A Better Way to Implement Constitutional Reform

by Col. (res.) Shay Shabtai

EXECUTIVE SUMMARY: The current debate in Israel on semi-constitutional reform is being carried out, as is often the case with Israeli strategic decision-making, in an improvised manner and under pressure. Better decision-making would strengthen the State of Israel and its three branches of government. Necessary factors include mutual acceptance that change is inevitable; agreement about a factual base; analysis of the main variables rather than long disputes; exploration of alternatives other than the flat acceptance or rejection of the Levin-Rotman option; and the rapid implementation of the selected alternative with an agreed review mechanism.

Background: Strategic Decision-Making in Israel

Because Israel lacks an agreed-upon national security strategy, its strategic decision-making process on national security is a chronicle of improvisation under pressure. The planning process is carried out across multiple governmental ministries and organizations, a system that does not encourage structured debate or the clear outlining of a strategic approach in the absence of a strategic constraint or crisis. Israeli national security policy, which should be derived from the strategic approach, instead depends on continuity and the preservation of existing conduct until such a constraint or crisis develops.

Israeli national strategic decision-making over the years has tended to fall into this pattern:

A. **A challenge arises that cannot be ignored:** This challenge is often a result of the conduct of an external party. It could be a new threat by an enemy, but could also be a new policy by an ally. It can even come from the Prime Minister, should he or she decide to fundamentally change Israel's approach on a strategic issue.

B. **Rapid planning process:** The relevant ministries and organizations conduct a rapid planning process in order to propose ways to deal with the challenge. Ideally, this process involves making adaptations after many years of dealing with the issue at hand. In most cases, however, it is a hasty process on an issue with new variables.

C. **Only two alternatives are presented:** Discussion converges around a single response to the challenge. The two alternatives are to carry it out or not carry it out.

D. **Debate phase:** Debate takes place among the decision makers and senior bureaucratic leaders. When the issue at hand is a high-profile challenge, it spills over into the media, and two factions are formed. Other alternatives are not really explored in depth.

E. **Bargaining phase:** At a certain point, the debate shifts to bargaining, and even negotiations, between the decision makers and the bureaucratic leaders. This brings the matter into the realm of party politics, personal politics, and organizational politics.

F. **A decision is made:** The decision expresses a choice between implementation or non-implementation but with adjustments that take into account some points raised by the other side.

G. **Execution and fixation:** After the decision is made and acted upon, the *de facto* national strategy is reestablished, incorporating the results of the crisis as an integral part. There it remains until the next challenge arises.

H. **Entrenched disagreement:** Debate between proponents and opponents of the decision goes on for years, with each side fixated on its original position regardless of the actual results of the decision.

There are many examples of this pattern. They include the decision not to militarily take over the West Bank in the War of Independence in 1948; the initiation of the Kadesh War in 1956 and the Six-Day War in 1967; the forging of peace with Egypt in 1979; the attack on the Iraqi nuclear reactor in 1981; Israeli restraint during the first Gulf War in 1991; the signing of the Oslo Accords; the unsuccessful peace negotiations with Syria in the 1990s; the "disengagement" from Gaza in 2005; the Second Lebanon War in 2006; the decision not to attack Iran's nuclear project in the early 2010s; opposition to the Iranian nuclear deal in

2015; the gas framework in 2015; and the maritime border agreement with Lebanon in 2022.

This pattern is deeply entrenched, and no real change to Israeli decision-making appears to be on the horizon.

Semi-Constitutional Reform: Another Chapter in the Chronicle

When Justice Minister Levin announced his intention to advance semi-constitutional reform, the gears of this familiar decision-making pattern began to turn. Levin raised a challenge that could not be ignored. A planning process was carried out hastily, though it was partially based on policy papers prepared ahead of time by non-governmental think tanks. Only two alternatives were presented, and a loud and toxic debate exploded in the streets, the media, and the Knesset.

This pattern can and should be broken. A more orderly decision-making process can be implemented in a way that will not prolong uncertainty or increase negative outcomes. This is how to do it:

A. **Acceptance:** The parties must recognize that a reform will take place and enter into a discussion about it. They must recognize that there will be a fundamental change in governmental check and balances and the influence of legal considerations on the decision-making processes, but also that solutions will have to be found to allay the concerns of many from the "tyranny of the majority". This acceptance would create a narrow but essential basis of trust between the parties.

B. **An agreed-upon factual base:** It is essential that both parties consent to the components of the factual base. They would reach this consent through documented analysis, and in so doing so also identify hidden assumptions within these documents. For example, does the High Court of Justice really defend minorities? Is the decision-making impasse really mainly a result of legal concerns and regulations?

C. **Analysis of the main variables:** Rather than take a black-and-white approach to mapping out the dispute, the parties would look for ways to mitigate the extreme elements of their respective positions in order to reach an optimal decision.

D. **Construction of alternatives:** Based on that process, the parties would construct several different alternatives. In the current scenario, that would mean coming up with options other than either adopting or not adopting the Levin-Rotman legislation. Ideas include rapidly turning the Declaration of Independence, the Basic Laws of Israel, and a new Basic Law for the

judicial branch into a constitution that would regulate governing in Israel; striking a deal on a new arrangement among the branches that would become law after a period of practical experience; and more.

E. **A short debate period and a rapid decision:** The lack of trust among the parties and the negative consequences for Israel that are quickly accumulating as a result of the conflict require that a decision be made fast. The agreed-upon factual base should make this possible. The decision-making process should be based on the following principles: **matter-of-fact bargaining, not negotiation,** intended to reach consent on the best alternative rather than simply hammering out a lame duck agreement; **an internal Israeli decision** that does not actively involve external actors; **both public and non-public discussions,** as it is not possible to produce rapid in-depth discussions and agreements entirely under the spotlight of a Knesset committee (which is important in itself, but in-depth, open, and frank discussions and bargaining on alternatives behind the scenes are also required); and a **simple, rather than simplified, agreement** based on solid foundations that can be relatively easily explained to the public.

F. **A decision that is a mix of alternatives rather than a binary debate**.

G. **Determined and rapid implementation with an agreed mechanism for review:** It is important to leave the toxic public debate behind and move the State of Israel forward, while understanding that there will be corrections to the decisions made down the road.

The bottom line is this: it is critical that the discussion on semi-constitutional reform not be dragged into national strategic decision-making patterns that have long been problematic. Managing this differently will entail distinct advantages for all three branches because it will improve their profile among the Israeli public.

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