Israel: Proposed Judicial Reforms

April 2023

LL File No. 2023-022183
LRA-D-PUB-002601
This report is provided for reference purposes only. It does not constitute legal advice and does not represent the official opinion of the United States Government. The information provided reflects research undertaken as of the date of writing. It has not been updated.
Contents

I. Background .......................................................................................................................................... 1

II. Constitutional Structure .................................................................................................................... 3

III. Checks and Balances ........................................................................................................................... 4

IV. Elements of the Proposed Reforms .................................................................................................. 4

   A. An Override Clause ..................................................................................................................... 4

   B. Changes to the Judicial Selection Committee .............................................................................. 5

   C. Cancellation of the “Standard of Extreme Unreasonableness” ............................................... 9

   D. The Transformation of Ministerial Legal Advisors into Political Appointees ....................... 10

V. Initiative of President Herzog ........................................................................................................ 10

VI. Possible Implications of the Reforms ............................................................................................ 12

   A. Shielding Legislation on West Bank Settlements and on Fitness for Office from Judicial Review ........................................................................................................ 12

   B. Enabling Overriding High Court Decisions on Civil Rights ..................................................... 13

VII. Status of the Legislation ............................................................................................................. 14
Israel: Proposed Judicial Reforms

Ruth Levush
Senior Foreign Law Specialist

SUMMARY
This report discusses the Israeli government’s proposed legislative package of judicial reforms introduced on January 11, 2023. It provides background information on the Israeli constitutional system of government and mechanisms for checks and balances, and discusses elements of the proposed reforms, their potential impact on existing Israeli law, and on the primary arguments of proponents and opponents. It also addresses a compromise proposal issued by Israeli President Isaac Herzog, which was rejected by the government.

The report discusses the draft bill on the selection of judges to Israeli courts that was forwarded to the Knesset (parliament) on March 27, 2023, for final readings.

The procedures for the adoption of the legislative package have currently been delayed until the end of April 2023. Meanwhile, discussions regarding a possible compromise between the coalition and opposition parties on the judicial reforms have commenced under the auspices of President Herzog.

Information provided in this report applies to developments taking place by April 8, 2023, and may be updated as necessary.

I. Background

On January 11, 2023, Israel’s Minister of Justice Yariv Levin, a member of Prime Minister (PM) Binyamin Netanyahu’s Likud party, introduced a legislative package proposing the enactment of laws that would overhaul the judicial system and limit the High Court of Justice’s authority to conduct judicial review over Knesset (Israel’s parliament) legislation and executive action. The proposals implement commitments undertaken under the coalition government’s agreements,¹ to pass reforms in order to “ensure governance and to strengthen the ability of the government to implement its policy.”²

According to Justice Minister Levin and other proponents of the measures, “the High Court has exceeded its authority in the last two decades and severely hampered the ability of elected


coalitions and ministers to enact government policy.” Levin explained that the four elements of the “first stage” of the reform were designed to strengthen democracy and rebalance the three branches of government. He further suggested that PM “Netanyahu’s indictments contributed to ‘public understanding’ of need for reform.” Netanyahu is on trial in three corruption cases.

In an unprecedented speech by President of the Supreme Court Esther Hayut, she condemned the plan that in her opinion would “crush the justice system [and] deal a fatal blow to the independence of the judiciary . . . .” Former top legal advisors have similarly denounced the proposed changes, saying they are destructive to the country’s legal system. The legal reforms initially disclosed by Justice Minister Levin are only some of the legislative proposals being promoted by the government, which together, according to a legal commentator, would constitute a complete “revolution” of the legal system in Israel.

[As of March 25, 2023] 2,910 private bills, 27 government bills, and five other bills from Knesset committees have been placed on the table of the 25th Knesset. The list of bills that deal with governmental and regime arrangements creates a complete picture of the revolution on the way. It is not only the legal revolution—also the restriction of the right to vote and be elected, the weakening of the legislative branch, the erosion of the welfare state, the strengthening of the rabbinical courts, the expansion of investigative measures against civilians, and the long imprisonment of flag-breakers and road blockers.

The government’s proposed reforms have met massive public opposition. On March 27, 2023, after a bill to change the system of selection of judges was forwarded for final readings enabling its rapid passage if and when the government decides, PM Netanyahu announced a temporary pause in promoting the reforms package until after the Knesset’s recess at the end of April 2023. Negotiations over a compromise plan are currently being held under the auspices of President Herzog. (See Part V., below.)

3 Jeremy Sharon, Levin Unveils Bills to Remove Nearly All High Court’s Tools for Government Oversight, Times of Israel (Jan. 12, 2023), https://perma.cc/GV8S-5RRD.


5 Levin: Netanyahu’s Indictments Contributed to “Public Understanding” of Need for Reform, Times of Israel (Jan. 16, 2023), https://perma.cc/6WS5-77DT.


II. Constitutional Structure

Israel does not have a constitution and a bill of rights. Although the 1948 Israeli Declaration of Independence envisioned the existence of a future formal constitution for Israel, the process of adopting a constitution has not been completed.\(^\text{10}\) Under the Harari Resolution of 1950, the “constitution [is] made up of chapters, each of which . . . constitute[s] a separate basic law . . . and all the chapters together [comprise] the constitution of the state.”\(^\text{11}\)

Thirteen basic laws have been passed to date, including basic laws on the government, on the Knesset, and on the judiciary.\(^\text{12}\) There is no basic law regulating legislation, however. In the absence of substantive or procedural limitations, the Knesset may generally adopt or amend basic laws by a simple majority. In recent years, with political instability and the formation of five coalition governments in four years,\(^\text{13}\) the Knesset adopted a number of changes that affected the structure of the system of government in Israel.\(^\text{14}\)

In the absence of a constitution, some individual rights in Israel are guaranteed under basic laws. Rights such as freedom of speech, freedom of demonstration, freedom of the press, and the right of equality are not provided in laws but have been established in decisions of the Supreme Court based on the principles enshrined in Israel’s Declaration of Independence.\(^\text{15}\)

The High Court recognized its authority to review and repeal legislation that contradicted the Basic Law: Freedom of Occupation and the Basic Law: Human Dignity and Liberty in precedent-setting decisions from 1997 and 1999.\(^\text{16}\) To date, the court has repealed 22 laws,\(^\text{17}\) most on grounds of severe harm to human dignity and freedom,\(^\text{18}\) freedom of occupation,\(^\text{19}\) and the right to equality.

---


12 Knnesset, Basic Laws, https://perma.cc/3V75-DA8H.


15 Knnesset, Declaration of Independence, supra note 10.

16 Knnesset, Basic Laws, supra note 12.


III. Checks and Balances

According to Israel’s attorney general (AG), the main means of achieving a balance of power in the Israeli system of government is the independence of the judiciary, and of the Supreme Court in particular.20 “The ministerial legal advisers, and especially the attorney general, are also considered to be legal ‘gatekeepers’ entrusted with the task of promoting government policy while upholding the rule of law across the executive branch.”21

Researchers at the nongovernmental forum Kohelet disagree.22 They argue that it is “[t]he lack of checks on the Supreme Court’s powers” that requires the passage of the reforms.23 In their opinion, the court should not intervene in decisions taken by elected officials on controversial matters, such as on the “advancement of Jewish settlements, funding events in support of terrorism, or calling for anti-Israel boycotts . . . .”24

The Kohelet researchers also object to the role of legal advisors, which they characterize as having veto powers enabling the advisors to interfere “in policy from its early stages, not due to legal reasons but rather reasons of reasonableness, proportionality and other ambiguous grounds developed or adopted by the court.”25

IV. Elements of the Proposed Reforms

The series of initiatives proposed by the minister of justice include the following reforms.26

A. An Override Clause

An “override clause” is a mechanism that would allow the Knesset, based on a majority of 61 of its 120 members (the minimum required for any coalition government), to reenact a law that was struck down, “despite the Supreme Court’s explicit ruling that it is incompatible with a Basic Law

---


24 Garber, Why Judicial Reform is Essential, supra note 22.

25 Id.

(that is, that the law is unconstitutional).” Other versions of “override clauses” include, for example, authorizing the Knesset to determine based on a majority of its members that “a law will be valid if it contains a provision that explicitly states that the law is ‘valid notwithstanding the provisions of the Basic Laws’.”

Proponents of the override clause explain that it is needed in light of what they deem the court’s judicial activism in striking down legislation, which they claim is more common in Israel than in other countries. A review by the Israel Democracy Institute (IDI), cited in a “whistleblower” article published in the Israeli newspaper Globes, refutes this claim.

B. Changes to the Judicial Selection Committee

1. Current Law

The Basic Law: The Judiciary guarantees the independence of Israeli courts by providing that “[w]hoever is vested with the power of adjudication shall not be subject to any authority regarding matters of adjudication, except for that of the law.”

The basic law regulates the appointment of judges for all courts in Israel. It provides that judges are appointed by the president of the state, based on the recommendation of the Committee for the Selection of Judges. The committee is composed of nine members and includes the president of the Supreme Court, two justices chosen by their fellow justices, two coalition government ministers, two Knesset members, and two representatives of the Israeli Bar Association. “The Committee may operate even if the number of its members has decreased, as long as it is no less than seven.”

The appointment of the president of the Supreme Court is based on a system of seniority, in existence since the establishment of the State of Israel. According to the seniority system, the oldest judge from among the Supreme Court justices is elected to the position of president of the

---


32 Id. § 4(c).
Supreme Court.\textsuperscript{33} In accordance with the Courts Law (Consolidated Version) 5744-1984, justices must retire by age 70.\textsuperscript{34}

2. Proposed Legislation

On February 13, 2023, the parliamentary block representing the coalition government (coalition block) in the Knesset passed the first of three readings of a bill that would grant the coalition government full control over the selection of judges by reducing the minimum required number of representatives on the committee from seven to five.\textsuperscript{35} The bill calls for removing the representatives of the bar association, and increasing the number of ministers from the coalition block from two to three, while ensuring that two coalition block members would serve in the committee, in addition to only one from the opposition. According to the bill’s drafters, the changes are “designed to strengthen the influence of elected officials . . . as opposed to its other members.”\textsuperscript{36}

Facing strong opposition against the proposed plan, on March 19, 2023, the government reportedly decided to defer enactment of parts of its planned legal reform and to push forward only a “softened” proposal to change the composition and procedure of the Judicial Appointments Committee by appointing its next president and two of its judges.\textsuperscript{37}

On March 27, 2023, hours before PM Netanyahu announced a temporary delay in promoting his government’s legal reforms,\textsuperscript{38} the Knesset’s Constitution, Law, and Justice Committee forwarded a new version of the bill on the system of selection of judges for second and third readings.\textsuperscript{39} The forwarding of the bill by the committee to the Knesset plenum enables the government to complete the adoption of the bill within one day of its decision to finalize it.\textsuperscript{40}

This version of the bill would grant the government control over the selection of judges by increasing the total number of members on the committee from nine to 11 while securing the dominance of the government block by increasing the number of government representative members from the previously proposed five members to six—the minister of justice, two other


\textsuperscript{36} Id.


\textsuperscript{40} Nitsan Shafir, Despite the Legislative Halt: The Coalition Placed on the Knesset Table the Law to Change the Committee for the Selection of Judges, Globes (Mar. 28, 2023), https://perma.cc/W224-UU6D (in Hebrew).
government ministers, and three Knesset members from the government block.) In addition, the latest bill would remove the representatives of the bar association from the committee.

The latest text of the bill introduces additional proposals to provide the government with the authority to appoint the president of the Supreme Court and the president’s deputy from candidates who do not currently serve on the Supreme Court.41

3. Arguments for and Against the Proposed Legislation

a. Composition of the Judicial Election Committee

Various claims have previously been made against the current system of selection of judges, which is arguably unique in the world,42 against the participation of judges in the committee, and against the alleged lack of diversity among judges in Israel. These claims have been rejected by others as incorrect or inapplicable in the Israeli context.43

According to a report by Israel’s AG regarding a proposed bill to amend the Basic Law: The Judiciary,44 “a broad examination shows that the currently proposed arrangement is precisely the exception from a comparative perspective.”45 The AG’s report contains detailed information and a comparative table relating to the model for selecting judges in different countries, in the context of their legal characteristics. Critics of the proposed changes also argue that this proposal would “severely hinder the judiciary’s ability to carry out its duties” because they would harm the public’s trust in the judiciary.46 According to the AG, the proposed increase [in the] political grip on the appointment of judges . . . came at the expense of the relative weight of representatives of the legal system whose relative power will be significantly reduced. . . . The importance of the professional parameter in the selection process is intensified by the structure of the legal system in Israel and its functions, since the judges of all instances, including the Supreme Court, deal with professional legal issues from the fields of civil, administrative and criminal law. The current composition of the committee provides a response to this.47

41 Tova Tsimuki, supra note 33.
45 Attorney General of Israel Gali Beharev-Miara, supra note 20.
b. Selection of the President and Deputy President of the Supreme Court

According to Simcha Rothman, chair of the Knesset’s Constitution, Law, and Justice Committee, “[t]he seniority system has to go away. . . . There is no reason why the Judicial Selection Committee or any other body that will replace it should be bound by decisions made more than a decade ago when that judge was elected to office.”

Introducing a private member bill on the subject, already in 2013, Justice Minister Levin, who together with Rothman leads the effort for passage of the legal reforms package, explained that changing the seniority system was necessary because the President of the Supreme Court and his deputy are highly influential and significant figures in the country, from the administration of Supreme Court procedures to the assimilation of policy and judicial spirit; they should be elected through a special and democratic process as much as possible, and replaced in any fixed period of time.

In response to a similar proposal promoted in 2017 to cancel the seniority system, IDI legal scholars explained that “[t]he seniority system protects the independence of the judges and prevents competition between them on who will judge in a way that will more greatly impress the politicians, the lawyers or the judge-members of the Judicial Selection Committee.”

According to the Israeli Law Professors’ Forum for Democracy, the court’s independence is important for protection of the rule of law and human rights in Israel, considering the absence of other means of checks and balances. The appointment of judges and of the president of the Supreme Court “on behalf of the coalition,” according to the forum’s statement, violates the rule on the independence of the judiciary.

The goal of the proposed takeover of the Supreme Court is to overcome the first obstacle in the way of adopting the entire “reform” proposal, since it is designed to guarantee that the next stages will not be struck down by the Court . . . Similar strategies have been adopted in other countries. This proposal adopts “the Polish protocol” — ensuring control of the Court first, in order to facilitate all other stages of the plan. This is no way to form a Constitution. Changes in constitutional structures that will affect us all for generations can be made only on the basis of open discussion and broad consensus.

48 Tova Tsimuki, Right-Wing Parties Against the “Seniority System” in the Supreme Court: the Battle for Hayut’s Replacement, supra note 33.

49 Basic Law: The Judiciary (Selection of the President of the Supreme Court and the President’s Deputy by the Knesset (Amendment), Private Member Bill by KM Yariv Levin (Mar. 13, 2013), https://perma.cc/445D-QX3Z.

50 Press Release, IDI Scholars Respond to Bill to Cancel Supreme Court Seniority System (June 1, 2017), https://perma.cc/EF8S-9LXG.

51 Procedures for the Appointment of Judges: Summary of Position Paper #7, supra no 46.

C. Cancellation of the "Standard of Extreme Unreasonableness"

As part of the reforms, the minister of justice planned to abolish the ground of reasonableness, which is rooted in Israeli administrative law, and originated from British law. Although there is no legislative basis for the test, the court has used the test to determine whether administrative decisions are "reasonable" and "have been made with the proper consideration of all relevant factors."54

According to a commentator,

The standard made headlines in the petitions against the appointment of Aryeh Deri as Minister of Health, on the grounds that the appointment of a person who has been convicted of a criminal offense three times during a public term is unreasonable. But the decision relates not only to examining appointments in the government, but to many decisions by the government and public authorities that concern every citizen, including the allocation of budgets and land resources, planning procedures and even the results of tenders [bids].55

Critics argue that, by using the test, the court replaces the government’s discretion. According to explanatory notes of a bill proposing cancellation of the standard, a review of the reasonableness of a governmental act is the prerogative of the Knesset, and should not be subject to judicial review as

it cannot be assumed that its judgment is more correct. Such vague grounds also undermine legal certainty and open the door to inconsistent rulings. In doing so, it undermines the public’s trust, which may get the impression that its legal affairs are subject to a subjective decision in its nature.56

Concluding that the use of the unreasonableness standard by the high court is infrequent, however, an IDI study found that the court intervenes in ministerial decisions on average in about 10% of the cases brought before it, and even when it does, only infrequently does this intervention ultimately lead to the disqualification of a decision.57

Addressing the proposal to abolish the reasonableness test, Supreme Court President Hayut reeled off a long list of examples in which the court had used this principle in the past to uphold critical rights and defend Israeli citizens, including cases in which the right to government welfare benefits, the right to surrogacy services for LGBTQ couples, the right

54 Id.
57 Nitsan Shapir, supra note 55.
to religious services, and rights to freedom of expression and assembly had all been upheld and asserted by the High Court.

“In other words, if the decisions of the government will be the final word and the court will be without tools to fulfill its role—it will not be possible to guarantee the protection of rights in those cases where government authorities violate those rights, be it through legislation or administrative decision, to an extent that exceeds what is required,” said Hayut.58

D. The Transformation of Ministerial Legal Advisors into Political Appointees

As noted above, legal advisors in Israel are considered by opponents of the reforms as gatekeepers of the rule of law. Government legal advisors are nonpolitical appointees selected in a tender process of the Civil Service Commission. They are administratively subordinate to the relevant ministry’s management and professionally to the AG. Their opinion is binding on the management of the ministry. Termination of their work requires the AG’s consent.59

Proponents of changing the role of ministerial legal advisors argue that the role of the legal advisor is perceived as one that enables the advisor to

reject ideas and processes promoted by the minister in charge of the ministry if, to the best of [the advisor’s] understanding, they are legally or constitutionally unacceptable. These changes sometimes lead to difficulties in the proper functioning of the ministry, resulting from disputes that arise between the minister in charge of the ministry and the legal advisor.60

V. Initiative of President Herzog

On March 9, 2023, President Herzog “denounced the government’s judicial overhaul legislation as ‘oppressive’ and harmful to democracy, and called for it to be abandoned immediately and replaced by a framework for consensual reform.”61 The president of Israel holds mostly ceremonial duties and does not have administrative or legislative authority.

On March 15, 2023, President Herzog presented a compromise proposal as an alternative to the government’s plan that “paves the way for in depth debate on the issue.”62 The proposal presents


a full legislative package, resting on a delicate system of balances that should be kept between government authorities, and must be seen as a whole. That is, no part of this document stands on its own, by itself, but depends on the other parts of the document. The document expresses proper balances, which must be maintained during legislative procedures.63

The plan would require the adoption of the Basic Law: The Legislation that will determine that “Basic Laws are the foundation for the state constitution, established according to the founding principles of the Declaration of Independence, while anchoring the values of the State of Israel as a Jewish and democratic state.”64

Regulating the basic structure of government, state institutions, the state’s basic principles, and human rights, the normative status of basic law would be secured by providing that a basic law cannot be repealed or changed except by another basic law. The passage of a basic law would require four readings, with the fourth supported by 80 members of the Knesset (i.e., a two-thirds majority). There would be no votes on basic laws after a decision has been made to dissolve the Knesset. In addition, “[a] Basic Law that was in effect before the publication of this document will be considered as accepted according to the Basic Law: The Legislation, and the provisions of the Basic Law: The Legislation as stipulated in this document will apply to it.”65

While recognizing the authority of the Supreme Court to exercise judicial review of legislation “to determine that a law is invalid due to a contradiction with the provisions of a Basic Law,” according to the proposal, basic laws that were adopted in accordance with the requirements under the Basic Law: The Legislation could not be reviewed by the Supreme Court.66

The proposal includes a plan for changes in the judicial selection committee,67 that, while granting the coalition a majority on the committee, would require the government “to secure other support on the committee to obtain approval of its candidates for the Supreme Court.”68

The proposal addresses additional issues raised by the proposed reforms, such as the need to formally codify in the Basic Law: Human Dignity and Liberty the right to equality and the prohibition of discrimination; the right to freedom of expression, opinion, demonstration, and

64 Id. at 1 (“The making and amendment of Basic Laws (Basic Law: The Legislation)”).
65 Id. at 2.
66 Id. at 2 (“Judicial review of legislation (Amendments to Basic Law: The Judiciary)”).
67 Id. at 3 (“Selection of judges (Amendments to the Basic Law: The Judiciary)”).
68 Jonathan Lis, supra note 62.
assembly,\(^{69}\) the scope of application of the reasonableness standard,\(^{70}\) and regulation of the appointment and authorities of legal advisors.\(^{71}\)

According to Herzog, “[t]he proposal addresses the important need to diversify the judicial system,” so that “the various voices of the people of Israel will be part of it.”\(^{72}\) He asserted that the proposal “cements a fair and balanced relationship between the branches and is fully committed to the principles of the Declaration of Independence.”\(^{73}\)

The coalition government rejected Herzog’s plan.\(^{74}\)

**VI. Possible Implications of the Reforms**

**A. Shielding Legislation on West Bank Settlements and on Fitness for Office from Judicial Review**

Passage of the proposed reforms may shield legislation that has already passed since the inauguration of the 37th government from judicial review by the high court.

1. **Legalizing Settlements in the West Bank**

On March 22, 2023, the Knesset adopted the Implementation of the Disengagement Plan (Amendment No. 7), 5783-2023. The Amendment Law repealed provisions in the law that banned Israelis from areas in northern West Bank that were evacuated during Israel’s 2005 pullout, and voids the nullification of property rights by any Israeli individual, corporation, or governmental, regional, and local authorities in the evacuated areas.\(^{75}\)

On June 9, 2020, by an 8 to 1 majority, the high court accepted a petition challenging the constitutionality of the Law on the Regulation of Settlement in Judea and Samaria, 5777-2017.\(^{76}\)

---

\(^{69}\) Office of the President, supra note 63, at 4 (“Establishing basic rights under law (Amendments to the Basic Law: Human Dignity and Liberty)").

\(^{70}\) Id. at 4 (“Reasonableness (Amendments to the Government Act)").

\(^{71}\) Id. at 5 (“Legal advice to the government (Amendments to The Government Act)").

\(^{72}\) Jonathan Lis, supra note 62.

\(^{73}\) Id.


In a pending case before the Supreme Court, state representatives requested a three-month extension for responding to a petition to evacuate settlers from Homesh, a settlement that had been forcibly evacuated as part of the disengagement plan and to which settlers attempted to return. The Amendment Law may render the petition to evacuate the outpost in Homesh moot.77

2. **Fitness for Office**

An amendment to Basic Law: The Government,78 already passed by the Knesset on March 23, 2023,79 prevents the removal of a prime minister based on a declaration of lack of fitness on any ground other than physical or mental fitness. Being charged in a criminal trial, or being subject to a conflict-of-interest agreement with the prosecution, would therefore not be a ground for temporary or permanent removal.80 Another reform could similarly block the high court from intervening in the appointments of ministers with criminal convictions.81

B. **Enabling Overriding High Court Decisions on Civil Rights**

Restrictions on judicial review might potentially impact existing Israeli law that has been established by high court decisions in multiple areas, such as in regard to draft deferral arrangements for Haredi yeshiva students,82 registration of marriage and divorce in Israel,83 the

---


rights of women, the rights of the LGBT community’s members, removal of discriminatory practices at schools, and many more.

VII. Status of the Legislation

On March 27, 2023, PM Netanyahu temporarily suspended his government’s controversial judicial reform legislation until after the Knesset’s recess at the end of April. The suspension took place after massive demonstrations erupted following the announcing on the firing of Minister of Defense Yoav Gallant, who had called for a pause in advancing the judicial reforms.

Earlier that day, the Knesset’s Constitution, Law, and Justice Committee forwarded the Basic Law: The Judiciary (Amendment No. 3) bill for second and third readings, enabling the governmental parliamentary block to pass it into law within 24 hours of the government’s decision to do so.

Following Netanyahu’s announcement of a pause, President Herzog invited the coalition and opposition parties to send representatives to start negotiations on an agreement on the proposed reforms. The opposition’s delegation is composed of lawmakers from Yair Lapid’s Yesh Atid party and Benny Gantz’s National Unity Party, who had said they would not compromise on “the independence of the judicial system and the principles of democracy.” Negotiators for the Yesh Atid party proposed that Israel’s Declaration of Independence serve as “a basis for a constitution that would anchor the rights and values and enable a shared life and common good for all parts of Israel.”

---

87 Kim Hjelmgaard et al., Unrest in Israel Temporarily Derails PM Netanyahu’s Judicial Reforms. Here’s What We Know, USA Today (Mar. 27, 2023), https://perma.cc/W88D-27UZ.
89 Id.