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To: MK Simcha Rotman, Chairman of the Constitution, Law and Justice Committee
Members of Knesset's Constitution, Law and Justice Committee

Consequences of Legal System Reform on Public Health

Where public health is concerned, the role of the state is to provide the basic conditions that enable its citizens a healthy life, from potable water and control of infectious diseases to housing and food security. This responsibility is based on the assumption that these conditions require collective action that the elected government implements through policy.

To ensure the advancement and preservation of the general population's health, it is of utmost importance that a government's decisions should enjoy the public's trust. To this end, these decisions must be implemented proportionately in terms of the violation of individual and collective freedoms and as equitably as possible among different populations. This is especially important in a diverse society like Israel's.

We hereby express our great concern and deep fear that the reform in the legal system currently on the agenda will fundamentally change the mechanism of checks and balances between the judicial, legislative, and executive branches of government, and will also impact on the field of health.

It is our professional and moral duty to warn of the dangers posed to public health by the reform in its current form. Therefore, in this position paper we will present the possible impact of this reform as it pertains to the authority of government ministries' legal counsels and of the Supreme Court as the counterbalance to government decisions, and how upsetting this balance will endanger public health.

Supreme Court: Main Body Giving Voice to Victims of Government Decisions

Government decisions have a significant impact on public health. The World Health Organization established the concept of Health in All Policies, which holds that policies outside the medical field, starting from taxation policy through urban planning and more, have an impact on health.

Abolishment of Judicial Review Eliminates Protection of Public Health. This was amply demonstrated during the corona pandemic, when the Supreme Court's impact on protecting the individual against government decisions was manifested. For example,

the Supreme Court heard a petition about the decision to allow a maximum of 3,000 travelers to enter Israel daily, as well as requiring unvaccinated or recovering Israelis wishing to travel abroad to obtain the approval of an Exceptions Committee. These guidelines were intended to enforce the isolation requirements on incoming travelers in order to prevent the infiltration of vaccine-resistant variants. The Supreme Court recognized the justified objective of stemming the spread of the pandemic, but noted the infringement on freedom of movement, freedom of occupation, the right to family life, freedom of association, and the right to education: "Some people are stranded abroad without medical insurance or coverage, at times in corona-ravaged countries; others are stuck without medications; some have no money left to pay for their extended stay, and yet others their visa expired. Most importantly, suddenly and unexpectedly, Israeli citizens are forced apart from their families and friends back home."¹ In view of the serious breach of individual rights and the availability of less stringent measures to enforce isolation, the Supreme Court ruled that the regulations in their form at that time should not be extended and also upheld the right of parents of disabled children to visit them in the institutions where they live.

Judicial Review Stimulates Reconsideration, Policy Adjustments, and Protection of Individual Rights. Yet another example is the government's decision, aimed at preventing the spread of the pandemic, to authorize the Shin Bet "to assist with epidemiological investigations by using the technological means at its disposal for the fastest tracking of a diagnosed person's movements during the preceding 14 days and of all the people staying in their immediate vicinity for more than 15 minutes."² In its ruling of 26 April 2020, the Supreme Court endorsed the decision made by the government at the start of the pandemic, but noted that to the extent that the state wished to continue using this technology, the government must enshrine this authorization in legislation spelling out its considerations before such surveillance could be enforced. The petition had cited the violation of the right to privacy that had resulted from the Shin Bet's use of surveillance means on Israeli citizens and the activation of a coercive mechanism that was not entirely transparent: "The use of tools

¹ [Supreme Court Ruling HCI 1107-21 Oren Shemesh et al v. Prime Minister Binyamin Netanyahu, supreme.court.gov.il](https://supreme.court.gov.il/11/107/21/1110721.htm), 17 March 2021 (Hebrew)

² The authorization according to Article 7(b)(6) of the Shin Bet Law-2002: (a) The Shin Bet will protect state security and the democratic regime and its institutions from threats of terrorism, sabotage, subversion, espionage, and disclosure of state secrets, and will also act to preserve and promote other state interests essential to the country's national security, as determined by the government and subject to the law. (b) For the purposes of subsection (a), the Shin Bet will perform these functions: (6) Activity in any other area decided upon by the government, with the approval of the Knesset's Committee on Shin Bet Affairs, aimed at preserving and promoting state interests essential to the country's national security.

developed against hostile elements and their redirection toward Israeli citizens and residents who wish it no harm ought to make every democracy seeker lose sleep."³

Following the aforementioned Supreme Court ruling, the Knesset plenum approved a law authorizing the Shin Bet to assist in the national effort to curb the spread of a new corona strain and to promote the use of civilian technology to track down people who were in close contact with sick persons. The specific piece of legislation, as opposed to the earlier sweeping authorization by virtue of the Shin Bet Law, lists the factors the government is required to take into consideration before choosing to use the Shin Bet for the purpose of preventing contagion, which are designed to ensure that any government decision under this law meets the test of proportionality.

Moreover, thanks to a petition filed by the Israel Medical Association about improving the living conditions of psychiatric inpatients in Israeli hospitals and psychiatric wards, the Supreme Court ruled that such a move was a "foremost public interest and the duty of every civilized country."⁴ The petition seemingly contributed to bringing about change, seeing that the government subsequently approved the allocation of substantial resources to the field of mental health in the 2021-2022 state budget, and appointed a special committee to map out the needs of the psychiatric hospitalization system and formulate a multiyear plan for its betterment. The committee headed by Prof. Yuval Melamed recently finished its work and submitted its report, which was posted on the Health Ministry's website on 10 November 2022 for public review.

Supreme Court's Authority to Examine Government Policy Strengthens Public Trust

Even when petitions on behalf of victims of government decisions are rejected, the Supreme Court's endorsement of the government's policy strengthens public confidence in this policy. The public's trust in the state authorities, including the health system, and in their decisions is essential for enlisting the public's cooperation.⁵ According to ethical rules, a policy aimed at preserving public health should be enforced on the basis of cooperation and trust, and not through policing or coercion.

One example is the government's decision to declare Bnei Brak's municipal area a "restricted zone" due to the high rate of confirmed corona cases. The Supreme Court ratified the legality of the decision, stating that "the purpose of the severe restrictions is clear: to protect the health and lives of the city's residents and of Israel's population at large.... The measure was taken after less injurious steps, such as those imposed on

³ [Supreme Court Ruling H CJ 2109-20 Adv. Shahr Ben-Meir v. Prime Minister](https://supreme.court.gov.il), *supreme.court.gov.il*, 19 March 2020.

⁴ [Supreme Court Ruling 3205/21 Israel Medical Association-Israel Psychiatric Association v. Health Minister et al](https://takdin.co.il), *takdin.co.il*, 18 September 2022 (Hebrew).

⁵ Michael Siegrist and Alexandra Zingg, [The Role of Public Trust During Pandemics: Implications for Crisis Communication](#), *European Psychologist* 19: 1 (2014), pp. 23-32.

the country's general population, failed to yield the desired results.... **We accept the government's position that the decision on this matter was made based on the recommendations of the professional echelons and for relevant reasons only**" (the emphasis is ours).⁶ Although the petition was rejected, the very fact that it was reviewed by a body independent of the government accorded legitimacy to the decision even for its opponents. In other words, the court's review strengthened the feeling that the government's policy and the willingness to act on it had not been at fault.

Weakening Gatekeepers Protecting Public Health

Over time, additional components were introduced to the proposed reform, such as reducing the independence of government ministries' legal counsels, enacting an override clause, and changing the way judges are appointed, all of which could also affect the checks and balances required to protect public health.

The independent legal counsel verifies that decisions conform to constitutional principles (such as equality and autonomy) and examines their compliance with the limitation clause contained in Basic Law: Human Dignity and Freedom, even before the governmental policy goes into effect. The emerging alternative, which would allow policymakers to ignore a legal counsel's recommendations, could result in the unequal distribution of public resources, including medical services. We have seen this before, in the decision of the Internal Security Minister not to allocate corona vaccines to prison inmates, which was nixed thanks to the intervention of the legal counsels and other professionals.

Reducing the authority of the professional experts in the legal field so as "not to harm the ability of government officials to promote policy" will end up harming the willingness to follow the advice of professional experts in other areas as well. It bears noting that guidance on health issues will gain the public's cooperation only if it is based on factual data and expertise. Public health experts are qualified to assess the health risks and benefits of any intervention based on scientific tools. Curtailing the authority of "civil servants" and "counsels" (that is, diminishing the status of professional experts and having decisions made by politicians) will damage the public's trust and, as noted earlier, could in no time lead to a decline in collective cooperation.

⁶ [Supreme Court Ruling H CJ 2435/20 Adv. Yedidya Leventhal v. Prime Minister Binyamin Netanyahu, supreme.court.gov.il](https://supreme.court.gov.il), 7 April 2020 (Hebrew).

Social Solidarity: Essential Element for Implementation of Public Health Policy

To repeat, dealing with crises in the health sector requires collective action. The corona pandemic illustrated to us all that the willingness to self-isolate, wear a mask, and get vaccinated in order not to infect others is based on solidarity; that is, on a sense of community and identification, which leads to willingness to act for the common good.

The acute public controversy over the proposed reform of the legal system in Israel, and specifically with regards to the Supreme Court's authority to review government decisions, harms social cohesion and could in no time harm solidarity. The erosion of solidarity will impede the efforts to deal with health crises that are yet to come.

The basic premise that "health" in the broadest sense includes the protection of the rights of the individual and the community, along with the realization that implementation of a policy pertaining to public health requires the public's trust, lead to the conclusion that the preservation of checks and balances, including the Supreme Court's authority to review and critique government decisions, is of utmost significance.

In view of the importance of checks that balance the legislative branch and of public trust in the state's decisions for the purpose of dealing with health crises, there is no room for changes that do not enjoy broad public approval, in the legal system in general and in the Supreme Court's authority in particular.

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