

No Judicial Review of Basic Laws Will Fatally Harm Equality and Democracy's Core

- Zulat for Equality and Human Rights promotes the protection of the rule of law and democracy. On 20 June 2022, we published a report titled *Pseudo Democracy: State of the Regime in Israel*,¹ warning of the authoritarian processes that have been accelerated since the establishment of the new government.

- **The proposed amendments are part of a legislation package aimed at regime change:** On 4 January 2023, Justice Minister Yariv Levin revealed his plan to change the regime in the State of Israel by crushing the independence of the judiciary and fully subordinating it to the executive branch, which already fully controls the legislative branch.² In order to implement this revolution, Levin announced a *package* of legislative amendments, including: a clause to override Supreme Court decisions by a majority of 61 of the Knesset's 120 MKs, increasing the number of politicians in the Judicial Appointments Committee, ending the reasonableness standard invoked by the Supreme Court to overrule government decisions deemed unreasonable, and making legal counsels of government ministries positions of trust. Retired Supreme Court President Aharon Barak called Minister Levin's plan a collection of "all the bad proposals made over the years" equivalent to a "revolution with tanks."³

- **The proposed amendment:** No judicial review of Basic Laws whatsoever.

- **The proposed amendment might totally dismantle Israel's already fragile constitutional fabric.** Israel is the only Western country that does not have a constitution or a full set of Basic Laws anchoring the structure of the democratic regime, relations between the branches of power, and recognition of human and civil rights. Since the mid-1990s, destructive processes have been promoted designed to erode the Supreme Court's recognition and protection of basic rights considered an integral part of any democratic regime, as well as to prevent judicial review of the executive branch for violations of these rights and of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation. All Israeli governments have blocked attempts to enact a full-fledged constitution and other Basic Laws that recognize and flesh out the totality of human rights, civil rights, and other fundamental components of a democratic regime. The balances in Israel's constitutional framework were further undermined when Basic Law: Israel-The Nation State of the Jewish People was enacted in July 2018, whose substance and form do not correspond to the conceptual structure of a constitution customary in democratic countries and conflict with the principle of equality.

- **Contrary to Western countries, Israel has no law regulating the legislation of Basic Laws.** A Basic Law may be approved, amended, or altogether abolished the same way as an ordinary law: by a simple majority, without even the support of 61 MKs, unless it is protected by a special majority caveat. Thus, as of the mid-1990s, amendments and changes to Basic Laws intensified based on the momentary needs of the government in charge. The frequency and scale of amendments of Basic Laws created uncertainty about

¹ Eitay Mack, [Pseudo Democracy: State of the Regime in Israel](#), Zulat, 20 June 2022.

² Yael Freidson and Noa Shpigel, [Netanyahu's Justice Minister Presents Plans for Radical Judicial Overhaul](#), Haaretz, 4 January 2023.

³ TOI Staff, [Ex-Chief Justice Barak: Government's Judicial Reform Plan 'Will Strangle Democracy'](#), The Times of Israel, 6 January 2023.

the rules of the political game, as well as about the extent and substance of the authority of state institutions. Consequently, the constant changes undermined the stability of the already fragile constitutional structure and eroded the status of Basic Laws in the eyes of the public.

- **The proposed amendment will allow the government, which has full control of the Knesset, to enact Basic Laws that are personalized and that enable conflict of interest according to its needs at any given time.** The amendment, which will block any judicial review of Basic Laws, is actually intended to curb the application of the "abuse of the constituent authority" doctrine to Supreme Court rulings. According to this doctrine, it is not enough that a Basic Law should be designated as such, but it should also conform to constitutional norms in terms of its stability, generality, and compatibility with the existing constitutional fabric. **For example, the coalition could pass an amendment extending the Knesset's tenure if it sensed a decline in the polls prior to an election, yet another amendment could preemptively extend the tenure of a prime minister for years on end (separately from the Knesset's tenure), a third could allow MKs and government ministers to receive a salary or donations from private entities without any restrictions, and a fourth could increase the Knesset's size for the purpose of a specific vote if uncertain of a majority.**

- **The proposed amendment will allow the government to enact laws whose substance will fatally harm the principle of equality and the core of democracy and will legitimize corruption.** The proposal, which will block any judicial review of the substance of Basic Laws, is actually intended to curb the application of the "unconstitutional constitutional amendment" doctrine to Supreme Court rulings. This doctrine, which ascertains that the substance of a Basic Law is compatible with the incontestable principles of the regime, specifically prohibits the Knesset from annulling Israel's core identity features as a Jewish state or a democratic one. **For example, the government could enact a Basic Law abolishing equality in criminal justice and granting full immunity from criminal investigation and prosecution to all the country's elected officials, including those in local government (officials in local government, already afflicted with widespread corruption, are essential to political parties for their day-to-day contact with the public, especially during election campaigns); yet another Basic Law could withhold employment and public/private services from religious, ethnic-national, sexual, and gender minorities, a third could prohibit opinions and protests against its policies, a fourth could outlaw all political parties except the ruling party, and a fifth could completely abolish elections and instead declare that the makeup of the government and the Knesset will be determined by the ruling party in an internal vote.**

- **The proposed amendment will impede blocking dangerous, corrupt, and undemocratic Basic Laws early in the legislative stage.** To date, the very notion that a rare option existed to overturn a Basic Law had a restraining effect on the legislative process and provided the Knesset's legal counsels and Attorney General's officers with leverage to tone down extreme and predatory bills. In other words, the proposed amendment means not only that the Supreme Court would be unable to review Basic Laws, but that more of such dangerous laws should be expected. For example, former Knesset Legal Advisor Eyal Yinon warned during the discussions on the Nationality Law held by a joint forum of the House Committee and the Constitution Committee: "This is a very important point, and I would like you to pay attention to it. I am aware of the claim that because this is a Basic Law, the article in question is protected and not subject to 'normal' constitutional review. However, it bears noting that in recent years the Supreme Court has

on several occasions raised the possibility of adopting the 'unconstitutional constitutional amendment' doctrine, which in extreme cases allows the invalidation of provisions in a Basic Law.⁴ Yinon's comments came against the backdrop of a quest by several MKs to add provisions that explicitly allowed discrimination of non-Jews. The measure of ambiguity that was retained in the final version allowed the Attorney General, and subsequently the Supreme Court's justices, to rule that the Nationality Law must be given a sustainable interpretation that is consistent with other Basic Laws, as well as with the principles and values of Israel's legal system, especially the principle of equality.⁵

- Therefore, Zulat recommends to the MKs representing the democratic public:
 - ✓ **Although the proposal deals specifically with the question of judicial review of Basic Laws, it is inseparable from the comprehensive move to effect a regime revolution and allow the government to gain full control over the legislative and executive branches, given the Knesset's traditional position against such review.**
 - ✓ **MKs must refuse to engage in a debate before the government reveals all the "chapters" of the legislation package it intends to promote based on the coalition agreements. The "salami method" is designed to confuse MKs and the public regarding the comprehensive move planned by the government to effect a regime revolution. MKs must refuse to discuss any proposed amendment separately. Instead, they must treat them as a single package that will transform Israel into an authoritarian regime and completely eliminate the checks and balances between the branches of power.**
 - ✓ **MKs must refuse to block the judicial review of form and substance of Basic Laws and not make do with a "compromise" allowing a review limited to finding gross errors in the legislative process (e.g., if the amendment contravened a special majority caveat), given that a government with absolute control of the Knesset would be able to enact Basic Laws in a seemingly correct procedural manner, which could nevertheless seriously harm the principle of equality and the core of democracy, both in form and substance.**

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⁴ [Minutes of meeting of Knesset's House Committee and Constitution Committee](#), *knesset.gov.il*, 10 July 2018 (Hebrew).

⁵ [Supreme Court Ruling H CJ 5555/18 MK Akram Hasson et al v. Israel's Knesset et al](#), *supremedecisions.court.gov.il*, 8 July 2021 (Hebrew).