

Basic Law Brief [Unofficial Translation]

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alongside translation of Basic Law prior to amendment from [Jewish Virtual Library](#)

A. Name of proposed Basic Law

Basic Law: The Judiciary (Judicial Reforms Amendment)

B. Principles of the Proposed Basic Law and its Necessity

This Basic Law has three goals.

The first is to change the composition of the Judges Sselection Committee to a composition that better reflects in a more representative manner the views held in society, the social diversity and diversity of values in Israel, and the public's expectations from the legal system, as well as to ensure transparency in the process of judicial selections.

The second goal is to set out, for the first time, in a Basic Law, the power of judicial review over the Knesset's primary legislation, to define its boundaries, to establish a layered override clause, and to ensure the nation's sovereignty and the subjection of the judicial branch to rule of law as clarified by the supremacy of the Basic Laws.

The third goal is to annul the unreasonableness grounds in Israeli administrative law as it has been shaped in the past decades, and to return administrative judicial review to grounds based on clear standards, and as accepted and understood around the world.

Changes to the Composition of the Judge's Sselection Committee and Guaranteeing Transparency in its Selection Process

It is proposed to establish in Section 4 to the Basic Law that the composition of the Judges' Sselection Committee will allow the expression of a wide range of public values and the diversity of positions and worldviews in Israeli society, and to prevent a situation in which sitting judges control – whether positively or by veto – the judicial sselection process, and that the judicial branch alone influences its composition. It is further proposed to allow a public hearing for candidates to the Supreme Court before the Knesset's Constitution, Law and Justice Committee, in a manner that will guarantee transparency in the sselection process. The hearing will guarantee the quality of judicial candidates and will guarantee open and public debate regarding legal approaches and candidates' values before their selection.

Prior to legislating this law, the Committee is composed of nine members. Three of them are Supreme Court judges, two are representatives of the Bar Association, two are Knesset members and two are ministers. In this composition, members that are not publicly elected officials – the judges and lawyers – have a majority in the Committee, and it is impossible to appoint a judge of who they do not approve to any judicature. Furthermore, the Supreme Court's representatives generally vote in a coordinated manner, and this causes the judiciary's representatives to negotiate with the other Committee members as one unit, with increased negotiating power.

The State of Israel needs a strong and independent judiciary, as all other advanced Western countries. Judicial review as carried out by the court on governmental actions are necessarily influenced at times by the judges' worldviews and values. There, it must be carried out by judges

who reflect in their legal views the principled values of the public. Judicial decisions are indeed different in character than political decisions in other governmental branches. However, they must also be undertaken by a forum that represents the public's values and worldviews. This is especially true in light of the fact that in recent years, the Court has involved itself in more public-political issues.

These matters are true with greater force in relation to the Supreme Court, in light of the fact that this law authorizes it for the first time to disqualify laws legislated by the Knesset. A judiciary that is authorized to interfere in the value-judgements of the legislator must reflect the wide range of positions in society to justify this power. It is not for nothing that, comparatively, states such as the United States, Germany and Canada, that authorize their courts to strike down laws, choose their supreme court judges by means of elected officials. By contrast, states that grant their judges a veto over judicial selection, such as the United Kingdom, do not empower their courts to strike down primary legislation.

It must be further emphasized that regarding judicial appointed, the situation in Israel is extremely exceptional in comparison to the norm in the Western world. A 2019 [study](#) of judicial appointments to constitutional courts of in the 36 OECD countries (supreme courts or constitutional courts) found that 24 out of 36 countries surveyed appoint their judges in a system that grants the power to elected officials exclusively. For example, in the United States, supreme court judges are appointed by the president, with the confirmation of the Senate; in Germany, constitutional court judges are appointed by both chambers of the legislature; in France, the judges of the constitutional council are appointed by the President and both houses of representatives in equal proportion, and alongside them serve former state presidents; in Japan, the selection is controlled by the government subject to ratification through a referendum. This system of exclusive appointment of judges by the elected officials is common to Canada, Australia, New Zealand, Belgium, Switzerland, Austria, Ireland, the Netherlands, Denmark, Sweden, Iceland, Finland, Norway and more. It must be stated that in Israel, such a system was used during the state's early years and that the judges that established the Supreme Court were appointed by the government with the Knesset's approval.

Only four OECD member states, besides Israel, appoint their constitutional court judges without giving the elected officials the ability to appoint the judges: Turkey, Greece, the UK and Luxembourg. However, the UK and Luxembourg are distinct from Israel and most other states in that their judges cannot void parliament's laws, and that the supremacy of the public's values are attained by legislative supremacy. From this, we see that of the 36 OECD countries, Israel's sole companions in giving a veto to non-elected officials over judicial appointed to the highest tribunal authorized to strike down parliament's laws, are Greece and Turkey.

Of the 50 states that comprise the United States, in 22 states, the supreme court judges are elected directed by voting ballot; in another 15 states, the appointments are ratified in a direct vote; four state elect their judges through the public officials and eight states appoint by committees in which the majority of the members are appointed by elected officials. (For a full overview of the judicial appointment system to supreme constitutional courts in the 36 OECD countries and the 50 American states, see: Shai Nitzan Cohen, Shimon Nataf and Aviad Bakshi, *Selecting Judges to Constitutional Courts – a Comparative Study* (2019))

This Basic Law is not a sharp transition to the appointment system accepted around the world for supreme tribunals, but rather adopts a middle ground between increasing the relative weight of democratic choice in the composition of the Judges Sselection Committee without removing the judges from the committee. This will create a balanced committee appropriate for appointing judges in all tribunals, through collaboration between the judges and the dominant

democratically elected members, in a manner that will ensure the expression of the public's diverse values in the various tribunals and the public's expectations from the legal system in general.

It is proposed to establish equal weight to the three branches of power, wherewith in the committee will serve three ministers, three Supreme Court judges and three Knesset committees chairmen: those of the Constitution, Law and Justice Committee, the Knesset Committee and State Control Committee. Alongside will serve two public representatives who will be chosen by the Minister of Justice, with one a lawyer and the other not, in order to present a public perspective of those who do not come from the legal field. The two public representatives will replace the two Bar Association representatives who previously served. There is no justification for the Bar Association representatives to serve on the Committee, as this body does not represent the general public, and it is even doubtful the degree that it represents the legal community in light of the low participation in the Bar Association selections. The public representatives will be appointed by the Minister of Justice as he is the one appointed by the Knesset to be responsible for the public interest in the legal field. The minister, as a current and changing representative of the majority, will choose the public representatives close to the establishment of a new Knesset.

Such a Committee composition is expected to yield throughout the years a diverse and pluralistic panel of judges that will better represent the plurality of opinions and communities in Israel. Looking back on the identities of justice minister who have served in Israel in the past twenty years and on their worldviews, one can see a broad diversity. This demonstrates how such a Committee composition will yield over the years a diverse and pluralistic court. Finally, chairmen of the State Control committee's service on the Judges' Selection Committee is meant to guarantee statutory fixed representation of the Knesset opposition in the Committee composition – something that was not always done in the past.

Finally, it is proposed to amend Section 7 and to establish that in order for the committee to dismiss a judge, the committee will require the support of nine members instead of seven. This is to ensure that the dismissal of a judge will require the support of representatives of the three branches of government.

Judicial review of legislative constitutionality and override directives

The second goal of this Basic Law is to establish for the first time judicial review of legislative constitutionality and to limit it to the standards set by the constitutional legislator.

It is proposed to add Section 15A to the Judiciary Basic Law which will set out a mechanism for judicial review of laws passed by the Knesset. The proposed section sets out that the nullification of regular laws that contradict Basic Laws is not automatic and that only the Supreme Court, with a full quorum of all its judges, excluding those precluded from participating for over 30 days from the day that the matter is to be decided, can preside over the law's nullification. This is in order to guarantee a comprehensive discussion with the full range of views in the Supreme Court, as well as to prevent the discussion from being influenced by the haphazard nature of the panel. It is further proposed that the majority needed to nullify a law is a majority of eighty percent of the total judges, as part of the understanding that the nullification of the democratic public decision is an extremely exceptional event, and if several judges doubt whether to nullify the law, the democratic choice of the people through their elected officials must stand. This position also expressed the fact that Israel has yet to complete a full and agreed upon constitution. Therefore, the nullification of legislation based on Basic Laws must be done with wide judicial consensus.

This proposed Basic Law bounds that grounds for judicial review to regular legislation based on incompatibility with the Basic Laws alone. Alongside this, the proposal sets out the complete supremacy of the Basic Laws and denies judicial review over them, in order to guarantee the Supreme Court's subjection to the rule of law and to the source of democratic authority. This is similar to the majority of Western countries in which there is no judicial review over constitutional norms.

According to the proposed order, any judicial branch in which the validity of a law will be challenged, will be able to reject the claim. However, if the judicial branch holds that the law must be nullified or limited, and it finds that the matter cannot be decided without ruling on the validity of the law, the parties will be able to raise the issue directly to the Supreme Court by means of a petition to nullify the law. The Supreme Court will be able to reject such petitions in a panel of three judges, and only if the Supreme Court holds that there is no alternative to presiding over a hearing on the law's validity will the Court sit in its full panel.

This Basic Law establishes an override clause by which the Knesset can reject the interpretation given by the Supreme Court to the Basic Laws or to the proper balance between values or interests, and to override a Supreme Court decision nullifying a law. According to the proposal, the Knesset will be able to, under specific conditions, override a judicial decision nullifying a law by means of the override clause. The basic concept that stands behind the override clause is not to exempt the Knesset from its commitments to constitutional values, but rather to give the legislator the ability to decide differently than the court as to the proper balance between values, and to the proportionality in a clash between them.

It is proposed that should the Supreme Court nullify a law in full consensus of all judges, the Knesset shall not be able to pass an override law during its term.

However, if the Supreme Court decision nullifying primary legislation was not taken in full consensus, it is proposed to allow the Knesset to override the Supreme Court decision nullifying the law with a majority of 61 Knesset members, as long as the law states explicitly that the law will be valid notwithstanding the Supreme Court's ruling. The override will remain valid for the term of the next Knesset, which may review it anew. As such, it is stated that the force of the override is limited to four years or until the end of the first year of the term of a new Knesset after the Knesset that passed the override law, according to the later event. This override model, in which there is no *a priori* override, allows a proper and useful dialogue between the branches, and for the Knesset to see the Court's detailed ruling before taking the exceptional step of override.

It is further proposed that the Knesset will be able to override the judgement to nullify a law given in full consensus. However, this is on condition that the Knesset that passes the override is a different Knesset than that which passed the nullified law, therefore expressing two Knessets' support for a different value framework than that of the Supreme Court. The fact that the public expresses its positions by means of general elections, that the matter pertains to a value judgement of two Knessets and that the negative incentive of immediate legislation is eliminated, justifies returning the final decision to the people and its representatives. In such a case, as well as in a case when a regular override is passed by two Knessets, the override will be permanent.

Repeal of unreasonableness grounds

Finally, it is proposed, in Section 15B, to repeal the unreasonableness grounds that have developed in Israeli jurisprudence. The government is obligated to act according to the law, within the limits of jurisdiction given to it and with due process. However, Israeli jurisprudence

has developed within the last decade exceptional grounds for interference in government actions whenever the Court holds that government or ministerial decisions are not reasonable. As the President of the Supreme Court Moshe Landau had warned, by adopting the unreasonableness grounds, the Court allows itself to stand in position of the executive and substitute its own judgement (see HJC 389/89 **Dapei Zahav Ltd. v Public Broadcast**, (1980)). As a result of the adopting of unreasonableness as grounds to nullify the judgement of the relevant legal authority, legal advisors continuously interfere in the discretion that the legislator entrusted to the government and its ministers for all sorts of decisions or appointments.

Review of the reasonableness of administrative branches is given to the Knesset, which gives its confidence to the government and to the public that elected it, and is not subject to judicial decision-making. The Court was never authorized to replace the discretion of the other governmental branches, and there is no reason to assume that its judgement is more correct. Such an ambiguous ground violates legal certainty and opens the door to inconsistent rulings. This harms the public's trust, who may have the impression that legal matters are a matter of subjective rulings. It also incentivizes flooding the courts with petitions that are simply a gamble on the judge's subjective positions. Therefore, it is proposed to repeal the unreasonableness grounds, and to return judicial review of administrative acts to the proper focus of lack of jurisdiction, due process and meeting the explicit demands of the law.

The Judiciary Basic Law (Judicial Reforms Amendment)

Chapter One: Basic Provisions

<i>Judicial power</i>	<p>1. (a) Judicial power is vested in the following courts**:</p> <ul style="list-style-type: none">(1) the Supreme Court;(2) a District Court;(3) a Magistrate's Court;(4) another court designated by Law as a court. <p>In this Law, "<i>judge</i>" means a judge of a court as aforesaid.</p> <p>(b) Judicial power is vested also in the following:</p> <ul style="list-style-type: none">(1) a religious court (beit din);(2) any other court (beit din);(3) another authority all as prescribed by Law. <p>(c) No court or court (beit din) shall be established for a particular case.</p>
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<i>Independence</i>	2. A person vested with judicial power shall not, in judicial matters, be subject to any authority but that of the Law.
<i>Publicity of proceedings</i>	3. A court shall sit in public unless otherwise provided by Law or unless the court otherwise directs under Law.

Chapter Two: Judges

Appointment of judges

4. (a) A judge shall be appointed by the President of the State upon selection by a Judges' Sselection Committee [**added:** whose members will be appointed within 30 days from when the Knesset has expressed its confidence in the new government].

(b) **Erased:** *The Committee shall consist of nine members, namely, the President of the Supreme Court, two other judges of the Supreme Court elected by the body of judges thereof, the Minister of Justice and another Minister designated by the Government, two members of the Knesset elected by the Knesset and two representatives of the Chamber of Advocates elected by the National Council of the Chamber. The Minister of Justice shall be the chairman of the Committee.*

Replaced with: The Committee shall consist of eleven members, namely the Minister of Justice who will serve as the Committee Chairman, two Ministers designated by the government, the Chairman of the Knesset Constitution, Law and Justice Committee, the Chairman of the Knesset State Control Committee, the Chairman of the Knesset Committee, the President of the Supreme Court, two other judges of the Supreme Court who will be chosen from their fellow judges, and two public representative chosen by the Minister of Justice, one of them being a lawyer; No government power, including the Supreme Court serving as the High Court of Justice, shall interfere in the appointment of Committee members except those assigned to it, and will not interfere in the Committee's working procedures, its member's discretion and its decision.

(c) **Erased:** *The Committee may act even if the number of its members has decreased, so long as it is not less than seven.*

Replaced with: The selection of a Supreme Court judge will be done by the Committee through a majority of its members. The selection decision will enter into force after an additional ratification decision by the majority of the Committee's members.

The selection decision

<i>Nationality</i>	5. Only an Israeli national shall be appointed judge.
<i>Declaration of allegiance</i>	6. A person appointed judge shall make a declaration of allegiance before the President of the State. The declaration shall be as follows: "I pledge myself to be in allegiance to the State of Israel and to its laws, to dispense justice fairly, not to pervert the law and to show no favour."
<i>Period of tenure</i>	7. The tenure of a judge shall begin upon his declaration of allegiance and shall end only - (1) upon his retirement on pension; or (2) upon his resignation; or (3) upon his being elected or appointed to one of the positions the holders of which are debarred from being candidates for the Knesset; or (4) upon a decision of the Judges' Selection Committee prepared by the chairman of the Committee or the President of the Supreme Court and passed by a majority of at least <i>seven members</i> [replaced with: nine members]; or (5) upon a decision of the Court of Discipline.
<i>Retired judge</i>	8. A judge who has retired on pension may be appointed to the position of a judge for such time, in such manner and on such conditions as may be prescribed by Law.
<i>Restriction on re-posting</i>	9. (a) A judge shall not be permanently transferred from the locality where he is serving to a court in another locality save with the consent of the President of the Supreme Court or pursuant to a decision of the Court of Discipline. (b) A judge shall not without his consent be appointed to an acting position at a lower court.

<i>Salary and benefits</i>	<p>10. (a) The salaries of judges and other payments to be made to them during or after their period of tenure or to their survivors after their death shall be prescribed by Law or by a decision of the Knesset or of a Knesset committee empowered by the Knesset in that behalf.</p> <p>(b) No decision shall be passed reducing the salaries of judges only.</p>
<i>Judge not to engage in additional occupation, etc.</i>	<p>11. A judge shall not engage in an additional occupation, and shall not carry out any public function save with the consent of the President of the Supreme Court and the Minister of Justice.</p>
<i>Criminal proceedings</i>	<p>12. (a) No criminal investigation shall be opened against a judge save with the consent of the Attorney-General, and no information shall be filed against a judge save by the Attorney-General.</p> <p>(b) A criminal charge against a judge shall not be tried save before a District Court consisting of three judges unless the judge has consented that the charge be tried in the ordinary manner.</p> <p>(c) The provisions of this section shall not apply to categories of offences designated by Law.</p>
<i>Disciplinary proceedings</i>	<p>13. (a) A judge shall be subject to the jurisdiction of a Court of Discipline.</p> <p>(b) A Court of Discipline shall consist of judges and judges retired on pension appointed by the President of the Supreme Court.</p> <p>(c) Provisions as to the grounds for instituting disciplinary proceedings, the modes of filing complaints, the composition of the bench, the powers of the Court of Discipline and the disciplinary measures it shall be authorised to impose shall be prescribed by Law. The rules of procedure shall be in accordance with Law.</p>
<i>Suspension</i>	<p>14. Where a complaint or information is filed against a judge, the President of the Supreme Court may suspend him from office for such period as he may prescribe.</p>

Chapter Three: The Courts

<i>Supreme Court</i>	<p>15. (a) The seat of the Supreme Court is Jerusalem.</p> <p>(b) The Supreme Court shall have appellate jurisdiction over the judgments of the District Courts.</p>
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<i>Other courts</i>	16. The establishment, powers, places of sitting and areas of jurisdiction of the District Courts, the Magistrates' Courts and other courts shall be in accordance with Law.
<i>Appeal</i>	17. A judgment of a court of first instance, other than a judgment of the Supreme Court, shall be appealable as of right.
<i>Further hearing</i>	18. In a matter adjudged by the Supreme Court by a bench of three, a further hearing may be held by a bench of five on such grounds and in such manner as shall be prescribed by Law.
<i>Retrial</i>	19. In a criminal matter adjudged finally, a retrial may be held on such grounds and in such manner as shall be prescribed by Law.
<i>Established rule</i>	20. (a) A rule laid down by a court shall guide any lower court. (b) A rule laid down by the Supreme Court shall bind any court other than the Supreme Court.
<i>Registrar</i>	21. A court may have a registrar, who may or may not be a judge.

Chapter Four: Miscellaneous Provisions

<i>Law not to be affected by emergency regulations</i>	22. This Law cannot be varied, suspended, or made subject to conditions by emergency regulations.
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Provisions to be prescribed by Law

23. Provisions as to the following matters shall be prescribed by Law:

- (1) the manner of selecting, and duration of the tenure of, the members of the Judges' Selection Committee;
- (2) qualifications for the posts of judges of the various grades;
- (3) the manner of appointing the President of the Supreme Court, the Deputy President of the Supreme Court and the President and Vice-president of a District Court and a Magistrate's Court;
- (4) the conditions and procedures for terminating the tenure of a judge;
- (5) the manner of appointing a judge to an acting assignment at another court and of transferring a judge, temporarily or permanently, from the locality where he is serving to a court in another locality;
- (6) proceedings for the suspension of a judge from office, and review of the suspension;
- (7) the matters which the courts of the different grades are to hear by a single judge or by three or more judges;
- (8) the manner of designating the judge or judges who is or are to hear a particular matter.

Provisions to be prescribed under Law

24. Provisions as to the following matters shall be prescribed under Law:

- (1) rules as to the administration of the courts, the making thereof and responsibility for their implementing;
- (2) the rules of procedure of the Judges' Selection Committee;
- (3) procedure for the resignation of a judge;
- (4) procedure for the appointment and the powers of the registrar of a court;
- (5) the number of judges who are to serve in the courts of the different grades and location.