



INTRODUCTION TO THE  
**2023 ISRAELI  
JUDICIAL REFORM**




BY THE JERUSALEM INSTITUTE OF JUSTICE



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Israel's proposed judicial reform has sparked significant controversy within society, revealing the ongoing tension between the Executive and Judiciary branches. Supporters of the reform argue that it will enhance democracy in Israel, while opponents fear that it will undermine the democratic principles of checks and balances, granting too much power to the Executive branch and potentially endangering minority rights and human rights. The debate over the reform has created a deep divide within Israeli society. Every Saturday night, hundreds of thousands of people gather to protest against the proposed reform. This level of public demonstration has not been seen in Israel since 2005, during the country's unilateral withdrawal from the Gaza Strip.

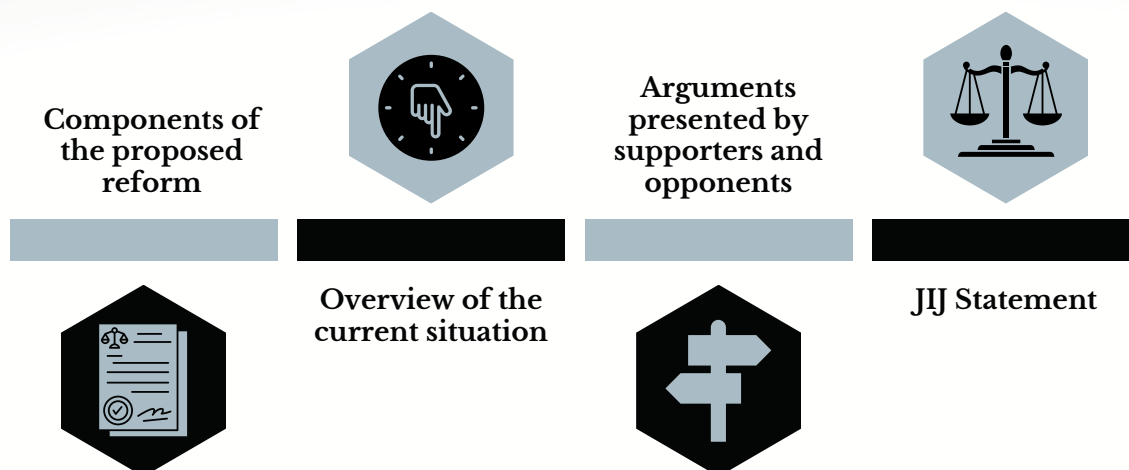
The reform proposal addresses essential areas of the Israeli legal system, including changes to the Supreme Court Selection Committee and limitations on the High Court's power to review government decisions and laws passed by the parliament. If the proposed changes are approved in their current form, it could potentially result in a constitutional crisis. Specifically, if there is a disagreement between the High Court of Justice and the government on a particular issue, it is unclear whose decision would be legally binding.

Israel's new coalition government, comprised of four right-wing parties, was elected just a few months ago. The driving force behind the proposed judicial reform is Israel's Minister of Justice, Yariv Levin, a member of the Likud Party, and the Chairman of the Constitution, Law and Justice Committee, Simcha Rothman, a member of the Religious Zionist Party. However, Israel's attorney-general, Gali Beharev Miara, issued an official legal advisory to Levin last month stating that Prime Minister Benjamin Netanyahu is prohibited from any involvement in the reform due to a potential conflict of interest related to his pending trial. Despite being the country's leader, Netanyahu cannot participate in the reform effort in any way. The government is completing the first of four-step reform before the Parliament's recess in April.

Many Israelis, including academics, economists, legal experts, intellectuals, and former politicians, are participating in protests throughout the country. They aim to exert pressure on the coalition government to halt legislative procedures and engage in negotiations for a reform that is widely accepted.

Israel's President, Isaac "Bougie" Herzog, recognized the public's discontent and took action. He delivered a speech promoting reconciliation and submitted an outline called "the people's blueprint" as a basis for negotiation between parties. However, within minutes of its submission, the coalition rejected the proposal outright.

In this lecture, we will explore the four components of the proposed reform, provide an overview of the current situation, and explain what changes the reform seeks to bring about. We will also examine the arguments presented by both supporters and opponents of the reform. Finally, we will demonstrate how the originally proposed outline would have a detrimental effect on Israel's ability to safeguard human rights.



Israel operates as a parliamentary democracy, with the government requiring a majority in the Knesset, the Parliament, which is based on a coalition system. This interdependence between the executive and legislative branches leaves little room for negotiations with the opposition. The judiciary, on the other hand, is independent of both the Executive and the Legislative.

In the absence of a constitution, Israel has a set of Basic Laws that hold a unique, almost constitutional, status. In the 1990s, the President of the Israeli Supreme Court, Aharon Barak, led a "Constitutional Revolution" that granted the court the power to annul laws passed by the Knesset if they contradicted the Basic Laws. Since then, the court has revoked 22 statutes and decisions of the legislature.

In recent years, some politicians have questioned the balance of power, arguing that the judiciary - particularly the Supreme Court and the government's legal advisers - have too much authority.

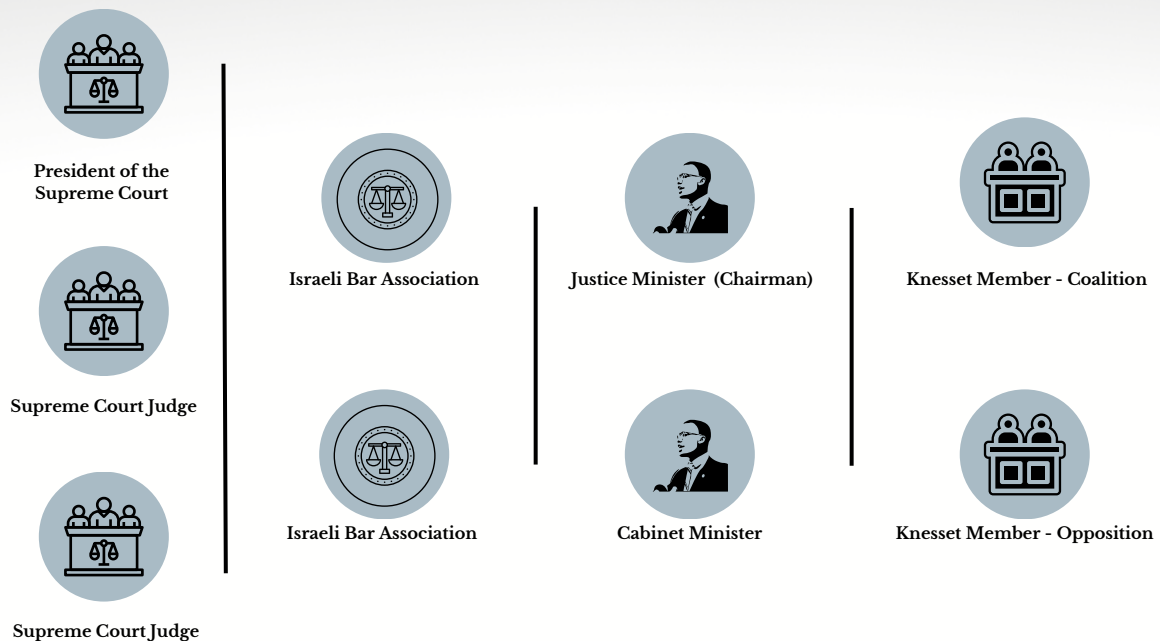


# JUDICIAL SELECTION COMMITTEE

One of the most crucial aspects of the proposed judicial reform is the Judicial Selection Committee. Established in 1953, this committee is responsible for selecting judges for Israeli courts and is composed of nine members as mandated in Article 4 of the Basic Law: The Judiciary.

The committee comprises three judges from the Supreme Court, including the president and two other judges, two members of the Bar Association, two ministers (the Minister of Justice and a Cabinet Minister), and two Knesset members, one from the coalition and one from the opposition.

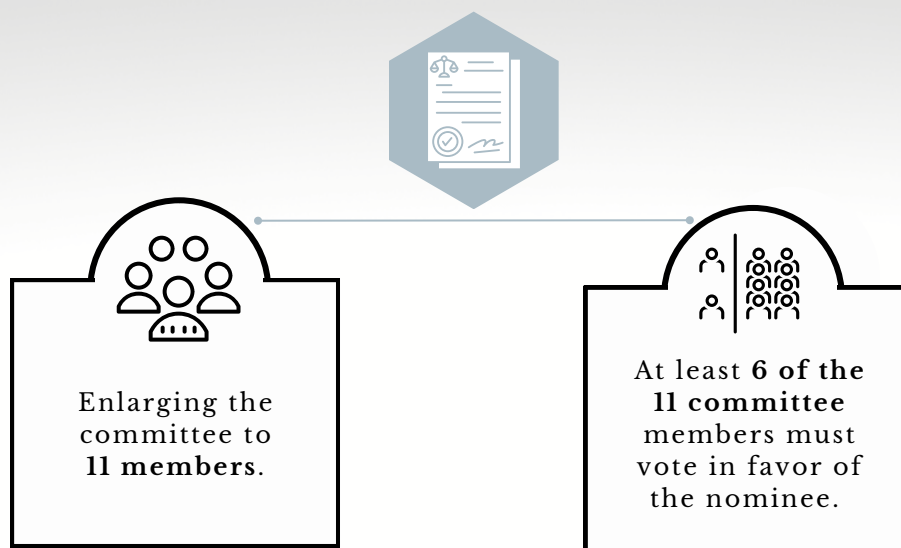
To appoint Supreme Court judges, the committee requires a majority vote of at least seven of its nine members.



# JUDICIAL SELECTION COMMITTEE

## PROPOSED CHANGES

The proposed judicial reform recommends enlarging the current committee responsible for selecting judges to 11 members. The new committee would comprise three members from the Supreme Court, three Ministers, and five from the parliament, with three of them from the coalition and two from the opposition. To appoint a judge, a regular majority vote would be required, which implies that at least six out of the 11 committee members must vote in favor of the nominee. This ensures that the government always has a majority.



# JUDICIAL SELECTION COMMITTEE

## PRO-REFORM ARGUMENTS

Proponents of the judicial reform argue that the current procedure for electing judges in Israel is unusual compared to other democracies around the world. This is due to the composition of the committee responsible for selecting judges. Currently, judges have significant control over the appointment of candidates creating a de facto veto power to block any nominee they do not approve of.

When a more liberal government is in power, the three Supreme Court judges, two representatives from the Bar Association, two Ministers, and one Knesset member tend to vote together. Consequently, the judges' side has eight members under a liberal government and at least six members under a ruling conservative government. This leads to judges having absolute control over appointments. According to Levin's assertion, this complete control results in a scenario where the majority of Supreme Court judges tend to be liberal and secular.

Those who advocate for the reform argue that if the proposal is put into action, it will result in better representation of more sectors of Israeli society, and ultimately boost public confidence in the Israeli justice system.



# JUDICIAL SELECTION COMMITTEE

## ANTI-REFORM ARGUMENTS

Those who oppose the proposed reform argue that altering the composition of the committee responsible for selecting judges will make it susceptible to politicization. They contend that granting absolute control over the selection of judges to politicians will result in elected judges being subservient to their appointers and acting as their proxies.

Furthermore, opponents of the reform assert that the current composition of the committee does not allow for any particular side to hold an automatic majority due to the requirement of seven out of nine necessary votes.

They also express concern about the ongoing criminal trial of Prime Minister Netanyahu. If the committee's composition is under his control, he could have complete authority over the selection of judges responsible for his fate.

# THE OVERRIDE CLAUSE



The override clause is a provision that allows the Knesset to re-enact a law that was initially passed by Parliament, but subsequently invalidated by the Supreme Court. In essence, it provides the power to cancel the cancellation.

In the current reform proposal, the inclusion of an override clause was a demand made by the ultra-Orthodox factions as part of their coalition agreements. The ultra-Orthodox leaders believe that the override clause will enable them to pass laws they deem essential without significant opposition. They seek to use this clause to pass legislation exempting yeshiva members from mandatory service in the Israel Defense Forces and to grant budgets to ultra-Orthodox religious and educational institutions.

In Israel's current legal framework, if the Supreme Court invalidates a law enacted by the Knesset, due to it violating a subscriber's right in the Basic Law, the annulment is considered final.

To fully comprehend the significance of the override clause, we must look back to a landmark ruling by the Israeli Supreme Court in 1995, known as the Mizrahi Bank case. This was the main ruling of the Supreme Court, led by Judge Aharon Barak, that initiated the “constitutional revolution” after the enacting of the Basic Laws. The court established that despite the lack of an official constitution, the Basic Laws served as a new form of constitution. The Supreme Court declared that it had the right to protect these fundamental laws through judicial review of primary legislation passed by the Knesset. In the Mizrahi Bank case, the Supreme Court took it upon itself, for the first time, to invalidate laws passed by the Knesset. Currently, a panel of three judges in the Supreme Court can invalidate laws without requiring a special majority.

The reform proposal specifies that for the Supreme Court to invalidate a law, it must convene with its full composition, and a majority of 12 out of 15 judges must vote to invalidate the law.

Additionally, the proposal states that if the Supreme Court invalidates a law passed by the Knesset, the Knesset can reenact the same law for a limited time, with the support of a majority of 61 Knesset members. However, if the Supreme Court invalidates the law unanimously, the Knesset can only activate the override clause in the following Knesset, rather than immediately.

Furthermore, the reform stipulates that the Supreme Court cannot anymore discuss the validity of the Basic Laws. To clarify, in the absence of a formal Israeli constitution, the review of the Basic Laws by the Supreme Court is the mechanism used today to recognize fundamental rights.



Supporters of the reform proposal have put forward several arguments in favor of the override clause. They argue that implementing the override clause would result in a better balance of power between the different branches of government, bringing Israel in line with other leading democracies around the world.

They claim that the Supreme Court has no inherent authority to invalidate laws passed by the Knesset and that it took this authority upon itself without any limitations. They further argue that the judiciary is the only branch of government that operates without any checks and balances. They point to the landmark Mizrahi Bank ruling as a "regime coup" and contend that the court has not only given itself the power to cancel laws but also decides who can challenge laws before the Supreme Court. This situation, they argue, effectively makes every law provisional until the court approves it.

Reform supporters argue that the override clause is necessary to balance the power between the branches of government, bringing Israel in line with other leading democracies. They claim that the Supreme Court exceeded its authority by taking upon itself the right to cancel laws enacted by the Knesset without limitations.

Additionally, supporters claim that the Supreme Court should not have the "last word" on policy matters nor on deciding which rights should receive the special status of "basic law."



The Supreme Court in Israel serves a significant role in safeguarding against human rights violations. However, the implementation of the Override Clause will impede the court's ability to protect the rights of minorities and prevent such violations.

Those who oppose the reform explain that Israel's decision to not submit to international legal mechanisms has made the Supreme Court the only available means to ensure human rights violations are punished. The proposed reform, which requires 12 out of 15 Supreme Court judges to invalidate a law, would severely limit the court's ability to fulfill its current role.

Opponents of the reform have suggested that an override clause may be necessary, but not with the proposed majority requirement. The current proposal mandates only 61 out of 120 Parliament members to re-enact laws that were previously annulled by the Supreme Court. This means that the governing coalition in place, with an automatic majority of 61 members in the Knesset, could easily re-enact annulled laws. However, if the clause required a higher number of Knesset members, it would necessitate the involvement of factions from both the coalition and the opposition in the decision to re-enact a law.



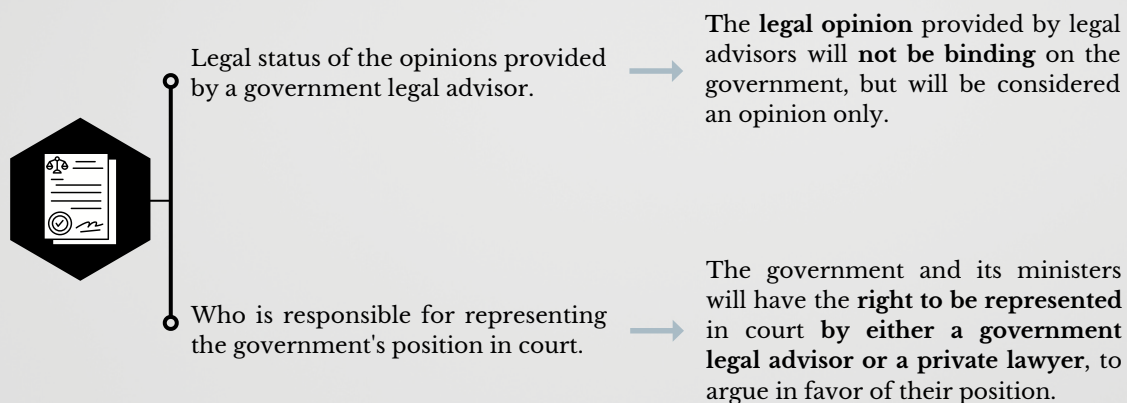
The Israeli government legal advisors provide legal counsel and guidance to the Israeli government and its various departments and agencies. They advise on matters of law, including constitutional law, administrative law, international law, and more. They are independent parties that represent the public interest and ensure compliance with the law.

Government legal advisors are also involved in the drafting and review of legislation, and in representing the government in legal proceedings, including before the Israeli Supreme Court. They are tasked with ensuring that the actions of the government and its officials comply with Israeli law, international law, and human rights standards.

This aspect of the reform addresses two issues: firstly, the legal status of a legal opinion provided by a government legal advisor, and secondly, who is responsible for representing the government's position in court.

Currently, there is no clear regulation of the powers and status of government legal advisors in Israeli law. The Supreme Court has attempted to address this gap through its rulings, affirming that a legal opinion provided by a government legal advisor is binding. However, two government committees - the Agrant Committee in 1962 and a public committee led by former Supreme Court President Meir Shamgar in 2000 - have concluded that the government has the authority to deviate from the Attorney General's legal opinion if it disagrees with it.





The proposed reform seeks to regulate the legal status of government legal advisors in Israeli law. The reform suggests that the legal opinion provided by legal advisors will not be binding on the government, but will be considered an opinion only. Additionally, the reform proposes that the government and its ministers will have the right to be represented in court by either a government legal advisor or a private lawyer, to argue in favor of their position. The reform proposes a change to the current system by allowing ministers to choose their own legal advisors. This change is meant to balance the government's position with the public interest and the law.

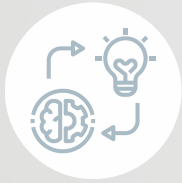
The arguments in favor of this particular change focus on the fact that in many cases the legal opinion of the legal advisor is not aligned with the agenda of the minister. Ministers claim that since the opinion of legal counsels is considered binding, it is difficult for them to promote reforms in their office and outline policy because the advisors have the last word.

Moreover, every government bill reaches the ministry's legal advisor in the current system. He examines it with one guiding question: whether the proposed law will stand in the high court of justice's test".

Supporters of the reform also point to another failure in the current situation: the issue of the representation of the state's position before the court. In the current situation, the Attorney General is the person entrusted with representing the state's position in court. This order leads to situations where the legal advisor is actually presenting positions and advocates before the court, contrary to the position of the office he represents.

Opponents of this section in the reform argue that allowing ministers to appoint the legal advisor as a position of trust will reduce the legal council's authority and compromise their ability to ensure that the minister's agenda aligns with the requirements of the law. They believe that this change will seriously harm the weight of the legal advice given by the legal advisor and could result in the advisor becoming a puppet of the minister instead of fulfilling their duty of loyalty to the public.

# THE REASONABILITY CLAUSE



The "reasonability clause," allows the Judiciary to review and invalidate government and Parliament measures.



The court evaluates whether the interests and considerations that should have been taken into account were given proper weight.



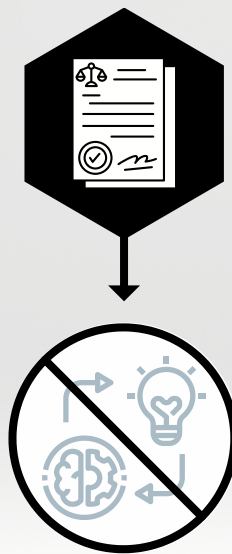
The court's position is that, a priori, it should not interfere unless the decision is highly unreasonable.

The "Reasonability Clause" allows the judiciary to review and invalidate government decisions, such as Knesset legislation or appointments, on the grounds of reasonability. The court evaluates whether the interests and considerations that should have been taken into account were given proper weight in the decision-making process. The court's position is that a priori it should not interfere with the government's decision and that government officials are presumed to have made decisions correctly, legally, and with reasonable discretion, unless the decision is extremely unreasonable.



# THE REASONABILITY CLAUSE

## PROPOSED CHANGES



The reform proposes to cancel the reasonability clause, therefore abolishing the ability of Supreme Court judges to invalidate decisions of the government and its subordinate authorities, on the grounds that a decision is 'extremely unreasonable'.

# THE REASONABILITY CLAUSE

## PRO-REFORM ARGUMENTS

Those who support the reform argue that the use of the Reasonability clause is too ambiguous, as it is unclear how the court will interpret the decision or determine its "reasonableness." Supporters of this aspect of the reform ask two critical questions: what is the appropriate balance between various factors when judges determine what is reasonable or not, and why is a judge's opinion considered superior to that of a government minister?

A greater criticism by some supporters is that the Reasonability clause allows the courts to unjustly interfere in policy creation. They assert that the Reasonability clause gives the court the authority to make decisions instead of the elected officials without any legal justification.

# THE REASONABILITY CLAUSE

## ANTI-REFORM ARGUMENTS

Those against the reform are apprehensive that eliminating the Reasonability clause will undermine the crucial checks and balances necessary to prevent the implementation of extreme policies, laws, and decisions. Furthermore, those whose rights are impacted by such measures will be left with no recourse for appeal.



The Jerusalem Institute of Justice is an organization devoted to promoting and protecting human rights, democracy, and the rule of law. As a legal research institute that advocates for the rights of minorities in Israel, we express our concerns about the promotion of the reform in its original outline. We are worried that it may potentially harm Israel's minority communities, whose rights are sometimes violated.

Furthermore, we are concerned that the reform may lead to an imbalance of power between the Executive and Legislative branches, at the expense of the Judiciary. Such an outcome would not be in line with the principles of the rule of law and the system of checks and balances, which are fundamental to a functioning democracy. We also fear that the mechanisms designed to protect human rights against offensive governmental decisions could become less effective.

We are not against reform, and we acknowledge the need for a series of amendments. However, we believe that only through dialogue and consensus-building can a reform be achieved that reflects the public's support and can stand the test of time.



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