Mandate of the Special Rapporteur on the independence of judges and lawyers

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Excellency,

I have the honour to address you in my capacity as Special Rapporteur on the independence of judges and lawyers, pursuant to Human Rights Council resolution 44/8.

The purpose of this letter is to share with you my comments and advice regarding a set of proposals put forward by the Minister of Justice, which, **if enacted without significant alteration, I believe would seriously undermine the independence of courts in Israel, including the Supreme Court. The proposals include measures that could harm the independence of legal advisers charged with guiding government ministries**. **Recalling that one of the main purposes of an independent judiciary is to protect human rights and check power that would endanger such rights, I have various comments regarding the compatibility of these legislative proposals with the international human rights law obligations binding on Israel**.

Specifically, the proposed legislative changes would likely:

- change the process of appointing judges,
- allow the Parliament to override decisions of its Supreme Court,
- give members of the Parliament the power to shield legislation from judicial review,
- direct the Supreme Court not to use certain standards in reviewing government enactments, and
- turn otherwise binding legal advice by government lawyers into advisory opinions.

In this context, I recall that Judicial independence is a bedrock requirement of the right to a fair trial, the right to equality before the law, and the right to a fair remedy for all manner of rights violations.

In this communication, I do not aim at providing a comprehensive analysis of the entire set of legislative proposals, or the historical performance of the Israeli Supreme Court. Instead, I focus on the possible impact of the proposals on judicial independence and the proposals' compatibility with international human rights law and standards.

Context

In Israel, the Supreme Court is both a court of appeal for review of decisions of lower courts, and a court with jurisdiction over matters "in which it deems it

necessary to provide relief for the sake of justice, and [which] are not under the jurisdiction of another court or tribunal".[1] It thus has the responsibility to limit the abuse of power by the legislature or the executive. Israel has a single parliamentary chamber, the Knesset, and no structurally independent executive. The Prime Minister is chosen by the Knesset and, unless a single party holds a majority of seats, is tasked with forming a government through coalition. The Prime Minister also appoints cabinet ministers, often drawn from members of the Knesset, who must be approved for these leadership positions. Any government is thus centrally involved in both the legislative and the executive branches. Because the majority holds power in both the legislative and executive branches, the judicial system has an important structural role as a check on the power of the other branches.

The proposed legislation

On January 11, 2023, Minister of Justice Yariv Levin published a memorandum setting out proposed legislative changes that could have the effect of limiting the power of the judicial branch. The Guiding Principles of the new government state it "(…) will take steps to guarantee governance and to restore the proper balance between the legislature, the executive and the judiciary." [2] Draft legislation aimed at implementing some portions of that proposal is currently under consideration by the Knesset. This draft legislation was submitted by the Chair of the Knesset's Constitution, Law, and Justice Committee, and will be submitted to the Knesset for a first reading as a bill of the Committee.

Changes to the process for selecting judges and the President of the Supreme Court

The legislation under consideration by the Knesset would amend Israel's Basic Law: The Judiciary (1984) and alter the judicial selection process by changing the composition of the country's judicial selection committee. The proposal would eliminate representation of the bar on the committee and ensure the parties of the coalition hold a majority of the seats. Currently, the selection committee is composed of nine members: two ministers, two members of the Knesset, three Supreme Court justices, and two members of the bar. This composition ensures that the majority of the committee are legal professionals (judges and lawyers). The new law would retain the size of the committee, but would change its composition and effectively replace two members of the bar with two individuals from the government. Specifically, rather than two ministers on the committee, there would be three, including the Minister of Justice. The committee would also include three members of the Knesset, including the Chair of the Constitution and Law Committee, one member from the parties of the coalition and another from the parties of the opposition. The number of judges would remain the same, with the Court's President on the committee in addition to two retired judges. Any ruling coalition would therefore have a majority on the committee and thus the unchecked power to appoint judges, including Supreme Court Justices. Currently, appointments of judges to the Supreme Court require support of seven of nine members of the judicial selection committee; however, the legislation under consideration changes that to a simple majority of only five out of nine.

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1 Basic Law: The Judiciary, sec. 15(c), https://m.knesset.gov.il/EN/activity/documents/BasicLawsPDF/BasicLawTheJudiciary.pdf,

2 Judicial reform, boosting Jewish identity: The new coalition's policy guidelines | The Times of Israel

Although not in the current draft legislation, the Minister of Justice has indicated in his comments his intention for the Selection Committee to break from the tradition according to which the president of the Supreme Court is appointed by seniority and serves as such until retirement. Instead, the Minister of Justice suggested that the Committee would be free to appoint as president of the Supreme Court an individual who was not already serving on the Supreme Court, and that the mandate of the president could be limited to a single term of six years. The president of the Supreme Court has the power to decide such important matters as the number and identity of the judges presiding over a case.

Subjecting the selection of judges to a process in which political considerations may easily prevail over the objective merits of a candidate would be contrary to international standards concerning the independence of the judiciary which stipulate that States must take specific measures to protect judges from any form of political influence in their decision-making, including by adopting clear procedures and objective criteria for appointment, suspension and dismissal[3]. Political control of judicial appointments may affect the professionalism of the judiciary.

Ability of the Knesset to override a decision of the Supreme Court and insulate laws from review

Under the Minister of Justice's proposal, legislative changes would introduce an override clause into Israel's Basic Laws, enabling a simple Knesset majority (61 votes in 120-seat parliament) to re-instate a law that has been struck down by the Court. This would allow the Knesset to essentially over-rule the Supreme Court, even if the law was struck down as unconstitutional because it violates one of Israel's Basic Laws, which have quasi-constitutional status.[4] A law that is thus reinstated would be immune from judicial review for four years or for one year after the election of a new Knesset. For laws declared to be unconstitutional by a unanimous Supreme Court, the Knesset would have to wait until a new term before over-ruling the Court.

The Minister of Justice's proposed legislative changes would also prevent the High Court from striking down Knesset legislation without a "special majority" of twelve out of fifteen justices. The draft submitted by the Chair of the Knesset's Constitution, Law, and Justice Committee would prohibit judicial review of Basic Laws or amendments to them. Since the Basic Laws can currently be amended by simple majority, the effect of this proposal would be to allow the Knesset to immunize legislation, shielding it from judicial review.

These proposals directly impact the balance of powers between the legislative and judicial branches, tilting significantly in favor of the political body and impact the nature of a tribunal. In international standards, the very notion of tribunal is a body that is "established by law, is independent of the executive and legislative branches of government or enjoys in specific cases judicial independence in deciding legal matters in proceedings that are judicial in nature"[5].

[3] CCPR/C/GC/32, para 19

[4] In 1995, the Supreme Court determined that Israel's Basic Laws have constitutional status. It also held that the Court had the power to review legislation passed by the Knesset, and that it could strike down legislation it found to be unconstitutional (incompatible with the Basic Laws).

[5] CCPR/C/GC/32, para 18.

International standards provide that equality before the courts and tribunals and to a fair trial is a key element in human rights protection[6]. These proposed changes may signify that the Supreme Court may be unable to play even its current role in curbing some forms of discrimination against minorities and marginalized communities. These populations could be made more vulnerable to the will of the majority and severe human rights violations if the Court is weakened. Observers have drawn attention to the potential impacts of the proposed changes on the rights of LGBTQ+ persons, religious minorities, and asylum-seekers.

The proposed changes would have a particularly harmful impact on the human rights of Palestinian citizens of Israel and Palestinians who reside in the Occupied Territories. Human rights Treaty Bodies have expressed their concerns that Palestinians are discriminated against by Israeli law and deprived of many basic civil rights[7]. If the Court is effectively stripped of its ability to meaningfully review legislation, Palestinians in the Occupied Territories, who are subject to an "entirely different legal system"[8], would live in even greater precarity if the legislature can shield its actions from judicial scrutiny. .

An end to the reasonableness standard

The Minster of Justice's proposed legislative changes propose that "the Court shall not review the reasonableness of the discretion of the government, its ministers and any authorities subject to the review of the Knesset", and would thus end the Supreme Court's ability to apply the reasonableness standard, which it uses to strike down as unlawful government or ministerial decisions that it finds highly unreasonable. By directing the Court not to use a standard it has developed and applied over many years—especially in the context of a proposal that contains other measures that would weaken judicial independence—the proposed legislation interferes in the inherent judicial role of interpretation, preventing the Court from independently determining the legality of executive and legislative actions. Judges have the essential function to use reason, establish doctrines, and develop standards for identifying the bounds of the law[9].

This mandate has also stressed the importance of the separation of powers as pre-requisite for the independence of the judiciary and its role in protecting human rights. In the 2009 report to the United Nations Human Rights Council, the mandate on Independence of Judges and Lawyers recalled that "[t]he principle of the separation of powers, together with the rule of law, are key to the administration of justice with a guarantee of independence, impartiality and transparency"[10]. Furthermore, in the 2017 report to the Human Rights Council, the Special Rapporteur highlighted that "respecting the rule of law and fostering the separation of powers and the independence of justice are prerequisites for the protection of human rights and democracy"[11].

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6 CCPR/C/GC/32, para 2.
7 CERD/C/ISR/CO/17-19 para. 15; CCPR/C/ISR/CO/4 para. 7.
8 CERD/C/ISR/CO/17-19, paras. 21-22.
9 CCPR/C/GC/32, para 18; and Basic Principles on the Independence of the Judiciary, Principle 2
10 A/HRC/11/41, para. 18.
A/HRC/35/31, para. 16

An additional threat to the independence of legal advisers

The Minster of Justice's proposed legislative changes would affect the independence of legal advisers, who have been, until now, legal counselors who opine on the legality of ministries' policies and actions. Currently, all government ministries have legal advisers who are appointed by professional tenders, and are subject to the authority of the Attorney General. The proposed changes would allow ministers to select advisers themselves, potentially impacting their loyalty. In addition, the proposal would transform otherwise binding legal advice by advisers into mere opinion that the government and individual ministers could disregard at will. This proposal could harm the ability of government lawyers to act as independent public servants.

Each of these proposed changes raises questions under international human rights law and standards. Taken together, they could amount to a serious threat to the functioning of Israel's judicial system and separation of powers as they relate to international standards.

Procedure for these changes

The first bill of a "judicial reform" legislation package, announced by the Government on 11 January, to amend Israel's Basic Law on the Judiciary passed a Knesset Legislation Committee vote on 13 February, and will be debated in the Knesset later this week. Changes of this scope to any country's judicial system should involve careful deliberation and considered consultation of those whom the changes would impact. These discussions required inclusive debate, adequate time and breadth to encompass a sufficiently broad diversity of relevant stakeholders in order to move forward.

Judicial independence, meaning the "actual independence of the judiciary from political interference by the executive branch and legislature," is an essential requirement of human rights law without exception.[12]

As it is my responsibility, under the mandate provided to me by the Human Rights Council, to seek to clarify all cases brought to my attention, I would be grateful for your observations on the following matters:

1. Please provide any additional information and/or comment(s) you may have on the above-mentioned analysis.

2. Please explain how Your Excellency's government will protect the Supreme Court's ability to conduct judicial review.

3. Please identify measures that will prevent the politicization of the Supreme Court.

4. Please share information on any additional measures to protect the human rights guaranteed by Basic Laws, especially as Basic Laws become more easily amended.

5. Please identify the steps Your Excellency's government will take to ensure that additional discrimination against Palestinian citizens of

[12] UN Human Rights Committee, General Comment No. 32.

Israel and harms to Palestinians in the Occupied Palestinian Territories will not transpire in the context of limited judicial review.

This communication, as a comment on pending or recently adopted legislation, regulations or policies, and any response received from your Excellency's Government will be made public via the communications reporting website after 48 hours. They will also subsequently be made available in the usual report to be presented to the Human Rights Council.

I stand ready to provide Your Excellency's Government with any technical advice it may require in ensuring that the proposal is fully compliant with international human rights obligations.

Please accept, Excellency, the assurances of my highest consideration.

Margaret Satterthwaite
Special Rapporteur on the independence of judges and lawyers