

War over Israel's Judicial Independence

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In mid-November 2022, I warned of the [“tangible and imminent threat to Israel’s judicial independence.”](#) My warning was based on a legal analysis of the [platform](#) of the Religious Zionist Party, which has since become a prominent member of Prime Minister (PM) Benjamin Netanyahu’s hard-right coalition government.

The government was [sworn into office](#) on December 29, 2022. [Its coalition agreements](#) require all parties to support all bills proposed by the Minister of Justice to reform the judicial system, and in particular the judicial selection method. The coalition parties further committed to grant these bills „absolute priority“ over any other legislation. The government wasted no time in initiating an all-out attack on the independence of the judiciary. It is promoting in full speed two parallel proposals to reform the judiciary in the hope that at least one of them, or a hybrid of both will be codified. The government claims that its proposed judicial reform will promote a more democratic and representative judiciary. Yet, a careful analysis of its proposed reform suggests that the government intends to fully politicize the judiciary. It will change the process of appointment to the Judicial Selection Committee, placing control in the hands of the government. Simultaneously, it will neutralize the ability of the opposition in the Knesset and the professional elites (the Justices and the Bar Association) to protect judicial independence from governmental takeover.

Currently, Basic Law: The Judiciary, [which forms part of Israel’s supreme yet largely flexible constitution](#), provides for judicial independence, but its provisions may be amended [by a 2 to 1 legislative majority](#). Without judicial independence, neither democracy nor the rule of law may exist.

Bill to Amend Judicial Selection Process

The new Minister of Justice, Yariv Levin, is a member of Netanyahu’s Likud political party. He has been an ardent proponent of judicial reform for many years. Netanyahu hadn’t appointed Levin as a Minister of Justice in his previous governments, because Netanyahu used to advocate judicial independence as a vital feature in the survival of a democracy and blocked any proposal that threatened it. Levin admitted that Netanyahu’s [“unjustified” criminal indictments](#) and trial convinced the government that judicial reform is essential.

[Levin’s bill](#) intends to restructure the Judicial Selection Committee in order to give politicians control over the composition of the Court. It will be composed of eleven members: (1) The Minister of Justice, who will chair the Committee; (2-3) two additional ministers appointed by the government; (4) Chair of the Knesset’s Constitution, Law and Justice Committee (Constitution Committee); (5) Chair of the

Knesset's State Comptroller Committee; (6) Chair of the Knesset Committee; (7) President of the Supreme Court; (8-9) two additional Supreme Court Justices chosen by the Court members; (10-11) two representatives from the public selected by the Minister of Justice, one of whom must be a lawyer. The bill further states that the Committee members will enjoy independent discretion: no governmental authority, including the Court, may intervene in their discretion, proceedings or decisions. Furthermore, the bill provides that the President and Deputy-President of the Court will be appointed for a single term of six years in the same way that judges are generally appointed, and may come from outside the judiciary. Removal of judges may be achieved by a decision of nine out of the eleven members on the Committee, even without cause.

Democratic Pretext for the Proposal

The bill's explanatory notes reject the current composition of the Judicial Selection Committee as inapt. Currently, [the Committee](#) consists of three Supreme Court Justices, one of whom is the President of the Supreme Court; two members of the Israeli Bar; two ministers, one of whom is the Minister of Justice; and two Knesset members elected [by secret ballot](#). Each of the four bodies represented in the Committee (Legislature, Government, Supreme Court and Bar Association) chooses its representatives. Neither body enjoys a majority in the Committee. Furthermore, [in 2008](#), Gideon Sa'ar, as an Opposition member, and the Minister of Justice at the time, Prof. Daniel Friedman, reformed the process of appointing Justices to the Supreme Court. They changed the requirement from the support of a simple majority to seven out of nine Committee members. They aimed to grant the politicians veto power over appointments to the Supreme Court.

Levin's bill aims to prevent the Justices from enjoying a veto power over the appointment of their successors. It also seeks to secure the politicians, rather than the professionals (Justices and lawyers), a majority in the appointment process. The bill claims that the proposed appointment process is more democratic, because it will lead to a more diversified judiciary that will better reflect public opinion. Furthermore, it explains that the Committee's current composition does not account for [the occurrence of the constitutional revolution in Israel](#) in the mid-1990s, which resulted in the exercise of judicial review over primary legislation. The judicial power that the Court has been enjoying since the revolution involves policy determinations. The new composition will supposedly ensure that a Court with such power is held accountable more effectively. The bill claims to grant "equal weight to the three branches of government," because three Justices, Ministers and Members of Knesset (MKs) will sit on the Committee. It seeks to replace the Bar Association representatives with public representatives chosen by the Minister of Justice, since the Bar Association does not represent the general public. In fact, the bill claims it doesn't even represent the attorneys, since many of them don't participate in electing their administration despite having the power to vote. The bill even states that the membership of the Chair of the Knesset's State Comptroller Committee *guarantees* for the first time in Israel's history that the Opposition will be represented on the Committee.

The Rule of the Few

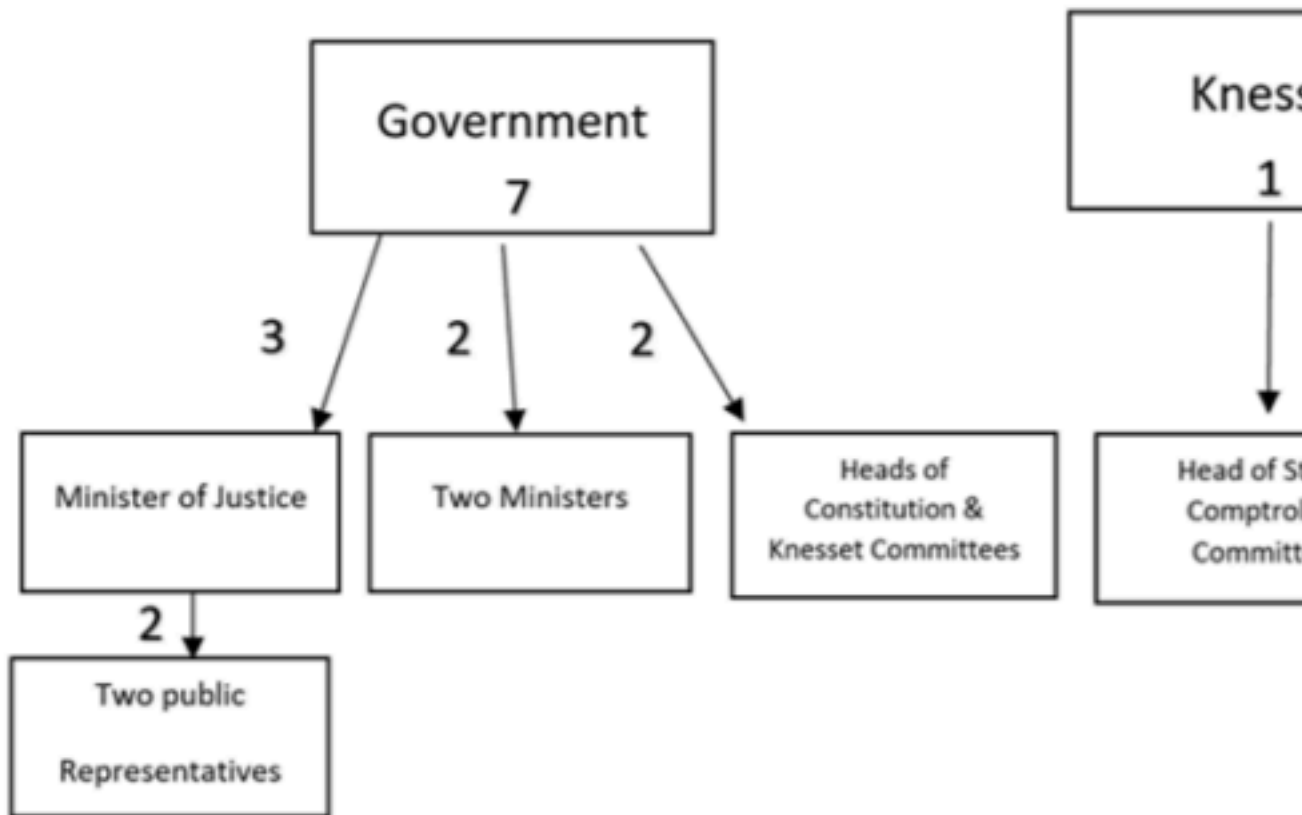
What's not to like? A careful examination of the proposal suggests that it intends to concentrate the power to appoint judges in the hands of a few individuals, not even a majority of the government, let alone the legislature. Members of the Judicial Selection Committee must exercise independent judgment [under Israeli law](#).

Thus, there is no way to translate governmental, or legislative, will to votes on the committee. This is why the current Committee's composition is advantageous. It ensures a consensual process in the sense that representatives of the four bodies (Knesset, Government, Judiciary and Bar) must strike deals to appoint Justices to the Supreme Court. This, in turn, affects appointments to the lower courts as well. This process prevents the appointment of inappropriate people, including candidates with radical positions, who do not reflect the Israeli population.

Who will compose a majority of the Judicial Selection Committee and thus the power to appoint judges and Justices under Levin's bill? The Minister of Justice will have three representatives on the Committee, since the Minister will also appoint the two public representatives. They will thus muster half the threshold to appoint judges. Since the 1960s, Ministers of Justice have [typically been members of the ruling party](#), though there were exceptions such as the former Minister of Justice Gideon Sa'ar, who represented [a faction of 6 MKs](#). Since Israel abolished direct elections to its PM in 2003 and until 2020, coalitions have included [on average 63 out of 120 MKs](#), with the ruling party comprising on average 53% of the coalition. Thus, even if the Ministers of Justice will come from the ruling party, they will represent at most 33 MKs, or 27.5% of MKs.

Moreover, in light of Israel's [proportional representation election method](#), which has a low electoral threshold of 3.25%, we may expect that small political parties will demand to run the Ministry of Justice. A small faction might leverage its bargaining power and condition its support of the government on gaining the power to determine the composition of the judiciary. Never before did the Minister of Justice hold such potentially irrevocable appointment power in its hands. If Levin's proposal is adopted, it will present a very tangible and imminent danger to Israel's fragile democracy.

A diagram of political control over the Judicial Selection Committee under Levin's proposal:



The bill further suggests that two additional members will be the Heads of prominent legislative committees: [the Knesset Committee](#) and the [Constitution Committee](#). The government's representatives chair the two Committees. Thus, the bill does not guarantee equal representation for the government and legislature in the Judicial Selection Committee. On the contrary, it promises 3 votes to the Minister of Justice, and 4 additional votes to the government through two additional ministers (whose identity is not specified in advance) and two heads of Knesset Committees. The difficulty is augmented when considering that often the same political party controls both the Ministry of Justice and the Knesset Committee. In fact, an examination of Israel's history since its founding suggests that the Minister of Justice, the Head of the Knesset Committee and the Head of the Constitution Committee represented cumulatively on average (per government) approximately at most 42% of MKs. Yet, they will together enjoy the power to control 83% of the majority needed to appoint judges. They will only need one more vote to appoint a judge, a vote they may get from one of the other ministers.

It seems that the better question is thus which votes on the Committee the government will not control? These amount to three or four at most. The bill suggests that the Judicial Selection Committee will elect the President of the Supreme Court for a single six-year term. Thus, the government will indirectly possibly control the vote of the President as well. The Court will elect two Justices

and the Opposition will have one representative through the appointment of the Head of the Knesset's State Comptroller Committee. But, even that is not a guaranteed vote for the Opposition. [The Knesset bylaws](#) currently grant the Opposition the power to chair this supervising Committee, but the bylaws may be easily amended by a simple majority vote.

Simcha Rothman, a member of the Religious Zionist Party, currently heads the Constitution Committee. He proposed an alternative bill to expedite the legislative proceedings. Under his bill, the Judicial Selection Committee will remain with nine members, but its composition will change. The Knesset will be represented by the Heads of the Knesset Committee, Constitution Committee and State Comptroller Committee. The government will appoint three ministers, including the Minister of Justice. The Minister of Justice, in turn, with the consent of the President of the Supreme Court will appoint two Presidents (ret.): one of the District Court and the other of the Magistrate Court. Under this proposal, the government will still control at least a majority (3 Ministers and 2 Heads of Knesset Committees). In other words, this bill is not a better alternative. It still undermines Israel's judicial independence.

The Grim Implications for Israeli Democracy

Not only will a few individuals enjoy the power to appoint judges, but the Judicial Selection Committee will be able to remove judges by a vote of nine members without cause. Since there is no guaranteed independence of the four non-governmental members of the Committee, Israel's principle of judicial independence is on the line. But, it goes beyond that. The fact that government directly or indirectly controls seven members of the Committee means that they may easily initiate proceedings to remove judges, from the Supreme Court as well as other courts. This potential abuse might have a chilling effect on any judge who considers ruling contrary to the dominant political opinion. Even if judges may overcome their fear and rule according to their judgment, judicial independence is lost if judges operate under the threat of such political abuse.

The Israeli public is awakening to the dire threat to the principle of judicial independence, which is a cornerstone of Israel's democracy. For three weeks in a row, tens of thousands of people have been amassing in growing numbers in Tel-Aviv to protest against the proposed reforms. The demonstrations grew from 30,000 to 80,000 to [130,000 people](#). People protest in other cities around the country as well. Yet, the government declares that there is one plan it does not intend to back down from: [taking control of the judiciary](#).

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