

# The Populist Constitutional Revolution in Israel

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On December 11th 2022, Israel's Minister of Justice, Yariv Levin, published memorandums outlining the first two major steps in the constitutional overhaul planned by Netanyahu's new government – an overhaul at the epicenter of the rise of constitutional populism in Israel. This essay will outline the proposed changes, explain the paradoxes of Israeli constitutional law that make it vulnerable to a populist attack, and point to the unique context of “democratic backsliding” in Israel, which occurs within a specific ethno-national context involving ongoing military occupation.

## Proposed Reforms to the Basic Laws

The memorandums include major reforms to two of Israel's Basic Laws. Basic Laws are laws enacted by parliament in its “constitutive” role, based on a 1950 compromise to legislate a series of Basic Laws that are supposed to be chapters in a future constitution. Since the mid-1990s, the Israeli Supreme Court took the position that all Basic Laws enjoy supremacy over regular legislation in a way that enables constitutional judicial review, even if they are in fact legislated in the same forum and by the same procedure and majority as regular legislation. As will be shown below, this paradox is part of what allows for the current abuse of constitutional power by the new coalition government.

One of the memorandums entails a major revision to Basic Law: The Judiciary. The main proposed changes are as follows:

1. [An overhaul of the judicial appointment committee](#). So far, this committee is comprised of two government ministers, two members of the parliament, two representatives of the Bar and three Supreme Court justices. The new proposal: (1) enlarges the number of government ministers to three; (2) increases the members of parliament to three, determining they will no longer be chosen by the Knesset but rather be the chairs of three parliamentary committees, two of which are usually headed by the coalition, and one by the opposition; and (3) most significantly, replaces the representatives chosen by the Bar with two public representatives personally chosen by the Minister of Justice. The number of judges on the committee remains unchanged. The result of this overhaul would be a committee controlled by the government, which would have seven representatives out of eleven. The committee would transform from a balanced one into one that allows the coalition government to appoint judges at will – but also to remove them, as removal falls within the committee's authority. According to the proposal, a six-member majority would be required to appoint a Supreme Court judge and a nine-member majority to remove one.

2. A reform to the process of judicial review of primary legislation that contradicts [Basic Laws](#). According to the proposal, a statute can be struck down only if held unconstitutional by 80% or more of all Supreme Court Justices. This change will make judicial review of statutes based on the Basic Laws almost impossible.
3. A determination that a decision regarding the judicial review of a statute will not serve as a precedent regarding any other statute.
4. [An “override clause,”](#) meaning that parliament can re-legislate, by a majority of its members, a law struck down as unconstitutional, as long as the statute states explicitly that it is valid “notwithstanding” the Court’s ruling. This law will be immune from judicial review for four years and if it will be re-enacted again by a subsequent parliament – indefinitely.
5. A prohibition of judicial review regarding Basic Laws – in a way that preempts the [nascent “unconstitutional constitutional amendment”](#) doctrine and the parallel doctrine concerning [abuse of constitutive power](#). This will allow parliament to protect from judicial review certain norms that may be struck down if included in a regular statute. One example already in the pipeline is [a proposed Basic Law on immigration](#) that seeks to revive – and entrench – provisions previously struck down in regular legislation, which allowed indefinite detention of asylum seekers. The proposed bill will also restrict asylum seekers’ access to the judicial system.
6. A prohibition against reviewing administrative action based on the reasonableness doctrine.

Similar changes are proposed in a [parallel bill](#) proposed by Simcha Rotman, the Chair of the Knesset’s Constitution, Law and Justice Committee. In spite of some important differences, his proposal shares the main tenets of Levin’s proposal.

An additional proposal includes [suggested changes to Basic Law: The Government](#). The main proposed changes are:

1. The government may determine its legal position on any matter.
2. The Prime Minister and any minister may determine the positions of their offices on any legal matter.
3. Any legal advice given to the government, to the Prime Minister or to any government minister will not bind them; they can reject it and act in contradiction. (This is complemented by a proposal in the pipeline to turn legal advisors in government ministries into personal appointees by the sitting minister, rather than professional appointees.)

## Constitutional Backlash

These proposals, which are going to be discussed in the Knesset’s Constitution, Law and Justice Committee over the new few weeks, form a major anti-constitutional revolution that must be understood as part of a major turn to authoritarian populism by the [new Israeli government](#). While populism and [democratic backsliding](#) are not novelties in Israel, and we have already witnessed populist constitutional changes such as the [“Nation State” Basic Law](#), the current changes are of dimensions not seen before. This is enabled by the fact that unlike in the past, [this time Netanyahu](#)

[is not dependent for his coalition on any centrist party – whereas in the past his coalition partners had vetoed such steps. Instead, this coalition includes extreme right-wing politicians](#), who are backed by [right-wing think tanks](#) that have been preparing for this moment for years.

The proposed changes are part of an ongoing backlash to the so-called “constitutional revolution” of 1992, when the Court, under the leadership of Justice Aharon Barak, developed the concept of judicial review based upon the Basic Laws, following the legislation of Basic Law: Human Dignity and Liberty. Like other populist leaders, the advocates of change argue they want to reinforce democracy by letting the people rule, while in fact abolishing the judicial independence that is required for democracy. In the Israeli context, they argue that the development of judicial review by the Court based on the Basic Laws, absent a full constitution, was itself not legitimate.

In the Israeli context, no discussion of ‘democratic backsliding’ can ignore the reality of the [ongoing military occupation](#) of the Occupied Palestinian Territory (OPT) – a prolonged occupation that entails military control over millions of people whose rights are trampled upon regularly, by a government they did not choose, [in a way that undermines democracy](#). To a large extent, the current reforms are intended to entrench this control, by removing any legal obstacles even to those few measures regarding the occupation that [the legal system had struck down, such as the takings of private Palestinian lands for Jewish settlements](#).

Overall, given the control the coalition government *de facto* has over the parliament, the result of these changes is a consolidation of power by the government, which would no longer be bound by the legal system. If these proposals (even in a somewhat tweaked version) were made into law – and there is no reason to think they will not, given that Netanyahu’s coalition currently enjoys a strong majority in the Knesset – the coalition government will have total control over judicial appointments, but at the same time will also be able to override any holding of the Supreme Court concerning the constitutionality of statutes, unbound by any opinion of its own legal advisors. This comes in addition to the ability to entrench any arrangement within “Basic Laws” that will be immune from judicial scrutiny.

The abolition of the reasonableness doctrine seeks to curtail judicial review of administrative action. Arguably, courts will be able to bypass this prohibition by turning to other administrative law doctrines such as proportionality, equality, etcetera; yet nonetheless, its expressive and potentially chilling effects are significant.

Taken together, the proposals seek to erase the idea of a government limited by law and to concentrate all power within the ruling coalition. Accordingly, [all seven of Israel’s living previous Attorney Generals](#) described the plan as one that threatens to destruct Israel’s legal system. Even more dramatically, [Supreme Court President Esther Hayut called the program an attack on the judicial system](#), intended at its destruction and at giving a fatal blow to Israel’s democratic identity.

# Constitutional and Administrative Capture

The changes in judicial appointments, as well as restrictions on judicial review, will probably remind readers [of constitutional capture](#) processes that occurred in Hungary, Poland and other countries where authoritarian populism displaced democracy. However, for the purpose of fully understanding the extent of the what we are witnessing, it is necessary to consider not only the constitutional changes regarding judicial appointments and review. This post is too short to list all the changes in Israeli political life; but perhaps one of the most important and sometimes overlooked elements of the populist tsunami in Israel is the disintegration of Israeli governmental ministers, with the aim of subordinating specific areas of the government to specific ministers or deputy ministers from the coalition, so they can promote reactionary and authoritarian agendas. These changes are detailed in the [coalition agreements](#) Netanyahu struck with his coalition partners. They are accomplished by appointment of an “additional minister” in an existing government department (something enabled by a constitutional change to [Basic Law: The Government, enacted already on December 27th](#) 2022), or of a deputy minister, or by shifting departments from one ministry to another.

A few examples illustrate this:

[First, the subordination of the “civil administration,” which in practice governs the daily life in the OPT, to an “additional minister” in the Ministry of Defense](#), rather than to the Military command chain. The Minister in question is Bezalael Smotrich from the Religious Zionist Party, whose agenda entails expanding settlements significantly.

Second, the appointment of Avi Maoz from the Noam Party, which has a strong [“anti-gender” homophobic agenda](#), to Deputy-Minister in the Prime Minister’s office. Under his purview – rather than with the Ministry of Education – now falls [the authority to approve of external programs that are offered in schools](#), most likely to the detriment of any democratic, feminist or pro-LGBT program that schools may choose to incorporate if approved by the division now torn out of the Ministry of Education’s control and entrusted to Maoz.

Third, another reform that already took place is [an amendment to the Police Ordinance](#), enacted on December 28th 2022. It undermines the independence of the police by giving the Minister in charge of it, now renamed Minister of National (in place of “internal”) Security, the authority to determine the police’s policies and priorities, including its investigations policy. This is especially significant given the appointment of [Kahane](#) disciple Itamar Ben-Gvir from the Jewish Power Party to this office. Ben-Gvir has multiple previous convictions for criminal offences, including incitement to racism and supporting Jewish terrorist groups. He already attempted to influence police policy in a political way by ordering the police to ban Palestinian flags in demonstrations (a move which is [legally dubious](#), to say the least) and to arrest demonstrators who block roads in the anti-government demonstrations that have been taking place weekly since January 7th. Additionally, according to the coalition agreements, the Israeli Border Police, a powerful agency involved in the

control of Palestinian populations and in various internal security issues, will be detached from the police and directly subordinated to Ben-Gvir.

These changes are supplemented by media law reform plans, which include a plan to privatize the [public broadcasting corporation](#), which has been a steadfast of fair reporting and quality programming, without being influenced by economic interests that affect private media outlets. It has managed to maintain its independence despite its governmental nature. No less important are plans, according to the coalition agreements, to amend Israel's anti-discrimination law in a way that will create broad religious exceptions, in ways that may be detrimental especially to LGBT and women's rights.

## The Frankenstate and the Elephant in the Room

As we have learned from other countries, no singular move can be looked at separately. As [Kim Lane Scheppele](#) and other have shown, we see the process whereby measures are supposedly adopted from other countries in order to justify them. For almost each measure, there is supposedly a parallel somewhere. Political appointments of judges in the US, a “notwithstanding clause” in Canada, etcetera. However, what we are witnessing is the partial adoption of tools that do exist in some countries, without their broader context and without the constitutional guarantees that accompany them elsewhere. Instead, we see an adoption of the least democratic provisions from a few countries and their aggregation together into [a monstrous reality](#) Scheppele decried as the Frankenstate. For some, this process will be seen as a natural continuation of the autocratic control Israel already deploys towards the Palestinians in the OPT, now creeping into Israel. Others see Netanyahu as agreeing to all this in the hope that he will eventually get his way with further reforms that will undermine his ongoing corruption trial. In the Israeli case, the paradox whereby Basic Laws enjoy constitutional status even if they can be legislated with a regular majority paves the way for populist authoritarians to introduce major constitutional reforms, thus entrenching their anti-democratic moves, and further securing them by installing a prohibition of judicial review of the Basic Laws themselves.

While the various moves by the government instigated big protests that may continue to expand over the next few weeks, a long breath seems to be needed for the battle over Israeli democracy, especially given that the current proposals are probably only the first steps and additional “reform” proposals are waiting down the line. A fractured opposition that [could not hold a government together](#) faces a coalition of like-minded parties.

The popular protests already include contentions about the elephant in the room – should the demonstrations also address the question of the occupation. As discussed above, the Israeli case is unique in its ideological ethno-national features and the relationship between the “backsliding” and the continuation of a regime that has never been democratic towards its Palestinian subjects.

Accordingly, while many argue that there is no democracy with occupation, and that the current processes cannot be understood out of this context, others believe that raising the issue of occupation distracts from the immediate battle against constitutional reform and alienates centrist voters who don't share the leftist opposition to the occupation. It is this author's view that the current constitutional changes advanced by the new coalition are not just about entrenching its own rule and protecting Netanyahu from the corruption trial, but are largely about entrenching the occupation, and more generally securing Israel's Jewish "character" against decisions upholding rights of asylum seekers, LGBTs, and in some cases Palestinians.

Any battle for democracy in Israel that ignores this will fail in the long run. However, the first constitutional crisis that may occur has to do with the judgment issued by the Supreme Court on December 18, 2022, in the petition concerning the appointment of Aryeh Deri as Minister of the Interior, notwithstanding his recent conviction for tax offences. This appointment required a change ([as part of the December 2022 amendment](#)) to Basic Law: The Government relaxing the rules about appointment of convicted criminals as cabinet ministers. While the Supreme Court refrained from giving a holding on the argument that the amendment is an abuse of the Basic Laws framework, it decided to strike down Deri's appointment based mostly on the "reasonableness" doctrine. Following this holding, the government may accelerate the legislative processes that will prohibit review on this basis. This, notwithstanding that the holding actually proves that such a move will not necessarily fulfill the government's wish to curtail judicial review of administrative action, as a significant number of judges relied on other administrative law doctrines instead of or in addition to reasonableness. Whether the Court will consider proposals curtailing its powers as constituting "unconstitutional constitutional amendments," or whether Netanyahu will attempt at re-appointing Deri, provoking further petitions centering on other administrative law doctrines, we may witness a head-on collision with the government. In any event, the collision may occur sooner or later, when Levin's legislative plan, if and when it becomes law, will be attacked directly in the Supreme Court. Either of these scenarios may lead to a [constitutional crisis](#) of dimensions that Israel has not witnessed before.

