

Restoring Trust in Politics

Reinforcing Constitutional Foundations



Constitutional Reform for Israel

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1. Introduction

This document presents a plan put forward by the Israel Democracy Institute for constitutional reform in Israel. The unprecedented political and constitutional crisis that has gripped the country over the last few years, alongside the immense health and socioeconomic challenges posed by the COVID-19 pandemic, make it essential to overhaul the constitutional rules of the game in Israel.

The Israeli State is grappling with the effects of the COVID-19 crisis after a long period of political struggle over democratic values and institutions. This struggle has in some cases found expression in populist accusations against the legal system at almost all levels; fierce attacks on the gatekeepers of the legal system and the system of law enforcement; systematic attempts to severely curtail the scope of the Supreme Court's powers; fundamental changes to the system of government hastily carried out through amendments to Basic Laws; new legislation which appears incompatible with a commitment to equal rights for the country's Arab minority; and challenges to the equilibrium between the two value components of the State's identity – the Jewish and the democratic components.


These troubling trends, which have been our lot now for a decade, have escalated in recent years and are systematically eroding our political and constitutional norms. They do not represent legitimate political and public debate—in an age when there are so many issues worth arguing about—but rather, attacks on the fundamental democratic structure of the country, the very structure that allows the functioning of the political system and makes it possible for all sectors of Israeli society to exist side by

side. After four rounds of elections, it is vital to sound the alarm regarding the democratic values and institutions that must be protected. But it is also vital to propose a proactive plan for constitutional reform that will make it possible to rehabilitate public trust in the political system and fortify the constitutional foundations of the State of Israel.


At the present time, the country's constitutional challenge is nothing less than a strategic priority. Alongside social and economic programs, and reforms to Israel's electoral system and system of government, it is essential to put forward a plan to strengthen Israel's constitutional and legal framework. Following a long period of political crisis, we face a very great danger: that is, that politics will lose its relevance and legitimacy as an arena for settling social disputes, and that the political system will break free from pre-existing checks and balances which all agree are necessary, regardless of political orientation. In an age when internal issues are evolving into Israel's most serious challenges, it is essential that its political parties and its new government place constitutional reform at the top of its list of priorities.


And so, the new government should lead a process of amending and updating Israel's constitutional framework, including by addressing issues that have been put aside in the past, but which now threaten the functioning of the political system and can no longer be avoided. This constitutional reform must strengthen, not weaken, Israeli democracy.


Thus, we propose:

 **Safeguarding Basic Laws.** Passing a Basic Law: Legislation which will define the legislative powers of the Knesset and safeguard Basic Laws from

being altered by a fleeting coalitionary majority. In this way, Basic Laws will provide stability to the political-constitutional system.

 **Anchoring powers of constitutional judicial review in a Basic Law**, thus providing a model for a healthy constitutional dialogue between the Knesset and the courts.

 **Constitutional rights and freedoms.** Bolstering the constitutional bill of rights, and passing new Basic Laws to fortify the protection of constitutional rights and freedoms, particularly - the right to equality.

 **Political commitment to protecting the legal system and its gatekeepers.** In a time of aggressive attacks on the law enforcement system in Israel, the Israel Democracy Institute calls on all political parties and on the new government to commit to resolutely protecting the system's gatekeepers, to highlight their important democratic role, and to refrain from delegitimizing them in public discourse.

We call on all political parties to adopt the Institute's constitutional plan, and we call on the new government to follow the steps laid out in this proposal as part of the legislative agenda it adopts.



2. Codifying the Status of the Basic Laws and of Constitutional Review of Legislation

The State of Israel's inadequate constitution, comprising the 13 Basic Laws passed to date, suffers from a number of lacunae, with one of the most central- being the lack of a Basic Law regulating the legislative authorities of the Knesset and safeguarding the special status of the Basic Laws themselves.

Basic Law: The Knesset, states that the Knesset, with 120 members, is the state's house of representatives, but it does not anchor the Knesset's legislative powers in law. At present, most of the regulation relating to legislation is found only in the Knesset Rules of Procedure. The Basic Laws, which as stated, are Israel's constitution-in-the-making, are not passed via any special process and do not require a special majority in order to be passed or amended, with the exception of amendments to specific Basic Laws that are protected by a majority of Knesset members (61 out of 120)—a majority easily achieved by a stable government, and a handful of other Basic Law provisions requiring a super-majority for deviating from them.

This state of affairs has intolerable consequences: Israel's Basic Laws—which dictate the “rules of the game” with regard to the system of government, the separation of powers, the electoral system, human rights, and the rule of law—are constantly in the balance. Almost all of them can be changed or repealed by a slim majority of 61 Knesset members. This constitutional situation is highly unusual in the modern democratic world. Practically, every other constitution in the world provides for a special process for amendments to be made—through a special majority of two-thirds, ratification by two houses of parliament,

presidential consent, referenda, requirement to hold elections in between readings of the amendment, or similar measures. In many countries, requirements include two or more on of the above. In no other country is it possible to amend provisions of the constitution through a slim, at times even simple, majority, and in some cases—through three readings in a single day, as is the case in Israel.

This anomaly is not merely theoretical in nature. The intolerable ease with which Basic Laws can be changed in Israel reflects a political culture that views such amendments as an almost trivial matter, and indeed—in recent years, amendments have been too frequent, eroding the stability of the system of government. Since the early 1990s, Israel’s Basic Laws have been amended approximately 30 times per decade, and this trend has gained momentum over the last few years, abusing the Basic Laws by making hasty substantive amendments to them. A recent example of this was the “rotating government” amendment made following a marathon debate lasting several days and nights, which represents a fundamental change in the Israeli system of government and which came into effect immediately. Similar substantive amendments have been made to the Basic Law: The State Budget.

This state of affairs spawns extreme instability of the fundamental norms of the state. The knowledge that all these norms are essentially up for discussion at any given time, and can be altered by a Knesset majority, creates an incentive for holding frequent elections. Politicians are aware that the balance of relations between the branches of state, as well as the rules governing fitness for holding public office, can be remolded if a majority can be won following elections. This situation of passing and amending Basic Laws also lowers their status, making it difficult for them

to be recognized and respected as the supreme norms of the legal system and as fundamentally different from other laws. It also raises fears of their misuse- especially by the ruling government—in order to reinforce its hold on power and reduce the possibility of being replaced.

We therefore recommend instituting a Basic Law: Legislation, which will constitutionalize the relations between the branches of government in Israel. The following are the main points of the proposed law:

- 1.** Anchoring in law the special status of the Basic Laws relative to regular legislation.
- 2.** Anchoring in law the powers of the Knesset to pass laws, as well as the process of legislation.
- 3.** Safeguarding all the existing Basic Laws by requiring a majority of 80 Knesset members for amendments to be made (with the exception of very specific laws and clauses which are not customarily viewed as constitutional legislation or which require a degree of flexibility; these will be protected by a majority of just 61 Knesset members).
- 4.** Anchoring in law the process of constitutional amendments, by instituting a special procedure for passing or amending a Basic Law. This procedure will require that Basic Laws are put forward only by the government, by the Knesset Constitution, Law and Justice Committee, or by at least 25 Knesset members. Passing a Basic Law will require four readings in the Knesset, with the fourth reading taking place in a session dedicated exclusively to that issue and requiring a majority of 80 Knesset members.

Alongside the safeguarding of Basic Laws, our proposal for a Basic Law: Legislation, also includes an indirect amendment to the Basic Law: The

Judiciary, which will recognize the authority of the Supreme Court to apply constitutional review to Knesset legislation. This constitutional grounding of the power of judicial review over the validity of laws is particularly significant at this point in time in Israel, and indeed at any time, because it is an important aspect of regulating the relationship between the branches of state—particularly against the backdrop of the public disagreement with regard to the balance of power between the Knesset and the courts.

The following are the main principles of our proposal for anchoring the courts' powers of constitutional review in law:

- 1.** Restricting constitutional review exclusively to the Supreme Court.
- 2.** Requiring an expanded quorum of the Supreme Court in order to strike down a law passed by the Knesset, consisting of at least two-thirds of all Supreme Court justices.
- 3.** Stipulating that when the Supreme Court finds a particular law to be unconstitutional, the default will be to suspend the expiration date of the bill and return it to the Knesset for it to be passed again (with necessary amendments) within a year of the Court's decision. This proposal stands in contrast to the current default arrangement, whereby if a law is ruled unconstitutional, it is immediately struck down. The proposal thus puts forth a model of constitutional dialogue which allows the Knesset to examine constitutional aspect of the law and amend it in line with the Supreme Court's ruling.



3. The Bill of Rights: Renewing Legislation on Fundamental Rights

The Israeli constitutional model consists of Basic Laws, passed “chapter by chapter,” which when combined, are eventually supposed to comprise the state’s future constitution. While some components have already been completed, major components are still missing. Several of the basic rights anchored in almost every constitution around the globe have yet to be included in a Basic Law in Israel. The courts have an important function in providing constitutional protection for certain rights via legal interpretation, but there is a limit to what can be achieved in this manner, and these protections are dependent on judicial rulings that can change from time to time. Anchoring constitutional rights in Basic Laws will allow the Knesset to shape the content of Basic Laws and the protection they provide to fundamental rights more clearly and permanently.

Protecting human rights is justified on the basis of moral and historical principles as well as in the light of the local experience and context. The formulation of the bill of rights can and should take into account the state’s constitutional history and its unique characteristics. However, the constitutions of liberal democracies almost always include several rights and freedoms “which are very noticeably absent from our legal system”¹ and from our Basic Laws here in Israel. The most important of these rights and freedoms have come under fierce attack in recent years, chief among them being the right to equality and the right to freedom of expression and protest.


Constitutional Protection of Rights is a Precondition for all Regulation of Separation of Powers


Regulating the relations between the branches of government and anchoring the role of judicial review in law cannot be accomplished without first

1 [Constitution by Consensus: Israel Democracy Institute Proposal](#), 2005, p. 139.

addressing the need for constitutional anchoring of the bill of rights and expanding the list of protected human rights.

The Israel Democracy Institute maintains that Israel must introduce a comprehensive bill of human rights, as recommended in the Institute's "Constitution by Consensus" proposal. However, at the current time, facing a global health and economic crisis as well as a political and constitutional crisis, the new government must, at the very least, pass several new Basic Laws that will proactively ensure the protection of essential constitutional rights and of the Supreme Court's role in defending them. We call on the incoming government and on the parties represented in the Knesset to adopt the following new Basic Laws:

 **Basic Law: The Declaration of Independence.** Israel's Declaration of Independence serves as a source of inspiration for legal interpretation, including in constitutional interpretation, and whose power varies from context to context. However, Israel has no explicit constitutional arrangement stipulating that all the country's legislation, including other Basic Laws, should be interpreted in light of the principles enshrined in the Declaration of Independence. Introducing such an arrangement, alongside the proposed entrenchment clause, will safeguard the status of the Declaration of Independence as a mandatory source of inspiration for all legal interpretation in Israel. This has special importance in light of the Declaration's recognition of both the Jewish character of the State of Israel and the civic equality of its Arab citizens.

 **Basic Law: Equality.** Efforts should continue to pass the Basic Law: Equality, which has undergone a preliminary reading and preparation for a first reading in the 23rd Knesset. The Israel Democracy Institute has prepared a comprehensive proposal presenting the appropriate model for establishing the constitutional right to equality in Israel.

⊗ **Basic Law: Freedom of Expression and Assembly.** This law will establish the constitutional right to freedom of expression and the right to demonstrate in a Basic Law.

⊗ **Basic Law: Rights Before the Law.** The rights of citizens and residents during legal proceedings are fundamental to the rule of law and grant legitimacy to the democratic system. Currently, there is no protection in the Basic Laws of fundamental rights protected by modern democracies such as: the right to seek legal remedy, the right to due process, rights of detainees and prisoners, the right to representation and to a defense against charges, the right to the presumption of innocence, the right to punishment only as prescribed in law, and the right to a fair administrative process.

⊗ **Basic Law: Economic and Social Rights.** At a time of socioeconomic crisis, with social cohesion under threat, the need to anchor social and economic rights in legislation is more important than ever. Doing so would bolster democratic resilience and enhance the wellbeing of individual citizens. It would also anchor a general commitment of the state to respect the rights to education, health, housing, a basic standard of living, and social security, in the constitution. This overarching commitment would bar any arbitrary denial of access to rights, and would require (subject to budgetary limitations) the gradual advancement of the provision of basic public services, which would be defined in law as deriving from these rights.

⊗ **Basic Law: Collective Cultural Rights.** Citizens' affiliation with ethnic, religious, cultural, or linguistic groups is an important component of their identity. Comparative law and international law recognize the need for constitutional protection of the ability of these groups to preserve and develop their culture, religion, language, and heritage on a collective basis.

4. The Legal System: Independence, Accountability, Social Representation, and Transparency

We propose instituting the reforms detailed below to the judicial branch, the prosecutorial and law enforcement authorities, and the Attorney General's Office. The proposed reforms are designed to protect the legal system and realize the principles that undergird the work of these institutions, for the good of the Israeli public: independence, accountability, transparency, and representation of all segments of society.

The Status of the Judicial Branch

There is currently no law in Israel that defines the "judicial branch" and grants it an equal constitutional standing to that of the two other branches of state. Moreover, although judicial independence is anchored in the Basic Law: The Judiciary, the institutional independence of the court system and its status as a separate "judicial branch" are not anchored in law.

We recommend formally establishing an independent judicial branch by amending the Basic Law: The Judiciary, so that it recognizes the court system as the state's judicial branch. Amendments should be made to existing law so as to enhance the administrative independence of the judicial branch from the government when it comes to court orders, budget, administrative personnel, administrative arrangements, management of judiciary personnel, and establishment of new courts. Awarding constitutional independence to the judicial branch is a necessity in every democratic system, and is particularly important given the current political circumstances in Israel.

Prosecutorial Authorities, Law Enforcement Authorities, and the Attorney General

On the one hand, the criminal prosecution system in Israel is largely decentralized, but on the other, is also extremely powerful. Prosecutors have great leeway in deciding whether or not to issue an indictment. Moreover, many proceedings end in plea bargains, for which judicial review is not effective, and furthermore, in the Israeli legal system, which is based on confrontation between the prosecutor and the defender in criminal proceedings, there is an inherent risk that prosecutors will mistakenly view their role as gaining a conviction at any cost. In this context, we recommend instituting the following reforms:

- 1.** Expanding the powers of the Public Commission for Complaints against Representatives of the State in Legal Proceedings, specifically—giving it the power to carry out system-wide reviews.
 - 2.** Combining the Israel Police Prosecution Division with the State Attorney's Office, or alternatively, increasing oversight over the former, by means of a central unit in the State Attorney's Office.
 - 3.** Increasing the transparency and accountability of the Attorney General's Office by publishing a multi-year work plan and a detailed annual report, which will make the Office's activities public, according to a format to be decided upon.
 - 4.** Upgrading the system for investigating complaints against police officers. Steps should be taken to improve the effectiveness of the Department of Internal Police Investigations in the State Attorney's Office, to strengthen the independence and transparency of the departments within the Israel Police responsible for investigating complaints, and to improve the interface between these systems.
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Senior Appointments in the Law Enforcement System and the Judicial Selection Committee

1. Senior officials in Israel's law enforcement system play an important role in the country's system of checks and balances, and hence it is vital to maintain their independence. Therefore, an examination should be made of the need to strengthen the mechanisms of professional oversight over senior appointments in the law enforcement system so as to prevent unworthy appointments. For example, it is worth considering adding threshold conditions for appointees to senior legal positions, as well as empowering independent oversight mechanisms to ensure that appointed senior officials meet professional standards.

2. The principles behind the system of selecting judges, which aim to balance the independence of the legal system against its accountability should be maintained by means of preserving a balanced composition of the Judicial Selection Committee (judges, politicians and leaders of the legal bar). Particularly in Israel, which has almost no other checks against the political majority, it is vital to protect the professionalism of the judicial selection process and to prevent it from becoming entirely political (as has been put forward in several proposals made by politicians), with a view to ensuring judicial independence and bolstering public trust in the judiciary. At the same time, we propose the following changes, which are designed to put into practice the principles behind judicial selection in Israel:

a. Anchoring in law the constitutional tradition of choosing a representative of the opposition to serve on the Judicial Selection Committee. This would involve amending the law to require that at least one of the two Knesset members on the Committee is appointed from and by the opposition.

b. Diversifying the way in which the institutions of the legal profession select their representatives to the Committee. Options include: one of the representatives of the legal profession will be selected by a forum of deans of university and college law faculties; one representative will be the president of the Israel Bar Association Disciplinary Court; or one representative will be chosen by members of the opposition parties in the Israel Bar Association National Council.

c. Fortifying the independence of the members of the Judicial Selection Committee by requiring all members to declare at the beginning of their term of service that they will vote according to their own personal judgement. Committee members should be made aware and reminded of the rules against conflict of interests when voting.

d. Publishing the Judicial Selection Committee rules regulating the framework and content of the preparatory training course for judges as well as the relative weight given to assessments of candidates by the course instructors, and also publishing the rules that regulate the work of an advisory committee on exploring promotion possibilities within the judicial system (the “Committee of Two”). It is also worth considering increasing the transparency of the Judicial Selection Committee’s work on appointing judges, by reporting to the public the main considerations used in selecting candidates.

e. The Judicial Selection Committee should display greater commitment to the principle of social diversity of the courts. It should actively pursue initiatives that will lead to the inclusion of minority groups and women in the list of candidates for judicial appointments and on the judicial benches of courts at all levels (including the Supreme Court).

5. Warning Signs: Initiatives Harmful to the State's Democratic Character

Many initiatives put forward in Israel over the last decade, mainly legislative initiatives, run the risk of dealing a substantial blow to the democratic character of the state and its institutions. In this context, attacks on the legal system and the institutions responsible for upholding the rule of law have been greatly ramped up in recent years. We believe that initiatives aimed at weakening the independence and power of law enforcement agencies and the legal system should be resisted; on the contrary, these bodies should be protected and strengthened.

Attempts to Undermine the Rule of Law: The Immunity Law and the "French Law"

The most potent example of an attempt to attack the rule of law in its formal, most basic sense, according to which "every person is subject to the law," is the "French Law" that was put before the 20th Knesset. This bill, which attempts to introduce immunity from legal proceedings for a serving Israeli Prime Minister, exists in some presidential democracies, but is not suitable for a parliamentary democracy like Israel where the Prime Minister is first among equals and where no term limits exist. We consider such legislation as undermining the very core of the rule of law, according to which the law applies equally to every citizen. It would place the head of the executive branch of state, the country's leader who is expected to provide a personal example for all its citizens, above the law. In the course of the 20th Knesset, and even more so following the elections for the 21st Knesset, other bills were introduced, targeted at amending the Law of Immunity for Knesset Members providing that the Attorney General would be required to request that the Knesset strip Knesset members of their

immunity in order for them to be brought to trial (whereas currently no immunity is the default rule). This is an attempt to turn back the clock to the legal situation that applied in Israel before 2005.

We believe that the Basic Law: The Government, should be amended to include a stipulation mandating the suspension of a serving Prime Minister if he or she is indicted for a serious offense that carries an element of “moral turpitude.” The purpose of such an amendment would be to ensure that Israel will again not be forced to endure a situation in which a Prime Minister indicted for bribery continues to serve in office, despite the grave conflict of interests involved, and the serious damage to public trust in government as a result. During this period of suspension, the Prime Minister would be able to appeal to the Supreme Court against the decision to issue an indictment against him/her. In addition, we oppose repealing the rule according to which Knesset members are, by default, not immune to prosecution, that is—that active intervention by the Knesset is necessary in order to grant them immunity.

Attempts to Limit Constitutional Review: The Override Clause

In recent years, there have been repeated attempts to grant the Knesset the power to quash Basic Laws by means of an Override Clause. There have been many different initiatives of this kind, but common to them all has been the idea that a regular law passed by the Knesset can override Basic Laws or a court verdict that a particular law is unconstitutional.

Some versions of the proposed override clause stated that a majority of just 61 Knesset members would be sufficient to override Basic Laws. In Israel, in which there are almost no other checks and balances apart from judicial review (the country does not have two houses of parliament, and has no real separation between the government and the Knesset, since

the parties comprising the former have a majority in the latter, does not have an electoral system based on regional constituencies, lacks a stable constitution, and is not subject to international courts),² granting such powers to the Knesset would give the ruling coalition unlimited power. The ruling political majority in the Knesset would have absolute power to infringe on any human right or principle of democratic rule, even if it enjoyed the support of only the slimmest majority of Knesset members. This would be an extremely dangerous situation, one without precedent in the democratic world.³ We believe that these proposals should be unequivocally rejected, and a Basic Law: Legislation, be adopted to regulate constitutional dialogue between the Knesset and the courts.

Attacks on the Model for Appointing Law Enforcement Gatekeepers and on their Powers

Any attempts to restrict the authority of the Attorney General, the State Attorney, the police, the state comptroller, and the judicial branch should be resisted. The robustness of these institutions is essential to upholding the rule of law and to the struggle against government corruption. The government and its ministers should be required to respect the independent status of these gatekeepers and to refrain from any actions designed to intimidate them, limit their powers, or interfere in their work.

We recommend that future governments will include in their coalition agreement a core commitment similar to that found in the core principles of the 27th government headed by Benjamin Netanyahu: “The government will operate in accordance with the founding principles of democratic rule and will respect the status and decisions of its systems of oversight—the Knesset, the courts, the State Comptroller, and the Attorney General.”

² Amichai Cohen, “The override clause: Checks and balances of Israel’s political institutions and legal system,” May 2018, *Israel Democracy Institute*.

³ Amir Fuchs, “How is the override clause administered in Canada, and why is it again the subject of public discussion?,” May 22, 2019, *Israel Democracy Institute*.

Respecting the Authority of the Attorney General

For the most part, the status of the Attorney General and of the entire system of legal counsel to the government is not regulated by legislation. The Attorney General's standing and function are based to a considerable extent on constitutional custom, on government resolutions, on reports of public commissions, and on court rulings. The two main tools allowing the Attorney General to act as an effective gatekeeper of the rule of law are not anchored in legislation, and thus it is easy for them to be quashed by a simple majority in the Knesset: The first tool is the binding status of the Attorney General's legal opinion with respect to the government, and the second is the Attorney General's exclusive authority to represent the state in court, according to his or her professional judgement. These tools are both justified and essential because of the clear precedence of the Attorney General—and of the legal system under his or her authority over other parts of the government with regard to interpretation of the law, and the importance of ensuring that the government speaks with one voice vis-à-vis the other institutions of state. There is also a danger that breaching these two dams will entirely topple the system of professional and independent legal counsel to the government. Thus, the Attorney General's standing in these matters must be protected at all costs, as must the independent status of legal advisers to government ministries, including maintaining the professional process for their appointment.

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