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Passing override clause would severely hamper democracy, legal experts say

Chen Maanit

Legislation that would allow 61 of the Knesset's 120 lawmakers to override Supreme Court rulings would essentially abolish the separation of powers, eliminate protections for minority rights and enable the government to do as it pleases with no oversight, jurists warned.

For some members of the likely governing coalition, passing such legislation is an ideological issue. But Likud Chairman Benjamin Netanyahu will probably support it only because unless its power is curbed, the High Court of

Justice would overturn measures to stop his trial.

A 61-lawmaker override would let the majority "do whatever it wants, ignore Basic Laws and High Court rulings - not just to legislate with no limits, but to act with no limits," said Prof. Suzie Navot, vice president of the Israel Democracy Institute.

"It's important to remember that even without enacting such an override clause, Israel is the only country among those defined as 'free' that has no tools to decentral-

ize political power," she added, noting that just 61 MKs are enough to change Basic Laws, the courts' powers and the system of government, or to curtail human rights.

"In this situation, the judiciary is the main branch of government with the power to check the majority's power," she concluded. "Therefore, here especially, judicial oversight that can effectively protect human rights and the constitutional and democratic order is more necessary."

Former State Prosecutor

Moshe Lador said that in a democracy, governments "can't do whatever they please without some mechanism that can check them when they make unconstitutional decisions."

"Democracy also means protecting the minority against the majority, not just accepting the majority's position," he added. "An override with a 61-MK majority means there will be no institution capable stopping the government in any situation. The minority will be left powerless against such decisions..."

Effectively, there will be no oversight of the coalition's judgment and it will be able to do anything it likes."

In theory, coalition lawmakers can vote their conscience. But in practice, Lador noted, MKs adhere closely to Netanyahu's talking points, "because otherwise, they'll be eaten up in the next primary and will have to find a different way to earn their living. So they'll support any decision by the Netanyahu-led executive branch.

"When have you ever heard anyone from the elected coalition talking

about rights? In their view, democracy means only that decisions are made by the majority."

Some supporters of a 61-lawmaker override say they merely want to restore the legal situation that existed until the early 1990s, before the Knesset passed two Basic Laws - Human Dignity and Freedom, and Freedom of Occupation. Back then, the court didn't overturn laws on the grounds that they contradicted Basic Laws.

Moreover, the right to petition the High Court was very limited; only someone directly harmed by a govern-

ment action could do so. And the court rarely overturned government decisions on the grounds that they were "extremely unreasonable." But after those two Basic Laws were enacted in 1992, the court began treating them as having constitutional status. This allowed it to overturn any law that contradicted them.

Navot argued that prior to this constitutional revolution, judicial intervention was less necessary, because the cabinet and Knesset restrained themselves. "Israel

See COURT, Page 3

COURT

Continued from page 1

had a strong governmental culture," she said. "It wasn't all about 'legal or illegal,' there was also 'inappropriate and improper.' Israel had shame. There was governmental restraint and a democratic culture based on a broad consensus that 'some things just aren't done.' Back then, nobody would dream of frequently changing the rules of the political game because of some political caprice."

Though much of the legal and political establishment opposes a 61-lawmaker override, other models for an override clause spark less opposition from jurists, or even draw support. Canada, for instance, also lets a simple parliamentary majority override Supreme Court decisions, but only for a limited time.

Israel's Basic Law on Freedom of Occupation already has a clause allowing 61 lawmakers to reinstate overturned laws for a limited period. But no such clause exists

in the Basic Law on Human Dignity and Freedom, which is the court's main tool for protecting minority rights.

Former Supreme Court President Aharon Barak warned in 2019 that a 61-MK override would disproportionately harm both the court and ordinary Israelis. But he didn't rule out an override requiring a larger majority; he proposed 80 lawmakers as the correct number.

Before retiring as deputy attorney general in September, Ran Nizri was part of a team appointed by Justice Minister Gideon Sa'ar to draft a Basic Law on Legislation that, among other things, would regulate the court's power to overturn laws. "I always said an override clause isn't a dirty word" depending on "how you legislate it," he said. But a 61-MK override "is like a broken cane for a lame man who needs a major leg operation."

Nevertheless, he said, it should also require a special judicial majority to overturn a law, which isn't the case today. "In a proper balance among the branches of government it's wrong for

laws to be overturned by a one-vote majority among the justices."

Navot said it was high time to regulate both the status of Basic Laws and the power of judicial review in a Basic Law on Legislation. She too doesn't rule out an override clause, "but only if there's no other possible way, and only after the entire constitutional process is complete."

Even then, she added, "there must be an understanding that use of this tool should be the rarest of exceptions, and it must be built to infringe as little as possible on human rights. The majority needed for an override must be high enough to ensure extremely broad legislative support for reenacting a law, spanning both coalition and opposition, to mitigate fears of a tyranny of the majority." The override should also be limited in time - "four or five years, for instance," she said.

Lador, in contrast, opposes any form of override for fear that it would hurt minorities. "It's not difficult to muster even an 80-MK majority for a decision that harms a minority," he warned.