

A Possible Regime Change in Israel

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Israel is rapidly undergoing a regime change/constitutional revolution – Hungary style – as reflected by various draft bills placed on the Knesset's agenda during the past days, accompanied by a [grand plan of reform](#) presented by the Minister of Justice on January 4th.

Two background notes:

1. Israel's structure of government lacks important checks and balances. It is a parliamentary democracy with a unicameral legislature of 120 members, elected nationally on the basis of proportional representation, resulting in strong party discipline (in contrast to most democratic countries, which have some district or constituency representation balancing the strict loyalties to the party). Israel lacks a rigid constitution. Basic laws, which are regarded superior to regular legislation, can be enacted by simple majority. Hence, the government, which enjoys a parliamentary majority, has enormous power. The only mechanisms to counterbalance the raw majority are the public legal institutions, the judiciary and the Attorney General's office, which are at present comparatively [independent](#).
2. The 5th general election within three and a half years was held in November 2022, and resulted in the current coalition – the most right-wing and religious government Israel has ever had. The political deadlock of the past years was not a consequence of socio-economic or ideological divides, but a divide between a pro-Netanyahu alliance versus a left, center and right-wing anti-Netanyahu alliance, surrounding corruption charges against Netanyahu, which materialized during this period in an indictment and an ongoing trial. The November elections gave a victory to Netanyahu's camp, with 64 out of 120 seats in parliament. This result, however, does not mean that the 50-50 split of the Israeli public has changed; the 8-seats gap (64:56) is the consequence of two left-wing parties which did not pass the 3.25% threshold.

The new government only took office a few weeks ago. Within a few days, the new Minister of Justice laid down his plans, which were evidently prepared carefully over several years. He has already published draft bills that the Knesset began deliberating this week. With the Prime Minister and coalition partners' united support, the reforms can be enacted very quickly.

They include:

A change in the judicial appointments' procedure – *de facto* providing the ruling government the power to appoint all judges.

The current system, in place since 1953, is that all judicial appointments are made by a nine-member committee, comprising representatives of the three branches of government and the Bar (3 Supreme Court justices, 2 ministers, two Knesset members, traditionally one from the opposition, and 2 representatives of the statutory lawyers' association). The support of seven members is needed for appointments to the Supreme Court (note that the Israeli Supreme Court, in line with the Anglo-American tradition, is a court of last resort in criminal and civil matters, as well as the top administrative and the constitutional court). This system balances between political and professional considerations. It was lauded by numerous international scholars and even served as an inspiration for reforms by [other countries](#) (e.g. the UK).

[The draft bill](#) proposes small changes in the composition of the committee, which makes a very significant difference – to increase the committee members to 11, adding two ruling coalition members (an additional minister and an additional coalition Knesset member), and to replace the two Bar representatives with public representatives chosen by the Minister of Justice. It also proposes to cancel the requirement for a special majority for Supreme Court appointments. Thus, the six ruling coalition members and representatives will be able to dominate and secure all judicial appointments, including to the Supreme Court.

The draft bill also proposes to abolish the seniority principle which guided the appointment of the President of the Supreme Court and the Deputy, stating that candidacy for these positions is not exclusive to the serving judges of the Supreme Court and that Presidents and Deputies will be appointed to a fixed term of six years. These arrangements, together with the introduction of public hearing in the Knesset for all candidates to the Supreme Court, means that not only the appointment of judges will be in the sole power of the government, but that politics and power struggles within the judiciary would increase.

Amendments to the Basic Laws that will practically annul judicial review of legislation.

Among other changes [the draft proposal](#) includes an overriding clause, allowing the Knesset to overturn almost any court decision by simple majority vote (61 out of 120 legislators). As noted above, Israel does not have a rigid constitution. Instead, the Knesset decided in 1950 that it will enact Basic Laws that are meant to be amalgamated into a constitution in the future. After various Basic Laws dealing with the structure of the different branches of government, the Knesset enacted in 1992 two Basic Laws protecting several civil and human rights, such as the right to dignity, liberty and property. These rights cannot be violated, save by "a law that corresponds to the values of the State of Israel, which serves an appropriate

purpose, and to an extent that does not exceed what is required” (Section 8 of Basic Law: Human Dignity and Liberty). On that basis, the Supreme Court began to preform judicial review of legislation. It has struck down 22 laws (or specific articles of laws) in the course of the last 30 years; a very small number when compared to most other countries which practice judicial review of legislation. In recent years, and as the result of the political deadlock, the Knesset enacted various amendments to the Basic Laws, as well as new Basic Laws, such as [Basic Law: Israel as the Nation State of the Jewish People](#), which were challenged at the Supreme Court. The Court rejected all the petitions, leaving open the question of its jurisdiction to review the constitutionality of Basic Laws.

The draft bill published by the Minister of Justice bans altogether judicial review of Basic Laws. It further holds that judicial review of “regular” legislation must be undertaken by a panel of all judges of the Supreme Court (in contrast to smaller panels which currently hear such cases), and has to be decided by an 80% majority. Even such a super-majority decision can be overruled by a simple majority of Knesset members, save if the Court’s decision was unanimous, and in such a case it can be overturned only by the next Knesset.

Adopting the proposed reforms means not only that judicial review of laws infringing basic rights would be much more difficult (due to the requirement of a super majority of all judges), and subject to the Knesset’s overturning power, but also that all Basic Laws, adopted by a simple majority of the Knesset, would be immune from any review. Theoretically, the current government could simply enact a Basic Law that extends its term by another 4 years, with no possibility to challenge it constitutionally.

Abolishing „lack of reasonableness“ as a ground for judicial review.

This doctrine, inherited from English law, has been further developed by the Israeli courts throughout the last 70 years. It is the primary foundation for judicial review of administrative decisions, and served, for example, as early as 1993, to strike down appointments of ministers who were indicted for corruption charges (one of these appointees, Aryeh Deri, who was convicted three times since the 1993 affair, was again appointed as a minister in the current government, and a petition against this appointment is [pending](#)).

Abolishing lack of reasonableness as ground of review means that ministers and other officials will have an almost unlimited discretion within their statutory authorities; their discretion in exercising their powers would be above review.

A major reform of the governmental legal counselling service.

As noted, the only checks on raw political power in Israel are by the courts and the Attorney General’s office. The Attorney General wears three hats – the head

of criminal prosecution, the legal advisor to the government, and the head of the legal advisory apparatus serving the government ministries. The legal opinions of the Attorney General bind the government, and the legal opinions of the legal advisors to the ministries bind the ministers. Already during his first term as Prime Minister in 1996, Netanyahu tried to appoint as Attorney General a [close political ally](#), in contrast to the professionally orientated tradition until then. The affair resulted in the establishment of an appointments committee, comprised of politicians and professionals. The appointment process for ministries' legal advisors is also professionally orientated and under the supervision of the Attorney General. These legal advisors are the first trench against corruption and unconstitutional/illegal measures taken by ministers.

The [new reforms](#) put forward by the Minister of Justice propose to change the procedure for the appointment of legal advisors to the ministries, transforming them into so-called "trust appointments" of each minister. They also propose to state by law that the legal opinions of the Attorney General and the ministries' legal advisors will not be binding upon the government or its ministers.

Evaluation

These are only part of the proposed legal reforms, but even these alone amount to a regime change – driven by the loss of the independence of the judiciary and the legal advisors to the government, on the one hand, and the blocking of the Supreme Court's power to review government and legislature actions, on the other.

The initiators of the reform are well prepared. As part of their public relations campaign, they show comparative data that in all four areas of proposed reforms – judicial appointments, judicial review, administrative review and the Attorney General powers – the current arrangements are exceptional to Israel. In some of these claims there may be a grain of truth, but of course this comparison ignores other crucial factors relevant to mechanisms of checks and balances which exist elsewhere, such as a federal structure, the construction of parliament and the election system, review by transnational courts such as the European Court for Human Rights, etcetera. Taking these variables on board will result in the grim picture that Israel's system of government will become exceptional in the wrong way: it will grant the executive and the legislature absolute rule by simple majority vote.

The government's coalition agreements inform us of other reforms in the pipeline in other areas: increasing the religiosity of Israel and limiting the freedom from religion, scrapping the prohibition against discrimination in the provision of products and services (with Arab and LGBTQ citizens first in line for negative discrimination), tough law and order policies, the politicization of the police and the army, and, of course, enhancing Jewish settlements in the occupied territories. We face an immense increase of human rights violations with no effective legal avenues to challenge them. Israel may fully lose its democracy.

