

Israel: The Extreme Governmental Changes - The Proposed Legislation- Feb. 18th, 2023
(based on the chart published in “Calcalist” on Feb. 9th, 2023¹)
Voting in the Israeli Parliament (Knesset) began Feb. 13th, 2023

Topic	Current Status	The Change	The Concern
Judicial Appointments	Composition of the Committee for Judicial Appointments and Majority Required	<p>Comprised of 9 members Since 2008, 7 votes are required to elect a Supreme Court justice and 5 votes are required to elect lower court judges.</p> <p>Both the judges and the politicians have a veto over the appointments to the Supreme Court, and <u>neither side can appoint judges to the Supreme Court without the other side’s consent.</u></p> <p>Politicians: 4 2 ministers and two MPs</p> <p>Judges: 3 President of the Supreme Court and two Supreme Court justices</p> <p>Lawyers: 2</p>	<p>Levin/Rotman of the coalition propose adding more politicians from the coalition (instead of the lawyers from the bar), suggesting different combinations and numbers (9 or 11 members), but all with the same result:</p> <p><u>The votes controlled by the coalition will be sufficient by themselves to appoint any Supreme Court judge and judges of the lower courts, rendering the judges’ votes meaningless</u></p> <ul style="list-style-type: none"> • The Executive will have complete control over judicial appointments to all the courts. De facto, one can expect that only judges personally loyal to the prime minister will be appointed to the supreme court and that the coalition will choose to appoint in all the courts only judges whose loyalties and opinions match the coalition’s agenda • FOR ISRAEL THIS WILL MEAN NO MORE SEPARATION OF POWERS. With the executive branch controlling both the legislative and judicial branches, Israel will cease to be a democracy (ISRAEL HAS NO OTHER CHECKS AND BALANCES IN PLACE OTHER THAN AN INDEPENDENT JUDICIARY) • Public faith in the professionalism and nonpartisanship of the judges will be crushed • A dependent and politically controlled judiciary leads to abuse of human rights and disregard for democratic principles • Danger of growing corruption, for lack of an independent judicial branch • Israel’s Prime Minister, Benjamin Netanyahu, now standing trial on charges of Bribery, Fraud and Breach of Trust, will be able to determine the choice of judges who will hear his future criminal appeal

¹ Based on the original chart by Adiel Eithan Muskati in “Calcalist” on Feb. 9th, 2023, <https://m.calcalist.co.il/Article.aspx?guid=hynkirbps>- this chart has further add-ons written by private citizens, mostly in the column “The Concern”, drawing on the public positions put forth by the President of Israel’s Supreme Court, Ms. Esther Hayut, Israel’s Attorney General, Ms. Gali Baharav-Miara, Deputy Attorney General, Dr. Gil Limon and the former Attorney General, Dr. Avichai Mandelblit.

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Judicial Appointments (cont'd)	Hearing for Judges	In the Committee for Judicial Appointments	Additionally, in the Constitution Committee of Parliament	The populist atmosphere in parliament will have a chilling effect on the willingness of serious candidates to seek judicial appointment
	Appointment of the President of the Supreme Court	The longest tenured justice becomes President of the Supreme Court (the seniority system)	Planned: cancellation of the seniority system. External appointment of the President of the Supreme Court by the Committee for Judicial Appointments (where the votes controlled by the coalition will be sufficient for the appointment)	<ul style="list-style-type: none"> • Prime Minister Netanyahu, now standing trial before Jerusalem's District Court on charges of Bribery, Fraud and Breach of Trust, will be given the power to select the President of the Supreme Court according to personal loyalty, thus determining the outcome of his criminal appeal • The President of the Supreme Court has authority to select the panel of judges for all Supreme Court cases • Elimination of the seniority system could influence judges' rulings (given that their candidacy for the presidency will be decided by the committee controlled by the political coalition parties) • The President of the Supreme Court (who will be appointed by the coalition and will be dependent on it for all judges appointments in the judiciary) sits on the Committee for the Appointment of Judges and will accordingly vote with the coalition
Legal Advisors in Government Ministries	Type of Position	Considered a career, non-political appointment, the legal advisor is selected by a nonpartisan professional committee, after a tender	The position will become a non-career "personal trust" appointment by the minister or director general, to be selected and terminated at will	<ul style="list-style-type: none"> • Legal Advisors will become "yes men", ignoring violations of the law (otherwise they risk being fired) • Politics will trump consideration of the public interest • Severe danger to basic human rights in the absence of independent legal advisers within the ministries • Loss of unique legal knowledge and expertise in difficult ministries (Health, Transportation, Defense) due to high turnover of legal advisors • Corruption will proliferate (e.g., legal advisors chosen personally by ministers on the basis of "personal trust" would chair all large-scale tenders) • Risk of chaos (lack of governance) due to contradictory legal opinions among ministries with no single binding legal authority
	Opinions	Legal opinions are binding, subject to opinion of the Israeli Attorney General (Legal Advisor to the Government)	The legal advisor's opinion will be non-binding and can be ignored. Ministers will be able to appoint an external legal advisor of their choosing to represent them whenever they so choose	

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Judicial Review of Basic Laws²	Two doctrines that have not yet ever been activated. “The unconstitutional constitutional correction” doctrine and “nefarious use of the constituent authority” doctrine	Prohibition to overturn any law categorized as a “Basic Law”	<p>Given there is no formal limitation on the content of Basic Laws, Parliament will be able to legislate anything the coalition desires under the guise of a “basic law” <u>and in so doing completely circumvent judicial review by the supreme court</u></p> <p>It will become possible to severely infringe upon basic Democratic Principles and human rights</p>
Judicial Review of regular laws/ Override Clause	In extreme cases, courts can invalidate laws of Parliament that contradict Basic Laws	A super-majority of the judges will be required to invalidate regular laws (Levin 12 out of 15 judges, Rotman 15 of 15). However, even the rare laws invalidated could be legislated again via the Override Clause, with a majority of 61 MPs (that is held by every coalition) (Rotman even proposes an “Advance Override Clause”)	<p>It will become possible to severely infringe upon basic Democratic Principles and human rights:</p> <ul style="list-style-type: none"> • According to the proposed legislation, regular laws will be subject to judicial review only in regard to rights that are <u>expressly</u> protected in Basic Laws. Since in Israel there are basic democratic principles that are not yet protected in Basic Laws (such as: equality and freedom of speech), <u>laws that infringe on equality and freedom of speech will be immune to judicial review</u> • there exists no formal limitation on the content of Basic Laws, so that they may offer no protection of human rights to begin with or in themselves infringe upon basic human rights • The likelihood of overruling a law will be practically nil anyway
Reasonableness Doctrine	The court can overrule decisions of the executive authorities, based on gross unreasonableness	The doctrine will be canceled and the court will not be able to use the reasonableness doctrine	<p><u>“Immunity” for all grossly unreasonable, arbitrary and capricious executive and administrative decisions. Rights of individuals will be infringed upon on a regular basis and the courts will not be able to help.</u></p>

² Since there is no *Basic Law: The Legislation*, and Israel has no written constitution or a secured bill of rights, **there exists no formal limitation on the content of Basic Laws nor special procedure for their legislation**, thus allowing the Israeli Parliament (Knesset) to legislate any Basic Law that comes to mind with a simple majority