

## **NO to Override Clause, YES to Repeal of Validity of Laws Article in Basic Law: Human Dignity and Liberty**

In this policy paper, we will show how the emerging coalition's intention to enable the Knesset to override Supreme Court rulings represents a serious violation of human and civil rights. We will then propose an alternative for expanding the protection of human rights based on a repeal of the Validity of Laws Article in Basic Law: Human Dignity and Liberty.

### **What Is the Override Clause?**

The override clause in the format currently being discussed in the coalition negotiations will allow the Knesset, by an as yet unknown majority, to overturn any Supreme Court ruling that invalidates a law and to enact laws that will be immune from any future judicial review. Such a clause is expected to affect the existing protection of all the rights and instruments of government enshrined in Basic Laws, impair the protection of human rights in Israel and in the Occupied Territories, and impinge on the Supreme Court's ability to protect human rights. In other words, it will affect the human rights of all of us.

At present, when the Supreme Court overturns a law, the Knesset is required to amend the pertinent Basic Law in order to legitimize the violation of human rights. The proposed override clause will obviate the need for any such amendment, as it will allow the Knesset to reverse, either in advance or retroactively, any ruling stating that a law violates a constitutional right and does not meet constitutional requirements.

Indeed, an override clause already exists in Israel's law books, in Basic Law: Freedom of Occupation, and its characteristics illustrate how dangerous is the one being proposed now. The existing clause applies to a single right, which despite its importance is not at the core of human rights. Its enactment came about due to the need to find a concrete solution to a specific problem (restricting imports of non-kosher meat), and it has never been used other than in this case. The proposed clause, on the other hand, would apply to all constitutional rights, including the rights to equality, dignity, elect and be elected, liberty, freedom of speech, freedom of conscience, freedom of religion and from religion, privacy, property, exit and enter Israel - in fact to all the rights currently enjoying constitutional protection, not to mention that it would enable personalized legislation that would seriously damage the rule of law and the battle against corruption.

Although a study has found that compared to other democratic countries Israel's Supreme Court hardly ever invalidates laws, the existence of the very rare option to overturn a law has had a restraining effect on the legislative process in the Knesset and has provided legal advisors of Knesset committees and Attorney General's officers with leverage to tone down extreme and predatory bills. In other words, the meaning of the proposed override clause is not only that the Supreme Court will not be able to annul laws that violate human and civil rights, but also that more such dangerous laws are expected to be enacted.

## Checks, Balances, and Human Rights

Human rights are based on the recognition that the power of the majority, any majority whatsoever, is limited. To curb the power of the majority, almost all democratic countries in the world have adopted a mechanism of judicial review that allows the court, which is an autonomous body independent of other authorities, to reverse legislation that unlawfully harms human rights. These limitations on the power of the majority do not only not harm democracy, but enable its existence.

An override clause is particularly problematic in the Israeli political system, which is not based on a strong system of checks and balances. In the few countries that have not adopted judicial review or in countries where there is an override clause, there are other mechanisms designed to curb the power of the political majority. Thus, some have a federal regime that distributes power between the central government and the states; some have a bicameral and possibly contrarian legislature; some have a presidential regime where a clear separation exists between the executive and legislative branches; and yet other countries subordinate their laws to international treaties and tribunals, such as the European Court of Human Rights.

Such checks and balances do not exist in Israel. Under our parliamentary system, the government has a majority in the Knesset or else it would almost always lose a vote of confidence, and most of the bills that become laws are submitted by it. Therefore, given the majority enjoyed by the current coalition, a decision enabling the Knesset to overturn a Supreme Court ruling, either in advance or retroactively, would be tantamount to giving the government unlimited power to violate human rights.

Israeli politics being what it is, the fear is not only about an override clause that hinges on a majority of 61 MKs, but even about one that requires a greater majority. Sadly enough, in certain contexts, support for the denial of human and civil rights as well as the rights of women, LGBTQ, religious and national minorities cuts across political parties and is a matter of "bargaining."

## One Step Forward, Two Steps Back

The proposed override clause will set Israel back decades in the protection of human rights. Indeed, we think that the protection of human rights that exists today is not optimal and Israel still has a long way to go on the subject. However, there is no doubt that the achievements attained to date, be they few or many, will be in danger of extinction from the moment every human right is once again made dependent on a political majority.

Israel made progress in recent years in protecting human rights, with the help of both court rulings and specific laws banning discrimination. For example, an important step in this direction was the Supreme Court's ruling that the rights to equality and to freedom of expression are part of the protection of human dignity. Of course, still more steps are needed to balance other laws that violate human and civil rights, such as **Basic Law: Israel-Nation State of the Jewish People and the amendments of the Admissions Board Law**. To strengthen and expand the protection of human rights in Israel, first and foremost the right to equality, Zulat proposed to enact [Basic Law: Equality](#) and, on the

occasion of its 30th anniversary, it recommended amendments to [Basic Law: Human Dignity and Liberty](#).

The override clause that the emerging government will promote will not only undermine any attempt to strengthen and improve the protection of human rights, but will thwart it altogether. Basic Law: Human Dignity and Liberty will remain on the books, but only as an empty shell. The constitutional rights anchored therein, which aim to restrain the power of the majority in the Knesset, will not be revoked but will exist only on paper. Given that any law invalidated by the Supreme Court could be reinstated by the Knesset with whatever majority enjoyed by the coalition, the protection of human rights in Israel will at most be conditional and hinge on the good graces of the political majority.

For example, the Judea and Samaria Settlement Regularization Law that enabled the appropriation of privately-owned Palestinian land and its transfer to Israeli ownership (subsequently overturned by the Supreme Court because it infringed on the right to property) could be reinstated, as could the law that allowed the prolonged incarceration of asylum seekers at the Holot facility in the Negev (subsequently invalidated because it violated the right to freedom). Gender segregation arrangements in the public space could be legislated that would be exempted from judicial intervention even though they would harm equality.

The same may be done for laws that go to core of the democratic process, which the Supreme Court would not be able to invalidate, such as declaring the postponement of elections, denying Arabs or anyone defined as "disloyal" the right to vote, criminalizing journalists who refuse to disclose their sources or subjecting them to surveillance, etc. A country that does not allow its citizens to elect and be elected, a country whose citizens cannot receive and exchange information, and a country that does not safeguard basic equality of its citizens is not a democratic country or one governed by the principle of one man, one vote. It is imperative to anchor the right to equality in a Basic Law and to reinforce Basic Law: Human Dignity and Liberty, but the emerging government instead seeks to infringe on fundamental rights that were attained through great efforts. Indeed, judicial review has not always been practiced in Israel, and there have been times when the Knesset's political majority had the final say. Supporters of the override clause want to take us back to those days, arguing that Israel was a democracy even then. This is wrong! The question is not whether Israel was a democracy then, but what kind of democracy we want to be today.

### Whitewashing the Override Clause

As part of the ongoing debate surrounding it, supporters have made several claims about the override clause, some of which distort reality and others that are false. We would like to point out two arguments against these lies:

- **The override clause does not strengthen the Knesset - it strengthens the government!** It is argued that under the new legislation the people and their elected representatives will retain the right to final say. However, the override clause will empower the government to overrule the Supreme Court, given that if 'coalition discipline' is imposed, it will inevitably have a majority of 61 MKs. It bears noting in this context that former justice ministers Daniel Friedman and

Yaakov Ne'eman had proposed to balance the Knesset's override powers with a demand for a special majority of 65, 70, or more MKs. To repeat, Zulat is of the opinion that an override clause is dangerous with any majority, since support for the denial of human and civil rights as well as the rights of women, LGBTQ, religious, and national minorities cuts across political parties in certain contexts.

- **The override clause reinforces authoritarianism – not governance!** It is argued that the rulings of the Supreme Court, in its judicial review of both the Knesset and the government, interfere with the latter's ability to govern. However, the question here is not the desire to "govern." The government is the most powerful authority in the State of Israel, and already today it enjoys quite extensive freedom of action without sufficient effective oversight by the legislative branch. In this respect, it is worth mentioning the government's draconian powers to enforce Emergency Regulations by virtue of Article 39 of Basic Law: The Government, which allows it to overrule Knesset legislation. **The attempt to intimidate the judicial branch and curtail its powers is bound to the authoritarian process promoted by Netanyahu and the right-wing camp, whose goal is to concentrate as much power as possible in the hands of the executive branch without any oversight whatsoever.** As demonstrated in Zulat's *Pseudo Democracy*, a report by Attorney Eitay Mack, the intensified movement toward authoritarianism in Israel in the past 12 years is threatening to swing the pendulum away from democracy, not unlike the case of Putin's Russia and Orbán's Hungary.

### **Repeal Validity of Laws Article in Basic Law: Human Dignity and Liberty Instead of Override Clause**

Zulat proposes to use the debate about the status quo to promote human rights. **We propose to repeal the article on the validity of laws in Basic Law: Human Dignity and Liberty, which prevents the Supreme Court from performing constitutional judicial review of any laws enacted before 1992** (when the Basic Law came into effect). The need to repeal this article is a constitutional necessity in order to enforce coherence and continuity throughout Israel's law books and is needed as a matter of policy in order to improve the protection of human rights.

According to the Supreme Court's interpretation, the article on the validity of laws bars any constitutional review of laws enacted before Basic Law: Human Dignity and Liberty went into effect. Thus, a series of complex laws of questionable constitutionality, such as the one giving monopoly on matters of marriage and divorce to the religious establishment, became immune to disqualification. This created a complex constitutional anomaly that effectively prevented the Supreme Court from conducting judicial review on these issues.

For example, were it not for this article, Israel's constitutional law on the right to equality of the gay community would have been sufficiently solid to oblige the state to create a platform for same-sex partnerships or marriages. Given that the law pertaining to marriage and divorce is protected by the aforementioned article, the Supreme Court has to date refrained from directly intervening in the matter and has only granted such rights circuitously.

Therefore, in light of the above and owing to the fact that the coalition seeks to challenge the constitutional status quo, we at Zulat for Equality and Human Rights propose to promote a repeal of the article on the validity of laws. If changes to the constitutional status quo is what this is all about, these had better **benefit the advancement of human rights in Israel rather than deepen their violation.**

Authors: Dr. Adam Shinar and Attorney Eyal Lurie-Pardes

Legal advice: Eitay Mack

Editing: Hadas Bashan

## Appendix

### Draft Bill for Amendment of Basic Law: Human Dignity and Liberty (Repeal of Article 10: Validity of Laws)

#### Explanation

This bill seeks to repeal the article on the validity of laws in Basic Law: Human Dignity and Liberty, thereby enabling the Israeli legal system to function in a holistic and coherent manner so that fundamental constitutional rights protected by this Basic Law and contained in laws and statutes legislated before its enactment in 1992 may be subject to judicial review.

The article on the validity of laws was enacted as part of a political compromise reached ahead of the establishment of Yitzhak Rabin's government in 1992. It states that, "This Basic Law shall not affect the validity of any law in force prior to the commencement of the Basic Law." The religious parties thus sought to fend off any judicial review of matters subject to religious law, such as the monopoly on marriage and divorce. The article was also designed to prevent a broader judicial review of the Emergency Regulations.

In contrast to the **temporary** nature of the same such article in Basic Law: Freedom of Occupation, which was set for the sole purpose of allowing a certain period of adjustment to the new legislation, the said article in Basic Law: Human Dignity and Liberty is permanent. As former Supreme Court President Aharon Barak put it, a "normative constitutional anomaly" was thus created given that "upholding the validity of laws harms harmony and unity" enables the existence of a system of old laws that are not strictly subordinated to evolving constitutional jurisprudence. It should be noted that the Supreme Court has set a number of interpretive principles that try to bridge over some of the aforementioned anomaly.

A repeal of the article on the validity of laws proposed herein is the right step for several reasons. First, as explained above, this would result in higher constitutional coherence. In other words, fundamental constitutional values already anchored in law would remain in effect regardless of any random legislation. Secondly, fear of judicial review has had a chilling effect on government ministries and kept them from promoting certain civil laws in order to avoid it. Third, this constitutional anomaly results in the violation of human and civil rights unbecoming of a liberal constitutional democracy.