



Scales of Justice

Drafting a Roadmap out of the Current
Constitutional Crisis with Broad Legitimacy





מגור | מרכז מדיניות ומעשה



יזמת המאה

Let's begin.

The public discourse in Israel today is one of crisis, with each side entrenching itself in its position. While the Netanyahu government is declaring rapid, sweeping judicial reform, the opposition and its supporters are outraged and protesting. Those expecting a compromise proposal or an imaginary middle ground will not find it within this document. Willingness to compromise with the other side will not create the proper roadmap for the State of Israel and its citizens; such a roadmap can come only from a place of openness and recognizing the failings identified by both sides – and those that both sides ignore.

So what will you find here? A truly centrist approach, based on adopting parts of each side's perception of reality – each of which is partially true, but captive to power struggles and limited in the ability to offer a suitable and balanced solution for all of Israel's citizens. Our ability to observe what is currently happening on the ground leaves us free to offer innovative alternative paths.

It starts with a genuine and honest understanding of each side's point of view, how they approach reality, the failings they have identified, and the problems that are not discussed but which affect us all.

Failings identified by the right: In recent decades, the judiciary has taken upon itself authority it was not explicitly given. Without having been elected by the public, the court has turned itself into a supra-sovereign branch of government. This is a blow to the democratic system. The so-called "reasonableness principle" has become a tool for overruling the government's discretion. The judges lack diversity and uphold the same outdated elitism. The ministers and government bodies, too, are not happy with the many restrictions imposed on their discretion by the attorney general. Additionally, over the years judiciary representatives and politicians from the left have rebuffed any proposals for reform, change or dialogue.

Failings identified by the left: The left's starting point is that democracy depends not only on majority rule, but also on protecting minorities and individual rights. Israel has no constitution and just one legislative body in which the government has an automatic majority – so the Israeli court is the only authority that can balance the government's decisions. The court serves as the standard-bearer protecting liberal values – especially in the context of the deep divisions that run through Israeli society. For years, Israeli governments have sent issues they wished to avoid making decisions about for political reasons back to the courts, and as a result the court is the body signed on basic human rights for many populations. It is our duty to maintain a strong and independent legal system as a strategic asset of Israel as a democratic state – both internally and externally in the international arena. Making the legal system subject to political considerations will disable the only check that exists for decisions that violate individual rights, even if they are supported by the "majority".

However, regardless of the perceptions of the right and the left, the legal system is full of fundamental failings that cause all citizens to suffer: drawn-out legal processes, inefficiency in the State Attorney's Office, violations of the rights of detainees and significant budgetary shortfalls. The tremendous burden on the legal system harms anyone who comes into contact with it and damages public trust. As Esther Hayut, president of the Supreme Court of Israel, has noted, there are currently 802 judges and 73 registrars serving in Israel. This means there are approximately eight judges for every 100 thousand residents. For comparison, the average number of judges per 100 thousand residents in OECD countries is three times higher. Do you know how many new legal proceedings are submitted to the courts and rabbinical courts in Israel each year? It's hard to believe, but there are no fewer than 850 thousand of them!

But just a moment. It doesn't end with the courts. We have to look at the bigger picture and ask: Do Israel's other systems function properly? Is a strong Knesset enough to provide oversight of government actions? Seemingly not. In recent years the Knesset has become the weakest branch of government. It is currently almost entirely under the thumb of the executive branch, and its power of oversight over the government has gradually diminished. Interminable election cycles created a high turnover of inexperienced lawmakers; inflation of political parties; the so-called "Norwegian law" (according to which ministers may resign their Knesset seats while remaining ministers, with their seats being assigned to the next person on their party list); inflated governments; and above all, the political processes designed to exhaust and chip away at the Knesset through hearings in the Knesset plenum and committees – these and other factors have led to a significant decrease in the power and capabilities of our only representative democratic body.

Looking at the different points of view side by side shows that there are arguments that do not touch on the same issues, over which agreement can be reached. Moreover, it seems that what is currently on the table is far more about politics, narrow interests and identity than it is about the good of all the country's citizens.

How do we move away from "no" and create "yes"? How do we correct instead of destroying?

In the first stage, we present an alternative solution to the issue of the judicial reform currently being discussed. The second stage is changing the discourse about bending powers and weakening the different systems (such as government vs the Supreme Court and government vs the Knesset) and moving to a discourse about strengthening all government authorities. Only then can we attain the checks and balances that are right for Israeli democracy and create reform that is beneficial for all Israeli citizens.



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יזמת הדמוקרטיה

The Override Clause – Balances. Issues. Duration. Three conditions:

Not an override clause with a simple majority of 61 (which creates an automatic majority for the coalition and violates the rights of minorities), but other ways of creating checks and balances. For example:

Defining “majority”: Setting a balancing rule according to which applying the override clause to Supreme Court rulings requires several opposition votes (at least 10) in favor - a majority of 70 votes, of which at least 10 are from the opposition. In this, our proposed outline does not rely purely on an override clause based on a majority of coalition MKs, who are subject to coalition discipline, but ensures a balanced, high-quality system that will protect minorities from the tyranny of the majority while maintaining the advantage of being the sovereign power elected by the public to make decisions.

Limiting issues: For some issues, it will be forbidden to use the override clause at all – elections, for example. Think about it. If the Knesset tries to refuse parties equal access to the political playing field, who will protect the citizens from such a decision?

Duration: To avoid changes that exploit the power of the majority and potentially harm individual rights, we must ensure that the duration of the override be limited to four years. In the event that the Knesset wishes to re-legislate a law that was struck down by the court, it will be required to do this actively and start from the beginning.

Repealing laws will be the authority of the High Court of Justice with an extended panel and by special majority.

This is not a sweeping limitation on repealing laws, but a way of creating clarity and order. What would a solution that maintains this delicate balance look like? There are several ways:

Determining that the Supreme Court can repeal laws legislated by the Knesset. The High Court of Justice’s authority to repeal laws will be through an extended panel and by special majority only, in a panel of 11 judges, by a majority of at least eight. A balance such as this will anchor the court’s ability to perform judicial review, but provide a clear perimeter of how and when.

Additionally, we propose that the Supreme Court can only repeal ordinary laws, not Basic Laws – with the exception of procedural flaws that undermine the manner of legislating Basic Laws (e.g. the absence of a preliminary hearing or the required majority) and of cases in which the Knesset abuses its power as a constituent authority (e.g. categorizes a regular legislative issue as a “Basic Law” so that the High Court of Justice cannot review it).



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Reasonableness – not a repeal, but a demarcation.

Banning the test of “reasonableness” is a drastic measure, which removes the court’s ability to protect citizens from government decisions. What would be a better measure? Adopting an approach of creating order. Judicial certainty and preserving the power of the citizen vis-a-vis the administration.

Not replacing discretion except in clear cases: We adopt the argument that the grounds of reasonableness may be accepted by the court in the case of a ruling that no “reasonable” authority would have made. To prove that the ruling is one such as this, clear data must be supplied.

Distinguishing between outlining policy and implementing it: Here, too, we adopt the argument that reasonableness does not need to apply to decisions made by an elected body (government, ministers and heads of local government) that relate to outlining an ethical worldview. This is not so regarding decisions made by professional bodies (tenders, permits, licenses, approvals, and the like) that relate to implementing policy. Here reasonableness is an important principle and constitutes significant protection of individual rights vis-a-vis the administration’s authorities.

Composition of the Judicial Selection Committee – transparency, independence

If the Judicial Selection Committee (JSC) is made subject to the decisions of the coalition and a system of political appointments is formed, the court will become a populist and unprofessional body. We must create a sense of transparency, diversity and balance among the committee members. How do we accomplish this?

Changing the balance of the JSC without an inherent majority: We recognize the need to give politicians more sway in selecting judges for the highest court (the Supreme Court of Israel) in order to increase trust and diversity. It is possible to explore changes in the structure of the JSC, subject to principle that appointing judges to the court must not be a function of a guaranteed majority of coalition politicians. This is a key point - we can make changes, but none that are in any way subject to an inherent political majority. We adopt a proposal that creates change favorable to the representation of the people: three judges, three members of the coalition, two members of the opposition and a representative of the president of Israel.

Transparency in judicial appointments to the Supreme Court of Israel: We propose separating the method of appointing the judges to the Supreme Court from the method of appointing them to the lower courts and creating mechanisms for transparency. For appointing judges to the Supreme Court, we propose creating more transparency, publicizing the deliberation, and taking into account the candidates’ positions and worldviews.

The seniority system: We do not believe this to be the best method, but prefer it over others in light of the principles of conservatism, appreciation of knowledge and experience and the



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fear of primaries and judges making populist decisions. Therefore, we recommend maintaining the seniority system by which the most senior judge is president of the Supreme Court.

Legal advisers – balanced and apolitical

We recognize the real need to create order in the relationship between legal advisers and politicians. This is logical, as the lack of ground rules on this issue harms all sides. But the judicial reform at hand will not create balance. It will turn the legal advisers into political yes men. We seek to create balance and order, and there are several ways to do this:

First, we propose to divide the powers of the attorney general into two separate institutions: attorney general and head of the public prosecution system. It is clear to us that this is a complex process requiring deep consideration and deliberation, and a rushed and sweeping judicial reform is not the answer.

Additionally, we suggest exploring several measures that this publication respects and believes can bring about the appropriate balance: (1) Internal and external tenders in one process for choosing legal advisers. (2) Term limits for legal advisers. (3) Exploring ways to bolster representation from administrative ranks (not attorney generals) in the appointing process - as long as this does not make the appointments personal or political. (4) A more specific definition of the legal adviser's role as a function to help ministers realize their policies within the framework of the law, and reducing the use of "legal bars" for extreme cases as distinct from issues of outlining policy. (5) Streamlining the work of the legal advisers, shortening schedules and setting out clear and rapid decision-making mechanisms.

The conclusion, which is actually a beginning: A long-term process of regularization – because that is what we need

Now that we have addressed the existing judicial reform, we come to the second stage: We believe in the necessity of a long-term process. The purpose of the process is to define fair ground rules in order to safeguard the relationship between the judiciary and the legislative authority. This isn't a way of weakening one authority at the expense of another – it is a way to strengthen all government authorities in a balanced and deliberate manner. At the core of the process is ensuring the Knesset's role in oversight of the government, and constitutionally anchoring individual rights in a way that moves these rights from the sphere of judicial interpretation to the legislative sphere.

Because that is what we, the citizens, truly need to live in a flourishing and safe democratic and Jewish state.

Anchoring the basic rights set out in the Declaration of Independence in legislation	Empowering the three branches	The rules of the game
Equality, Israel's identity as a Jewish-Democratic State	Reinforcing the Knesset's ability to provide oversight of the government	Drafting "Basic Law: Legislation" Amending "Basic Law: The Judiciary"

Asterix

- **Override clause:** Let's say the Knesset legislates an ordinary law, but the High Court of Justice rules that the law contradicts one of the Basic Laws about human rights and moves to repeal it. As the name suggests, the override clause allows the Knesset to override the explicit repeal of the High Court of Justice and keep the law in place. The override clause is a rare device in comparative law, and exists elsewhere only in Canada.
- **Reasonableness:** This is a principle taken from the field of administrative law, which gives the courts the possibility of performing judicial review and repealing an administrative act on the grounds that such an act on the part of the administrative authority (this may be the government or one of its branches) is "unreasonable" or "unreasonable in the extreme".
- **The Judicial Selection Committee:** This is the committee that determines who will be the judges in the courts. The composition of the committee is prescribed by Basic Law: The Judiciary. As of today, the committee is composed of nine members: the minister of justice (who heads the committee), and an additional minister chosen by the government, two MKs chosen by the Knesset, two representatives of the Israel Bar Association, the president of the Supreme Court, and two additional judges from the Supreme Court.
- **Legal advisers:** Their role is to make sure that the government ministries conduct themselves properly and represent the interests of the public. According to present custom, the opinions given by the government ministries' legal advisers are binding. The government ministries' legal advisers are professionally subordinate to the attorney general of Israel and from an administrative standpoint are subordinate to the directors general of the ministries.