

AJC's Position on Proposed Judicial Reforms in Israel (as of 2/2/23)

As the global advocacy organization for the Jewish people, American Jewish Committee (AJC) has been closely monitoring the debates and protests taking place in Israel over the issue of judicial reform. The nature of how this discussion is unfolding in Israeli society demonstrates that Israel's democracy is vibrant and strong.

Judicial reform is a complex issue, with legitimate arguments and varying perspectives over appropriate checks and balances and the division of powers between the Israeli Knesset and the Supreme Court.

The discussions around judicial reform are heightened and are likely to become even more contentious. Just as in any democratic, legislative process, the initial proposals are likely to evolve and be amended over time.

Whether judicial reform is necessary is up to Israelis to decide, but AJC has expressed to Israeli leaders that any changes to the institutions fundamental to the structure of Israel's democracy should be made as a result of a thoughtful, deliberative, and inclusive process that maintains checks and balances and protects and ensures minority rights and civil liberties for every Israeli.

Background on the Proposed Judicial Reforms

What are the proposed judicial reforms?

The proposed judicial reforms are a package of laws to overhaul the Israeli judicial system. They touch on several topics, including the composition of, and process of appointment to, the bench and the power of the Court versus that of the Knesset. The reforms were introduced by Justice Minister Yariv Levin from the Likud Party, which leads the current governing coalition.

What are the key judicial issues being discussed?

1. Selection of Judges:

- **Current system:** One of the proposed measures would change the current process of how judges are selected in Israel. Currently, there is a nine-person panel that selects all Israeli judges, which includes representatives from the legislative, judicial, and executive branches of the government, as well as from the Israeli Bar Association. Israeli law states that a nomination to the bench requires 7 out of 9 of the votes of this panel, so consensus on the committee is required.
 - The term of judges in Israel is indefinite until mandatory retirement at age 70, or resignation.
- **Proposed reform:** The proposed legislation would create an eleven-person panel that would include increased representation of Knesset members and ministers (one additional member of the Knesset and one additional minister), along with two members of the public appointed by the minister of justice in place of representatives of the Bar Association. The new composition of the panel would allow for a scenario in which the panel could have seven members from the same political party.

- **What proponents say:** Supporters of this change argue that it would make the process of picking new judges more democratic, as members of the Knesset and representatives of the governing coalition, whose parties were elected by voters, would make up the majority of the selection committee.
- **What opponents say:** Critics say this change would allow a governing coalition to appoint any judge that it wants—undermining the existing system of checks and balances. They argue that appointments could become political in nature, rather than based on a candidate’s ethical character and legal expertise.

2. Judicial Review and the Override Clause

Judicial review refers to the power of the judiciary to review and potentially overturn legislation passed by the Knesset on the grounds that it is “unconstitutional.” While Israel does not have a formal constitution (see below), the judiciary treats the Basic Laws, particularly the Basic Law on Human Dignity and Liberty, as having constitutional weight.

- **Current system:** Like the United States Supreme Court, the Israeli High Court of Justice can declare a law passed by the Knesset unconstitutional by a simple majority. The High Court does not have to sit as a full bench of 15 in order to do this; most cases heard by the High Court are heard by smaller banks of justices. The reason for this is that, unlike the U.S. Supreme Court which hears about 150 cases per year, the Israeli High Court of Justice hears over 10,000 cases per year because it sits as both an appellate court and a court of first intent with respect to issues of constitutionality.
- **Proposed reform:** The proposed reform would change this in three ways:
 - It would require any case in which there is judicial review of a Knesset law to be heard by the full bench of 15 justices.
 - It would require a supermajority of 12 of the 15 justices to declare a law illegal instead of a simple majority.
 - It would institute an override clause, which would give the Knesset power to override a decision of the High Court and reinstate an overturned law with a simple majority of 61 members of the Knesset (some are advocating for a higher number). Should the override clause be adopted, it would give the Knesset supreme legislative power. It would become nearly impossible for the High Court of Justice to intervene in laws passed by the Knesset.
- **What proponents say:** Supporters argue that this gives power back to the Knesset that was, in their view, unfairly usurped by the judiciary in 1995 when it ruled that it had the power of judicial review. This followed the 1992 enactment of the Basic Law on Human Dignity and Liberty. They also argue that this makes the operation of government in Israel more democratic, since the Knesset governing coalition is elected, and therefore represents the will of the people.
- **What opponents say:** Critics argue that this reform would give unlimited power to a governing coalition with none of the checks and balances necessary for a strong democracy. They also note that an unchecked legislature does not necessarily represent the will of the people since—because of the way votes are apportioned as Knesset seats in Israeli elections, the ruling coalition does not necessarily represent the majority of the electorate. Critics also argue that this measure is extreme, as court invalidation of Knesset legislation is infrequent (only 22 provisions of laws have been disqualified since Israel enacted the Basic Law on Human Dignity and Liberty in 1992).

3. Reasonableness Standard

- **Current system:** The High Court currently uses what is called the “reasonableness standard” to review executive and administrative orders; if the High Court finds such an

order “extremely unreasonable,” it can disqualify it. The reasonableness standard has roots in English law, and many countries have something similar. It has been a part of Israeli jurisprudence since the founding of the State. Although there is not a specifically defined standard for reasonableness, a common definition of an extremely unreasonable act is one that puts political interests ahead of the public’s own interests and security.

- **Proposed reform:** The proposed reforms would nullify the Court’s ability to use this standard.
- **What proponents say:** Supporters of this reform say that this will curtail an activist court, which they believe has inserted itself too much into governmental policy. They argue that the current balance between the power of the judiciary and the power of the legislature is unevenly distributed, leaning too heavily toward the judiciary.
- **What opponents say:** Critics are concerned that this will give carte blanche to a governing coalition to enact policies that could endanger civil rights and the status of minorities in Israel.

What is the process going forward?

The proposed reforms are legislative initiatives. As is the normal process in Israel, legislation can be initiated by Members of Knesset (individually or as a group) or through Knesset committees.

The draft of the legislation is then prepared for a first hearing in the relevant committee. The preparation includes discussions that can result in amending the draft legislation. After this first hearing, the draft is presented to the Knesset.

If the Knesset votes in favor, the draft returns to the committee for further discussions and amendments. This process is repeated for three rounds. At each stage, the legislation can be suspended or recalled by the member of Knesset who initiated the legislation. If the legislation passes the third hearing of the Knesset, it will be published as a law. **Given this process, it is likely that the final legislation will be different from the original draft.**

The President will then sign the legislation. This is solely a symbolic act; the President does not have the power to enact or overrule legislation in Israel.

ADDITIONAL QUESTIONS:

Why doesn’t Israel have a constitution? What exists in its place?

When Israel was founded, a committee in the Knesset was established to draft a constitution. Disagreements about what to include and questions about timing forced the committee to dissolve before it could produce a draft and all efforts since then have been equally unfruitful. That said, Israel has 12 Basic Laws, a quasi-constitutional set of laws regarding the composition and operation of government and the values of the country, including equality for all and protection of minorities. The Basic Laws are understood as being the building blocks of a constitution. Despite this, they do not carry constitutional weight; with few exceptions, the Knesset has the power to pass any legislation with a simple majority, even if it conflicts with a Basic Law.

It has been widely reported that these reforms could impact civil liberties or minority rights. Why?

The proposed reforms are not about civil liberties or minority rights. Rather, they pertain to the structure and operation of the judicial system and the relations between the legislative and judicial systems. Opponents of the reforms are concerned because some in the current government have stated their intentions to try to enact legislation that curtails civil liberties and minority rights, and that a reformed judicial branch will not have the power to address these issues.