen: Professor Ginsburg, you have expressed concern that Israel could be the next Hungary. There is a temporary respite in the face of mass protests. Is this a historic victory for liberal democracy in Israel or, uh, a temporary respite in the face of mass protests, or something else? How significant is the delay?

[00:04:32] Tom Ginsburg: Well, it's hard to know. I wouldn't say it's a historic victory yet, but it certainly was historic in the way it played out. Anytime you see, you know, that percentage of people on the streets in any democratic country, it's a very significant thing. And the way I read it, it was the population coming out to enforce certain principles which they thought, you know, were sort of quasi-constitutional in nature.

[00:04:55] Tom Ginsburg: The immediate triggering event, of course, was the firing of the Minister of Defense. Because of his stated opposition, he's changing his view to say, "You know, this reform proposal is really tearing the country apart. Let's take a pause." Netanyahu fired him, and the people came out and said, "That's not acceptable." So, in other words, they didn't want it rammed through, uh, but, you know, it's hard to say whether this is, you know... The long-term implications, we have to see what happens with the bill itself and, ultimately, what happens with the balance of power in the Israeli government.

[00:05:26] Jeffrey Rosen: Professor Shany, tell us about the differences between the Israeli and American constitutions that led to this crisis and help American audiences understand the distinctive features of the Israeli Supreme Court that provoked opposition from Netanyahu's party.

[00:05:44] Yuval Shany: Right. So Israel, unlike the United States, does not have a written constitution. What it has is a series of basic laws that were passed over the years. You could see these basic laws. You can, uh, you can, uh, regard them as a ramp constitution or a constitution in the making.

[00:06:02] Yuval Shany: But the critical, uh, feature of these basic laws is that they are very easy to legislate and also very easy to change. So any government majority, uh, any coalition majority, which is in the Israeli system 61 seats out of 120 seats in the parliament, which is the Knesset, uh, which is something that in a parliamentary system, every government has because that's the condition to form a government is having 61 seats, that means that the Kn- that the government, through the Knesset, can change at any moment the basic laws and change essentially the structure of power in the country and also, uh, add, or, uh, or omit basic rights, which are currently entrenched in these basic laws.

[00:06:48] Yuval Shany: Now, what this government has tried to do is use its narrow majority in parliament to fundamentally change the balance of power between the executive and legislative branches on the one hand and the court on the other hand.

[00:07:02] Yuval Shany: The court in the last 30 years has issued a series of cases that had, have, um, stood for the proposition that the basic laws are, in fact, a ramp constitution and that, uh, on the basis of these basic laws, uh, the judiciary has the authority to strike down legislation and violate basic rights and, uh, upsets the balance power between branches of government.

[00:07:29] Yuval Shany: Also, uh, before that, it has used its authority to strike down, uh, administrative activity that it considered to be disproportionate or ethically unreasonable and the like. And the reform proposals were seeking to take away, uh, most of these powers from the courts by limiting the grounds under which the court would be able to exercise judicial review, by making it much harder for the courts to reach decisions to strike down legislation, by introducing a supermajority, by allowing the Knesset to override a decision of the court, and finally, and perhaps most critically, by changing the way in which judges are elected so as to transform the system from a system that is, uh, essentially professional in its orientation, where professional jurists are selecting judges, uh, to a system where politicians, e- essentially coalition politicians, are selecting judges.

[00:08:29] Yuval Shany: Now, all of these aspects are very different from the American system in the sense that you have at heart a constitution which is very difficult to amend. You have the Bill of Rights. You have the strong system of separation of powers. You do have political involvement in the appointment of judges, but that actually is offset by, uh, a multiplicity of checks and balances that exist between the different branches of government, between the different houses of Congress, between the federal and the state levels, which Israel simply does not have.

[00:09:02] Yuval Shany: In Israel, the only, uh, counter, uh, power that offsets the ex-, the very, uh, significant powers that the government and the Knesset has is the Supreme Court. And taking away these powers of the Supreme Court would mean, in the Israeli context, basically, uh, unlimited power exercised by the coalition government.

[00:09:23] Jeffrey Rosen: Basically, unlimited power by the coalition government. Uh, Professor Ginsburg, tell us more about the proposals that have been put on hold in addition to judicial appointment Professor Shany just told us that it would allow the Knesset to override decisions, uh, as well as taking away review of administrative decisions for reasonableness.

[00:09:44] Jeffrey Rosen: What were the particular controversies that led to the proposals, and, and how do these so-called reform proposals that would allow a majority of the Knesset to challenge the court compare to the similar attempts at court packing in an international perspective?

[00:09:59] Tom Ginsburg: Yes. I mean, what this... You mentioned Hungary before, and what this has in common is that it's a relatively narrow majority, a, you know, a temporal majority just right now, that seeks to undertake in its moment of power, uh, very fundamental changes in the structure of the state and the relationship among the, the branches of the government.

[00:10:19] Tom Ginsburg: But I think to really understand why we go here, you have to go back a little bit and look at the history of the last 25 years, 30 years, uh, which is what's called the Constitutional Revolution in Israel that began really in 1992 with the passage of a couple of basic laws that referred to human rights.

[00:10:36] Tom Ginsburg: And the chief justice of the time, Aharon Barak, used those, uh, the passage of laws reflecting basic rights, to say, "This is totally different. Now we have a constitution in Israel, and it's a constitution which we, the judges, can exercise the power of judicial review over."

[00:10:53] Tom Ginsburg: So, uh, you know, like the United States, judicial review isn't actually written, uh, into any basic law, but the court took the power. And that alone, you know, makes it sound a lot like the United States.

[00:11:06] Tom Ginsburg: What was different, I think, is the way that that court used the power. And it's very controversial in Israel, became a very big, uh, topic of debate among legal scholars, among, uh, the public.

[00:11:17] Tom Ginsburg: The court generally used it to protect liberal values in a country where there's lots of conflicts about the nature of the state. And, uh, there was somewhat of a backlash against that court because of its very expansive view of the role of judicial power.

[00:11:34] Tom Ginsburg: There were some changes in the judicial appointment system thereafter, and, in my opinion, I'm, you know, not Israeli, but observing from afar, it seems to me the Supreme Court kind of got the message that, "We shouldn't be deciding everything."

[00:11:47] Tom Ginsburg: But that battle over Aharon Barak's court, in some sense, is what's led us to today because conservatives have in Israel and various forces have just sought to reign in the court, saying, "You don't have democratic authority."

[00:12:01] Tom Ginsburg: All right. So now they start to act. And this is the interesting thing. When you look at each of those individual reforms that Professor Shany just laid out, you can find some example in some other country which uses those things, and it's still a democracy.

[00:12:17] Tom Ginsburg: It is the combination of them that makes the thing so particularly insidious, from my point of view. Uh, so, you know, for example, in the United States, we have a politicized, uh, appointment process. Well, we're still a democracy.

[00:12:32] Tom Ginsburg: Um, and there is a lot of comparative evidence on this that the more politicians are involved in appointing Supreme Court justices, the more politicized the court will be. So you have that kind of little pressure for politicization.

[00:12:44] Tom Ginsburg: But then they combine in Israel that change with, uh, the ability of the Knesset to overrule judicial decisions. And again, this isn't unknown. I mean, it's, uh, what we find in Canada. They have something similar where, uh, part- provinces and the national government can, notwithstanding a Supreme Court decision about basic rights, decide that, "Nah, we're going to go ahead with this anyway." The United Kingdom, the interpretation of the Human Rights Act is similar.

[00:13:16] Tom Ginsburg: So again, the proponents say, "Well, look, those countries have it. They're democracies. This has got to be okay." But think about the combination of the two. You have politicization of the court's membership and then also a check by the parliament by 61 members of the Knesset on any decision which the court, you know, happens to go against the parliament. It really weakens judicial independence very, very severely, the combination of the two.

[00:13:40] Tom Ginsburg: That's, I think, why there's so much fear about an unconstrained parliamentary majority, as well, I should add, I think there's a political dimension where it's this particular majority and their agenda because of the very fractured nation- nature of the coalition includes some very... Some elements which aren't at the mainstream of Israeli society, lots of debates in that society about the role of the religious groups, the settlers who want to, you know, more actively constrain Palestinians in the West Bank. There's a lot of contention and a lot of distrust of this particular coalition.

[00:14:17] Jeffrey Rosen: Many thanks for that and for mentioning the crucial role of, uh, Chief Justice Aharon Barak. I had the great privilege of studying with him in law school in the 1990s. And his transformation of the court, as you described, uh, culminating in the crucial, uh, decision in the 1990s which gave the Israeli, the Supreme Court the power of exercising judicial review is as crucial as you say.

[00:14:41] Jeffrey Rosen: Uh, Professor Shany, what is the counter-argument by the critics of the court, uh, who claim that the appointments process is in the hands of elites and not representative of governing majorities and, and object, as Professor Ginsburg said, to decisions

regarding the settlement? I-Is-is-is-is is there a principled case in favor of so-called judicial reform, or is this a purely, uh, partisan anti-constitutional clash?

[00:15:08] Yuval Shany: As Professor Ginsburg said, there are some, uh... There is, uh, concern in conservative circles about judicial overreach. There is, uh, a very, I think, well-established narrative in the Israeli right, which, uh, wh-wh- which maintains that although, uh, the Israeli public is generally right-wing oriented, and in most elections, the right-wing parties win the elections, the court is a bastion of liberal ideas, and as a result, the right-wing is not in a position to realize its, uh, its policies, its election platform because it is being stopped by these judges who are leftist and elitist, e- et cetera.

[00:15:56] Yuval Shany: A- and I think there is something to be said in favor of the proposition that in a system where the court is a counterweight to government power, uh, and in, in a system where most of these governments do tend to lean rightwards in their orientation, it would be almost inevitable that the court would, uh, therefore constrain, a, a right-wing government by, uh, enforcing, uh, more liberal values.

[00:16:29] Yuval Shany: Uh, there have also been, uh, specific instances where, uh, I, I think reasonable, uh, people may disagree whether the court should have gone, uh, on th-, on s-, on specific, uh, paths and trajectories, uh, for instance in intervening with appointment, uh, of ministers because they are, uh... They have been in the past, uh, charged with criminal offenses and the like. So- so there is, even within, uh, my own legal faculty at Hebrew U, there are those who think this is something which courts shouldn't be dealing with. This is something for the people, uh, to decide.

[00:17:06] Yuval Shany: Uh, but I think, by and large, these criticisms are very much, uh, overblown because they ignore, uh, uh, two things. First, uh, there have been also many decisions o- of the court which have been quite conservative in their orientation. I mean, and people on the left are often very frustrated as well with the court for, for instance, uh, uh, refusing to rule on the legality of settlements in the West Bank or for, uh, allowing very dubious, uh, security measures such as house demolitions and limits on family reunification, so for Israeli and, uh, Palestinian citizens.

[00:17:44] Yuval Shany: S- so, so to portray the court as, as this, uh, fringe left, uh, organization, it is, is very... I, I think is very exaggerated. The court sometimes, uh, gets it here, sometimes gets it there. The fact that it's also unlike the US Supreme Court, it doesn't sit in plenary in most cases but rather in smaller panels of three judges, five judges, means that there could also be fluctuations that, uh, relate to the identity of the judges, of the justices.

[00:18:14] Yuval Shany: A- And the second thing which I want to notice that, as Professor Ginsburg has said, uh, things, uh, have changed quite significantly from the 1990s. The composition of the court is now very different. Uh, there had been right-wing governments, and despite the rhetoric, they have been able to influence the composition of the court through the existing appointments system, which actually gives the coalition a right to veto appointments in the same way that it gives the judges themselves a right to veto appointments, which means, in reality, that, uh, bargains are struck between the judges and, uh, and the politicians for the

election of candidates. And we have seen the court become progressively more and more conservative.

[00:19:00] Yuval Shany: And we are now at the point which is actually quite close to a tipping point. So- so- so to maintain that the Israeli system, uh, has a court which is completely off the charts, i- is not right. And to, uh, maintain that the, uh, that the right doesn't have an influence on the composition of the court is also, uh, very inaccurate.

[00:19:20] Jeffrey Rosen: Uh, Professor Ginsburg, in addition to the appointments proposals, we've discussed others, including, uh, proposals to limit the court's authority to strike down legislation requiring a supermajority of judges, having an override clause that would allow the Knesset to re-enact laws and saying that the Supreme Court lacks authority to exercise judicial review over the basic laws themselves.

[00:19:46] Jeffrey Rosen: C- c- could any of those proposals be enacted consistently with judicial independence? And wh- what are the bare minimums for judicial independence that would be required to sustain an independent judiciary in Israel as this crisis plays out?

[00:20:02] Tom Ginsburg: Right. so thinking about judicial independence broadly, across, you know, all countries, it's, uh... First of all, it's important to recognize that there is another genuine value in democracy, which is judicial accountability. And you certainly don't want judges just deciding things that are completely insane, with no check on their power.

[00:20:19] Tom Ginsburg: Uh, and when you look at the history of democracies, including our own, this is often, uh, a story of sort of calibration, moving, you know, in one direction, another, depending on the court's exercise of power, depending on how popular its decisions are.

[00:20:35] Tom Ginsburg: You can think back to the court-packing plan, uh, you know, in the United States, which is an effort to sort of signal to the court that maybe it shouldn't, you know, restrain itself and such.

[00:20:44] Tom Ginsburg: So this is something that happens within democracies all the time. So the changes to the judicial appointments process, which have already happened, have increased the numbers. Now seven out of nine members of that, uh, judicial council, which are required to make an appointment, and that, I think, l- led to politicians, the political members of that body, to have some say, a veto, if you will, over appointments, which strikes me as a kind of infra democratic change, you know, that one can see all the time as countries, you know... As judges and democratic majorities interact in constitutional systems.

[00:21:23] Tom Ginsburg: Uh, to me, again, it's the combination of all those things, which makes it rather worrying. You know, I guess, one... You know, again, either one of them, I suppose, that does major changes, uh, to the appointment process or the override, on its own, would be a major change, uh, but wouldn't really signal, you know, such a body blow to judicial independence.

[00:21:43] Tom Ginsburg: In other words, this is the kind of thing which, in principle, you want small moves. You would like to have a broad consensus in society. And this is actually

with the president of Israel, who's a powerless politician in their system. But what the president of Israel said, "You know, there's just too much contention over this. Let's get, you know, supermajority agreement." Therefore, ramming through such a major change. And that's where, I think, we really see this qualitative difference.

[00:22:09] Tom Ginsburg: If I might, Jeff, I'd like to say a little bit about the reasonableness, I think which you have mentioned before. So, uh, what is reasonableness? Well, in our country, this would be known as administrative law. Administrative law is what you rely on if you go to apply for, like, a driver's license or something, and the person says, "I don't like your last name. I'm not giving it to you." That's unreasonable, right? And, of course, we have our own doctrines about what exactly this means.

[00:22:33] Tom Ginsburg: But in Israel, lacking a written constitution, much of what we would call administrative law, the law constraining government, comes down to common law doctrines that actually started with the British, uh, 'cause the British were, of course, the colonial power there. And, uh, in Britain today, reasonableness is sort of the backbone of administrative law.

[00:22:53] Tom Ginsburg: Now, the Israeli court has been very creative with this, and I think what is really upsetting this particular coalition is that the court has used reasonableness doctrine to actually, uh, interfere with who can run for office and who can sit in the cabinet and in the Knesset.

[00:23:14] Tom Ginsburg: Uh, and so it raises really interesting issues, which actually, many members of [laughs]... Several members of this coalition, uh, have a personal stake in the judges' interpretation of what's reasonable. And to be more precise, the argument in Israel the judges have created a doctrine very va-, very far-reaching, more far-reaching than I think is justified that not only can, uh, convicted criminals, someone who's been convicted of a crime, not sit in the cabinet but even people who have been indicted should not sit in the cabinet. And that's very far-reaching to me.

[00:23:53] Tom Ginsburg: You know, this is one of these things where, in my view, the court of public opinion also matters, and you, you can see some, uh, sort of parallels with discussions about Donald Trump and, should he be indicted and, you know, what would happen if he did? Can someone, you know, win the US presidency if they're a convicted criminal? Yes. The answer's yes. You can run from jail and win the office.

[00:24:12] Tom Ginsburg: But in Israel, that's not the case, and so I think... This is a long way of explaining that this reasonableness doctrine, yeah, it does represent judges interfering with ordinary decisions, but that's, I don't think, why we're seeing a push against it.

[00:24:26] Tom Ginsburg: I think we're seeing a push against it because of the personal interests, uh, personal and political interests of several members of the coalition, and that's another one of these things which really does kind of disturb me about this moment.

[00:24:37] Tom Ginsburg: If it was based on a principle, the argument that, "The judges are going too far. We're just recalibrating slightly," that's one thing. But, uh, it's a really major change pushed through with the bare majority, in which arguably, at least there's the appearance

of personal interest on the part of some of the proponents. So that's why I think it's, uh, more concerning than just a normal kind of change.

[00:24:58] Jeffrey Rosen: Professor Shany, tell us more about the personal interests of supporters of this plan, including Minister of Justice Yariv Levin and Prime Minister Netanyahu, and about this reasonableness debate, uh, which very much evokes one that we had in the United States when courts during the, uh, Lochner era were striking down laws under the reasonableness, uh, doctrine, and that led to FDR's, uh, court-packing plan.

[00:25:21] Jeffrey Rosen: And tell us about more modest proposals to reform the reasonableness doctrine, including by the Israeli, uh, president, Mr. Herzog.

[00:25:31] Yuval Shany: Yes, s- so, uh, f- first, it's important to clarify that court cannot strike down legislation for lack of reasonableness. This is only a doctrine that applies with regard to administrative law, so that's a very important distinction.

[00:25:44] Yuval Shany: Uh, with regard to, uh, the personal stakes for the actors, well, first and foremost, of course, it's the prime minister. The prime minister is standing on trial for, uh, three corruption charges. Uh, by the way, the court did allow the prime minister to... Despite the fact that he has an indictment, the court did, uh, allow the prime minister in a case decided three years ago, to, uh, maintain the position of a prime minister and, in a way, created a difference between eligibility to service a minister, wh- where Professor Ginsburg is right, the court has, uh, refused to allow service as, as a minister while under an indictment and, uh, the prime minister, which the court deemed more, uh, political and less administrative decision, uh, with regard to which the doctrine, uh, is inapplicable.

[00:26:35] Yuval Shany: But, of course, Netanyahu, the fact that he is standing on trial colors, uh, a lot of what's happening in very, uh, different light because, uh, some say, uh, he is out there to get, uh, the legal system as a form of revenge for, uh, bringing him to trial. But there may be e- either o- other more specific, uh, plans that he and his inner circle are thinking about, which could be, for instance, uh, changing some of the criminal laws under which he was indicted, so as to remove them from the law books, a- and therefore, prevent the court from convicting him on that basis, specifically, uh, the charges pertaining to what is called breach of trust, which is a essential anti-corruption law that Israel has.

[00:27:23] Yuval Shany: There are also, uh, speculations that by weakening the court, uh, and also the legal advisors that, uh, are very influential in Israel, uh, Netanyahu is paving the way for firing the current attorney general and nominating someone else instead of her, uh, with a view that a more, uh, friendly attorney general or, uh, chief prosecutor would strike, uh, a plea bargain with him.

[00:27:50] Yuval Shany: S- s- so you... One really cannot divorce the specific agenda of Mr. Netanyahu from the plans that we are seeing. Uh, there is also, as Professor Ginsburg alluded, another very important, uh, player here, which is Minister... Well, member of Knesset, Aryeh Deri, which leads one of the major parties in the coalition.

[00:28:11] Yuval Shany: Uh, Deri is, is an interesting figure in this story because he was the minister on whose back the court has reached the decision 30 years ago that c-, uh, indicted, uh, persons cannot serve as ministers. Now, uh, Deri has been, uh, also barred from o- office because he was convicted once again, uh, a year ago for tax fraud, uh, and the court has held it under these circumstances, although he received a suspended sentence, appointing him to, uh, a minister.

[00:28:42] Yuval Shany: And according to the coalition a- agreement, he's supposed to enter the, the, the, the role of minister of finance in two years, after being convicted of tax fraud is patently unreasonable. So he also... Actually, he's currently out of the government and is waiting to re-enter, uh, the government once some or all of the reform laws would pass.

[00:29:05] Yuval Shany: Uh, you also mentioned, and with this, I will close, the Minister of Justice Yariv Levin, who has been passing this legislation. I think for Levin, uh, d- does not appear to be, I, I should emphasize, a personal motive. Levin is a very strong i- ideologue, who has been, to his credit or not to his credit, has been arguing that the court should be cut down, uh, for many, many years.

[00:29:30] Yuval Shany: Uh, what is interesting is that Netanyahu put him in the position of minister of justice knowing that this is what his, uh, agenda, uh, uh, is. So I wouldn't say that he's driven by, uh, by any specific, uh, agenda but rather by... Uh, by any specific personal agenda by, but by an, a deep ideological commitment to, uh, an idea that, uh, the ruling majority is the one, uh, and only element which a democracy should have.

[00:29:59] Yuval Shany: Now, with regard to the reasonable, uh, compromise, regarding reasonableness, uh, uh, I should mention that the president did, uh, publish three weeks ago, uh, a proposal, a compromise proposal, which he called The People's Directive, which, uh, offers, uh, some, uh, way to, uh... Some way out of the crisis, some, uh, formula that he believed that the parties could come around, which, uh, we are not certain that that would happen but, uh, with respect to reasonableness, the president's proposal did introduce actually a couple of changes vis-à-vis the existing law, in the sense that appointment to the position of ministers would no longer be something that the court would be, uh, authorized to, uh, to review.

[00:30:48] Yuval Shany: Uh, and also decisions that are taken by the government in plenary would also be shielded from, uh, review under the reasonableness doctrine, as opposed to other administrative, uh, law doctrines, such as conflict of interest, or disproportionality, and the like.

[00:31:07] Jeffrey Rosen: Professor Ginsburg, say more about President Herzog's proposal, uh, which would harden the basic laws requiring a supermajority of the Knesset to pass them, would recognize the court's power to strike down laws, would have a supermajority requirement on the bench, two thirds from judges hearing constitutional cases, as well as, uh, refining the grounds for striking down laws.

[00:31:30] Jeffrey Rosen: Is... W- Would this be consistent with judicial independence in an international perspective? And compare it to what you've called the Commonwealth system,

where, uh, parliaments do have the ability to override Supreme Court decisions, what are the minimal criteria for judicial independence that a reform plan would, would have to meet?

[00:31:49] Tom Ginsburg: Yeah. So, first of all, I don't know that there's, uh, you know, universal rules about exactly what constitutes judicial independence. It's always quite contextual. Uh, and it reflects a particular combination of institutions.

[00:32:00] Tom Ginsburg: I'd like to, uh, say a word about that proposal and then actually hear what Professor Shany thinks about it. To me, this is an effort to clarify the Israeli constitution, to come to a modus vivendi between these various branches, which, right now, uh, you know, are all normatively legitimated by their own basic laws, none of which is higher than the other, uh, all of which trace their legitimacy ultimately back to the country's declaration of independence.

[00:32:28] Tom Ginsburg: But, of course, uh, the country could not come to a actual constitutional agreement during the first Knesset. And they took the decision to postpone that, you know, uh, constitution-making to the future, and of course, it's never been done.

[00:32:44] Tom Ginsburg: So I see the proposal as like, "Let's come up with a way that these institutions can work together, uh, that's... It means that at least the basic structures are not open to partisan contestation." And, uh, for that reason, I think it's a valuable thing. I don't think Israel's quite in the place to have a actual, you know, full constitution-making process. The society's quite fractured. But, uh, I'd be quite interested to hear what Professor Shany thinks.

[00:33:09] Jeffrey Rosen: Please, Professor Shany, w- w- what do you think of President Herzog's proposals?

[00:33:12] Yuval Shany: Well, I think, uh, I, I agree with Professor Ginsburg that it tries to square the circle and to offer, uh, s- some basic rules of the game, uh, that actually, listen attentively to both sides of the debate, uh, on the one hand, preserving basic democratic features, separation of powers, uh, judicial independence, rule of law, uh, a- and in a way, uh, doing away with the more, uh, dangerous and harmful parts of the minister of justice's package.

[00:33:43] Yuval Shany: But at the same time, uh, going in the direction of making it harder for the court to strike down legislation, insisting on supermajority also on the bench, so it would no longer be possible to strike down a decision by, a six to five vote, for instance, in the Supreme Court or a, a eight to seven, uh, but rather, there would have to be a two-thirds majority on the court, which is something quite exceptional in, uh, in comparative terms, and this is actually quite a bitter pill for those who, uh, are concerned about human rights in Israel because, uh, you have to understand this tough part of the equation.

[00:34:20] Yuval Shany: Uh, as I said before, there are also some minor adjustments, uh, with regard to reasonableness, et cetera. So I, I'm of the view that on the whole, it represents, at this point in time, a reasonable... I don't know if I can use the term, but a reasonable package.

[00:34:35] Yuval Shany: Uh, and a continued stalemate and even worse, I mean, deterioration into a full-fledge constitutional crisis i- is a much more, uh, risky gamble than, than following the plan. So although, I mean, I wouldn't, uh... I mean, I would have some reservations in some

specific items, most significantly the two-thirds majority on the bench, uh, I, I think it is a, it is a fair compromise under the circumstances.

[00:35:03] Jeffrey Rosen: Professor Ginsburg, supporters of the protest said that this is an inspiring example of a moderate majority of tens of thousands of citizens rising up on behalf of the principle of judicial independence.

[00:35:18] Jeffrey Rosen: Is that right or not? And are there any other international examples of mass demonstrations in the streets on behalf of judicial independence that result in a backdown by the political actors?

[00:35:29] Tom Ginsburg: Uh, sure, we do have some examples. There was a, you know... About a decade and a half ago, in Pakistan, something similar happened, where the military leader, Musharraf, who is, uh, you know, uh... Had taken civilian power. Wanted to reign in the Supreme Court, and the lawyers came out and demonstrated. And, uh, you know, that created a larger public demonstration.

[00:35:52] Tom Ginsburg: I think there's something similar here, from my understanding. I'm far away, but, you know, when you have a proposal like this, it's rather technical. Like, most people don't really know how judges are appointed in this system. And so what it required was, like, a very active, uh, sort of civic education program by the civil society, by academics who really were concerned about the court. And, you know, that kind of built and built, and then I think the president's intervention, saying, "Maybe we really need a consensus on this."

[00:36:23] Tom Ginsburg: There were a lot of steps over the last two months, really, uh, and longer, that led to the actual, you know, mass demonstration, which finally got the government to listen, which was, of course, when, uh... After the firing of the minister of defense.

[00:36:38] Tom Ginsburg: Ideally, you'd like it not to come to that. You'd like the government to see the demonstration, say, "Well, you know, maybe there is some consensus here," but this coalition was really intent on ramming it through, and they still might be.

[00:36:49] Tom Ginsburg: Uh, and so I do think it's something we do see from time to time. It's actually relatively rare to see that percentage of citizens show up in the streets and certainly over courts, but it has happened before. And in my view, politicians would be wise to listen, uh, when they see that level of support for something as obscure as judicial independence.

[00:37:10] Jeffrey Rosen: "To have citizens show up in the streets on behalf of judicial independence is relatively rare, and politicians should listen." Powerful words, indeed.

[00:37:18] Jeffrey Rosen: Professor Shany, tell us more about what Professor Ginsburg called "the civic education, uh, program" by academics, the role of the president, and how we came to this remarkable set of affairs, where there was mass mobilization on behalf of judicial independence.

[00:37:33] Yuval Shany: So before commenting on this, i- i- if I may, I, I will just add two, uh, notions. I think the Israeli case... Well, i- it's still, of course, too soon to tell what would... How the story would end, but in terms of, uh, the fact that there has been such a, a, a significant

and quick, uh, pushback, we were... I mean, uh, those who opposed the, the legal reforms were assisted by two, uh, by two, uh, aspects, uh, by two, uh, things.

[00:37:58] Yuval Shany: One is that the minister of justice, uh, announced o- outright what he's planning to do. So the whole scheme was actually, uh, put forward, uh, so, uh, people were, uh... I- it was easier for people to understand that this specific, uh, uh, adjustment of the judicial selection process is actually part of the bigger picture, which is about, uh, b- basically marginalizing the courts and concentrating all powers within the executive and legislative branches.

[00:38:33] Yuval Shany: So in a way, th- the government in itself, you could say, uh, played into the hands of its critics by exposing its cards too soon, something which didn't happen in some other, uh, backsliding democracies.

[00:38:45] Yuval Shany: And the second thing is that we did have the, uh, too, the work of people like Professor Ginsburg. We are already quite alert to what has happened in other democracies, specifically Hungary and Poland, so, uh, it's, uh, it's... So civil society in Israel knew that this is... On the basis of comparative law experience, this is the first stage in backsliding, and therefore, uh, we should take a stand now, not wait for these reforms to be passed because once the composition changes, of course, you are conducting the battle for democracy under much more difficult, uh, conditions.

[00:39:21] Yuval Shany: It is true that, uh, many of my colleagues, I mean, uh, in academia, have, uh, have really, uh, in a way, recruited themselves, uh, in, in a very impressive and a very total manner, to this fight against, uh, the judicial reform, uh, not doing only what academics normally do, which is write op-eds, appear in conferences, write blog entries, and papers, but also engage in a much more, uh, grassroots organization and activity, including media appearances, uh, a reaction team, which was active in social media, also offering, uh, their services to anyone who just wanted to hear, uh, about what are the implications of the judicial reform.

[00:40:07] Yuval Shany: So there were meetings in private citizens' houses, uh, to which, uh, professors, constitutional law, uh, public law professors would simply go, meet with 30, 40 people in a living room and discuss with them what would be the implications, and, of course, also working very much. I- it's... And, uh, some of my colleagues even went to, uh, you know, to pubs in Tel Aviv speaking with people on the spot about those implications of these reforms.

[00:40:35] Yuval Shany: S- so I think this mass mobilization not only of civic society but also of the academia did play a role in, in at least alerting, uh, people to what is at stake. And it is remarkable, and I must say that there... As an Israeli who's been often very critical of the Supreme Court myself for some of its decision, it's, it's quite remarkable that you hear people on the streets shouting slogans which go like, uh, "Liberty, equality, the Supreme Court." Uh, [foreign language 00:41:02]

[00:41:03] Yuval Shany: So this is something we, we never actually thought that actually, the, the Supreme Court would be the cause célèbre of, of a mass, uh, protest in Israel. This is

something... And, of course, [foreign language 00:41:13]. I mean, this, this idea that democracy is really the rallying cry, uh, basic rights, and the Supreme Court, this is something that had you told me this, uh, I mean, three months ago, I would've said it's quite, uh, quite impossible, and yet, I mean, this has been at really, at the, at the, at the center... At the front and center of the protest.

[00:41:32] Jeffrey Rosen: "Liberty, equality, and the Supreme Court." Absolutely remarkable. And the vision that you've just given us of academics, uh, in conversation with citizens in, in pubs, and in living rooms is an inspiring example of constitutional education at its best.

[00:41:46] Jeffrey Rosen: Professor Ginsburg, as you continue to engage in this education as this crisis moves forward, what, uh, w- what are you telling, uh, Israel is we can learn from Poland and Hungary in order to avoid democratic bi- backsliding, uh, and, uh, a- and authoritarianism. And what should citizens be aware of, uh, moving forward in terms of the, the bare minimums for maintaining judicial independence?

[00:42:09] Tom Ginsburg: Yes. You know, there... The famous line in the U-... Quoted often in the United States from Alexander Hamilton in the Federalist 78 that, "The judiciary is the least dangerous branch, lacking the power of the sword and the power of the purse."

[00:42:22] Tom Ginsburg: Uh, the Polish scholar Wojciech Sadurski, who himself was a target of the Law and Justice party, uh, has written that, "Actually, most of these populists act as if the judiciary is the most dangerous branch because it's the first thing that they go after." And that's exactly what happened in Hungary. They got the constitutional court, and then, once you have that, it legitimates everything else because the rule of law requires, generally, that we listen to the courts.

[00:42:50] Tom Ginsburg: So our era of the last three decades, when judicial independence, rule of law become these important sort of component parts of democracy Actually rendered themselves somewhat vulnerable to that particular line of attack.

[00:43:02] Tom Ginsburg: The Polish case is extremely complicated and interesting, uh, in that the [laughs], the government that existed before Law and Justice actually tried to pack the court on the way out, and then the Law and Justice party came in and didn't recognize those justices. And there's actually some legal argument that there is no legitimate [laughs] constitutional court of, uh, Poland right now, and yet, they're making decisions, so it can get pretty messy.

[00:43:29] Tom Ginsburg: Uh, I do think that there are some principles. We should want courts that, you know, are deciding, generally speaking, in accordance with the laws best that they can decide it. We all know that that's somewhat of a fiction. There a- are real politics to judicial decisions, uh, but we want courts, in principle, to be able to stand up to the government of the day. That's really important.

[00:43:54] Tom Ginsburg: And if the courts are packed, as they are increasingly, with low-level party functionaries who are not respected jurists, who didn't go to the top law schools, but simply are gonna do whatever the telephone call from, uh, from the party leader tells them to do, then we're in big, big trouble.

[00:44:11] Tom Ginsburg: So, insisting on professionalism, on good credentials, on structures that allow the judges, should they wish, to, uh, you know, go against the government of the day are really important.

[00:44:23] Tom Ginsburg: How do we get that? In Europe, there's a regional architecture of courts, and there's been a lot of pushback from the European Court of Human Rights, the European Union system, uh, against Poland and Hungary for the attacks that they have done in the judiciary.

[00:44:38] Tom Ginsburg: And yet, they haven't really been very successful, so I think part of the lesson for the rest of us is that we have to think more about that regional architecture and how to make it more effective.

[00:44:49] Tom Ginsburg: Um, and I think we do have some examples from other parts of the world, but, uh, but in any case, a regional structure's really important. Norms and professionalism are important. As my example about Pakistan suggested, bar associations are really important, right? Uh, civil society groups, the academics that, uh, Professor Shany was talking about, can also be important as part of a network of structures to defend judiciary independence when it's under attack and to insist on the basic minimum principles, which we would want.

[00:45:19] Jeffrey Rosen: Regional structures, norms and professionalism, uh, civil society and academics, all powerful guarantees of judicial independence.

[00:45:28] Jeffrey Rosen: Professor Shany, uh, last thoughts. As, as you look forward to the months to come, what would you say are the basic requirements of judicial independence and, and how can Israeli citizens, uh, argue for them to be maintained?

[00:45:43] Yuval Shany: Well, for us, the line in the sand appears to be, with regard to the court, the, uh, lack of politician control over appointments. This is, for us, uh, a critical aspect. I mean, having, uh, a country, again, without a fixed constitution, without a strong also public, uh, tradition of, uh, of, uh, constraint in, in, in policy that affects, uh, human rights, it's really down to the... To having an independent and professional judiciary.

[00:46:12] Yuval Shany: A- and for us, the line in the sand would therefore be that, uh, appointments system would be such as that, uh... A system in which politicians would not be able to, uh, make decisions about appointments without some involvement of, uh, of the professional, uh, parts of the system, uh, which are judges or, or the lawyers, or, or some other independent professionals. Uh, this is for us, a- at this point in time, uh, the greatest concern.

[00:46:40] Yuval Shany: Uh, going forward, I think it's, it-, it's quite clear that the Israeli system, uh, that, uh, has been muddling through for many years, uh, constitutional system is no longer sustainable in the sense that we have, uh, reached, uh, too close to the end of the cliff. And even if we will survive this time, uh, you, you know, the, the push against existing structures, there may not... N- n- next time, we won't succeed. So therefore, moving closer to a constitution, finding ways to make it more difficult to change basic laws has become, for us, uh, really an existential, uh, question.

[00:47:13] Jeffrey Rosen: An independent appointment system, ensuring politicians can't make appointments without professionals, and moving closer to a constitution.

[00:47:22] Jeffrey Rosen: Uh, last word, uh, Professor Ginsburg? Uh, a- are you optimistic or pessimistic about the future of Israeli, uh, constitutionalism?

[00:47:30] Tom Ginsburg: You know, I think this has been just such a remarkable period, as we've talked about. You know, it's incredible to see people show up in defense of judicial independence. And, uh, you know, ultimately, it is going to be the public that decides, in the sense of who they elect, um, right?

[00:47:47] Tom Ginsburg: And so, if politicians start to see that this movement actually might have some, uh, role in the reviving the opposition in Israel, you know, then that's gonna change their calculus and such so... I, uh, don't want to venture a prediction for how it's going to play out, but I do think it's gonna be pretty interesting, and it's gonna be absolutely critical for the future of the country. And ultimately, thus for the, for the Middle East more broadly.

[00:48:13] Jeffrey Rosen: Thank you so much, uh, Yuval Shany and Tom Ginsburg, for an important, uh, clarifying, and crucially engaging discussion about the future of Israeli constitutionalism and the Israeli Supreme Court.

[00:48:27] Jeffrey Rosen: Professor Shany, Professor Ginsburg, thank you so much for joining.

[00:48:30] Tom Ginsburg: Thank you, Jeff. Great to be here.

[00:48:32] Yuval Shany: Thank you very much.

[00:48:34] Jeffrey Rosen: Today's show was produced by Lana Ulrich, Sam Desai, and Bill Pollock. It was engineered by Kevin Kilbourne. Research was provided by Liam Kerr, Emily Campbell, Sophia Gardell, Sam Desai, and Lana Ulrich.

[00:48:46] Jeffrey Rosen: Please rate, review, and subscribe to *We the People* on Apple and recommend the show to friends, colleagues, or anyone anywhere who is eager for a weekly dose of constitutional and historical illumination and debate.

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[00:49:25] Jeffrey Rosen: On behalf of the National Constitution Center, I'm Jeffrey Rosen.