



## **The Israeli Judicial System Must Be Preserved**

**by Justice Elyakim Rubinstein**

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**EXECUTIVE SUMMARY:** The weakening of the legal system that would result from the enactment of Justice Minister Yariv Levin's proposals would represent a weakening of the State of Israel. The minister must engage in thorough discussion of his proposals with the president of the Supreme Court and public jurists and explore his proposal on "positions of trust" with an open mind.

The State of Israel -- the splendid success story of the ingathering of the exiles, with their long history of troubles -- is a wonderful testament to Jewish endurance and providence. We must maintain that State, with all vigilance, as Jewish and democratic. The Israeli court system is honest, nonpolitical, and one of the country's greatest achievements. It must not be undermined.

The Supreme Court is a strategic asset of the state, a protective vest against the international courts in The Hague. The framework of legal advice in government ministries has, on the whole, loyally and impartially served all Israeli governments.

No system is free of shortcomings or exempt from failings, but to weaken the system in the manner implied by Justice Minister Yariv Levin's proposals would be to weaken the State of Israel itself.

What are these proposals and why are they so problematic? I will address four main aspects of the changes that Levin is calling for.

### **The Composition of the Judicial Selection Committee**

The Israeli approach, which originated 70 years ago in the Judges' Law of 1953, is a globally recognized accomplishment. The collaboration between the government, the Knesset, the Bar Association, and the Supreme Court has given rise to high-quality and professional judgments. Why fix a tool that is not broken? Of course there may be unsuccessful appointments from time to time, but on the whole, this is a success story.

It is not true that judges elect themselves and that there is no protocol for meetings. There are deliberations among all members of the committee and there is a protocol. Sometimes there is consensus, but this is almost never at the expense of quality, and the professionalism of the committee is consistently evident. An effort is also made, in the spirit of the Zamir Committee in its day, to reflect the various facets of Israeli society.

Minister Levin is now proposing that he should personally appoint two representatives to replace the Bar Association representatives. The two would likely be his political confidants and would not necessarily be jurists. He also proposes that the number of ministers and members of Knesset be increased to three for each component. This would mean that instead of the current four politicians (two ministers and two members of Knesset) there would instead be eight, and the lawyers who are professionally familiar with the candidates would not be members of the committee. The politics/professionalism ratio of the Judicial Selection Committee would be utterly changed and its politicization would be complete.

Levin further proposes that hearings be held for Supreme Court candidates in the manner of the US Senate. In the US, these hearings are media circuses at which senators vote not according to the merits of the candidates but according to their own political outlook. The candidates usually try, with good reason, to avoid expressing strong views—one was indeed disqualified for voicing his opinions—on the grounds that they do not want

to take positions on subjects that could later arise in court. The hearings are nevertheless thoroughly politicized.

Hearings in the Knesset would be interesting media events but would be essentially futile for the same reason. Moreover, compare outstanding district judges in the civil or criminal field to candidates for the Supreme Court. Since, with the exception of administrative judges, they have not dealt with administrative and constitutional law, what can be expected of them in the hearings?

I speak from experience. In early 2017, together with my friend Justice Salim Joubran, I was chair of the expanded subcommittee that considered candidates for the Supreme Court. We did not ask serving judges about public positions, nor about issues that overlapped the political domain. We had no idea what their political beliefs were. The justices were selected on the basis of quality alone. Why change this in the first place, and why replace it with a procedure that is clearly political?

### **The Override Clause**

This is a rare creature that scarcely exists anywhere in the world (in Canada, the override clause is not used at the national level, and in Finland, a five-sixths' majority is required to override a ruling). It is not needed in Israel, considering that of the 450-500 constitutional petitions submitted in the 27 years since the Bank Mizrahi verdict, only 22 were accepted. Some assert that petitions were not submitted on legal advice, but that is a demagogic claim. Some deny that the court has authority in this domain—but in my humble opinion, it is impossible to interpret the limitations clause (officially entitled “Violation of Rights”) in Article 8 of the Basic Law: Human Dignity and Freedom as it was ruled by the court.

The court, and again I speak from years of experience, is very cautious on constitutional issues. Deliberations are conducted with great prudence and arguments are presented in detail. Override is not a real cause. It is a politics of weakening, and the number 61 is deliberately designed to represent any coalition—in other words, the government would have unlimited control

over constitutional decisions in addition to its control of the Knesset. This would amount to a “dictatorial democracy.”

There is no need for this -- certainly not with such a number and without reasonable dialogue with the judicial authority. It is worth noting that constitutional compositions of the court are usually very large and complex. A permanent large composition could be established here. In my view, if there is in fact any need for reform, the interests of the general public would be better served by the creation of efficient courts and rapid outcomes for procedures. In this regard the court system has made a great effort but lacks enough judges or budgetary resources.

### **The Extreme Reasonableness Standard**

Some have criticized this standard, including estimable judges in the past and present. I do not share their view, though I respect it. My experience in public administration and in the court has only strengthened my opinion on this issue. This standard forms a basis for helping the weak, the stranger, the orphan, and the widow; the woman denied a *get* (bill of divorce) by her husband; the single mother who needs national insurance stipends even though she possesses an old car; the farmer who has had his 120-year-old sales permit for the *shemmitah* (sabbatical) year revoked and is prevented from selling his produce; and the Palestinian threatened with accusations of collaboration. It is needed to help preserve state lands, a declining resource, and to give the tiny Karaite community a place in the sun with regard to personal status and slaughter.

All these cases were decided primarily on the basis of reasonability. What will be the refuge of such as these, and of those who fight for human rights against government administrative decisions? The reasonability standard must be used only in extreme cases; that is, cases of extreme unreasonableness that require the application of common sense and humanity. Interference in government administrative decisions should come only after deliberation, and more than once in the past it proved convenient for cabinet ministers that the court decided in their stead.

## Legal Advisers

As attorney general, I was the “professional father” of the legal advisers to the government ministries and my door was always open to them. In about 10 instances, I defended legal advisers who had pointed out illegality and whom the minister then sought to dismiss.

The role of the legal adviser is very difficult. Unlike the State Attorney’s Office, which is under the purview of the attorney general, the adviser to a ministry is professionally subordinate to the attorney general but answerable to a director general and a minister who sometimes want to shorten procedures and reach outcomes in a problematic manner. The adviser’s role is to formulate an opinion on how to achieve an objective by legal means, or to raise a red flag in cases of illegality.

According to the directives, when the minister or director general is dissatisfied, he or she can turn to the attorney general. I am not aware of any cases in which legal advisers subverted legal policy. I do remember a case when I was informed by the legal adviser of a large government ministry that the minister wanted to illegally provide someone with a very large financial favor (not for his own benefit). I spoke with the minister and said that if he persisted, we would sue him for the sum, and he relented.

Most ministers and directors general are honest—but there are interests and pressures. Turning the legal adviser into a personal servant causes damage in three ways: it politicizes the ministry; it creates complications every time a minister is replaced (a frequent occurrence in Israel) and promotes a lack of professionalism, since by the time an adviser learns the ropes he can find himself out of a job; and for devoted jurists in public service, it blocks the path of professional advancement to the post of legal adviser to the ministry. And how much professional trust would there be in these “trust” advisers in any case? This is not governance. It is antigovernance, like appointing two ministers to the same ministry.

Justice Minister Levin has promised thorough discussions of his proposals. I hope that as he gets to know the Supreme Court justices and the Justice

Ministry employees, will change his mind on at least some of the issues. In any case, notwithstanding his many statements on matters concerning the Court, he must approach the Supreme Court president with an open mind. It is also vital that he discuss with jurists in the public service the proposal for “positions of trust.” Then perhaps there might be some hope. Fairness and practicality are of the essence.

Destruction is easy; rebuilding is hard. We have no other country. Every effort must be made to protect the judicial system so hope is not lost.

*Justice Elyakim Rubinstein served Israel as deputy to the president of the Supreme Court, government secretary, and attorney general. He also served as a Supreme Court justice and as chair of the Central Elections Committee for the 19th Knesset.*

*Note: This is a translated version of a speech given on January 6, 2023 to a conference of the Movement for Quality Government in Israel.*