

## The Impact of Israel's Judicial Reforms on Palestinians A Legal Perspective

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The 37th Government of the State of Israel was sworn on December 29, 2022. It is headed by Prime Minister Benjamin Netanyahu from the Likud Party in coalition with extreme right-wing parties, namely the Jewish Power (Otzma Yehudit) Party – chaired by Itamar Ben-Gvir, and the Religious Zionist Party (RZP) – chaired by Bezalel Smotrich.

Less than a week after, the newly appointed Minister of Justice Yariv Levin of the Likud Party launched a press conference in which he presented the “legal reform” proposal, later known as the “legal revolution” or “legal coup” (Levin’s Plan). The chair of the Knesset Constitution, Law and Justice Committee, Simcha Rotman (RZP), then designated the committee’s full agenda for discussing proposals to amend legislation towards implementing the Levin Plan and moving forward with the coalition agreements.

If confirmed, the Levin Plan will lead to fundamental changes in the Israeli legal system. It aims mainly to restrict the authority of the Israeli Supreme Court (SCT) while granting the Knesset and government unlimited power to pass undemocratic and harmful legislation for human rights.

The Levin Plan is comprised of few components: a) prohibiting the SCT from intervening and examining Basic Laws; B) changing the composition of the Judicial Selection Committee and granting politicians exclusive majority; C) restricting the SCT's authority from striking down regular law and enacting an "override clause" which will allow the Knesset to re-enact laws that were disqualified by the SCT; D) politicizing the appointment of legal advisors to ministries; E) canceling reasonableness test that allows the courts to cancel governmental and public authorities' decisions; and F) restricting the right for legal standing before courts.

Since Levin declared the initiation of the legal plan, massive demonstrations were held in several Israeli towns mostly by Israeli Jews, protesting against the confirmation of the "Levin Plan". The protesters and opposition claimed, inter alia, that the "Levin Plan" aims at weakening the independence of the Supreme Court, breaching the principle of Separation of Powers, granting politicians full control of judicial nominations and thus leading to the weakening or even diminishing of major and basic principles in what Israelis view a "democratic and Jewish State". As a result, on March 27 2023, Prime Minister Netanyahu declared he would "suspend" and postpone the confirmation process of the proposed to the Knesset's summer session.

Despite the warnings against the violation of democratic values, including the violation of human rights, Palestinians intentionally did not take a role in the massive demonstrations. For Palestinian citizens, the State of Israel has never applied democratic values towards them, most importantly the principle of absolute equality. The legislation of the Basic Law: Israel - The Nation State of The Jewish People in 2018 (known as the Jewish Nation State Law), which constituted the constitutional identity of the State of Israel based on ethnic supremacy of Jews only, and the refusal of the Supreme Court to intervene and review the Basic Law in its July 2021 decision, comprised one of the last constitutional crises vis-a-vi the State of Israel, including its Supreme Court. On the other hand, for Palestinians, the ongoing pro-longed Israeli occupation of the Occupied Palestinian Territories, including the Israeli blockade of the Gaza Strip, cannot grant Israel the privilege to struggle for such democratic values as long as the Occupation exists.

As these legal reforms might be scrutinized during the summer session, one thing remains absent from the official debate about this plan, and that is how these proposed legal and constitutional amendments in the Israeli legal system will affect Palestinians in both sides of the Green Line. The analysis of the legal effects of the "Levin Plan" on Palestinians will thus be presented in this paper. Several human rights organizations in Israel have published position papers detailing the impact of the coalition agreements on Palestinians. This paper, however, will focus on the components of the Levin Plan and analyze the impact of the fundamental changes in the Israeli legal system on Palestinians (in both sides of the Green Line). For this purpose, the paper will address separately each of the Levin Plan's components and present the probable impact on Palestinians.

## Restricting Judicial Review Over Basic Laws

The Knesset enacts Basic Laws as part of its constitutive power rather than its legislative power. This makes Basic Laws superior to regular laws, as they were granted constitutional status. Meanwhile, the Levin Plan proposes to cancel the SCT's power of judicial review over Basic Laws. In analyzing this point, it is worth considering that currently, the Israeli Supreme Court's authority to review Basic Laws is limited to two main constitutional doctrines: The first is the "Abusive Exercise of Constitutive Power," which examines the abusive use of the Knesset's majority in exercising the constitutive power to enact Basic Laws. The second is the "Unconstitutional Constitutional Amendment" doctrine, which enables the SCT to declare an amendment to a Basic Law as unconstitutional if it is convinced the amendment breached fundamental and supreme principles of democracy.

One of the main reasons that the Levin Plan intends to prohibit the SCT's judicial review over Basic Laws was a recent decision issued by the SCT in July 2021, which upheld the "Basic Law: Israel – as The Nation-State of the Jewish People" (also known as the "Jewish Nation Law" or JNL). The Jewish Nation Law defines the constitutional identity of the State of Israel as the State for the Jewish People; it grants Jews only the unique right for self-determination while excluding Palestinian citizen-hood and diminishing the Arabic language. It also prioritizes the establishment of Jewish towns and grants Jews only the right to immigrate to and acquire immediate citizenship in Israel. Within the ruling and in spite of upholding the JNL, the SCT at the time confirmed it had the power to intervene and review Basic Laws based on the "Unconstitutional Constitutional amendment" doctrine. Despite petitioners' arguments that the JNL grants a constitutional legitimacy for racial supremacy and

discrimination against Palestinian citizens and residents, the SCT dismissed all 15 petitions submitted against the Basic Law and ruled that the JNL did not violate fundamental principles of democracy and therefore, it did not exercise the “Unconstitutional Constitutional Amendment” doctrine.

In response to the SCT confirming its authority to review Basic Laws, the Levin Plan proposes to prohibit any judicial review by the court over Basic Laws. This means that, if approved, this prohibition will prevent the court from reviewing several amendments to Basic Laws that are being discussed or have already been confirmed by the new governmental coalition. Undoubtedly, this will have major impact on Palestinians rights. Below are two examples of such Basic Laws:

- One of the fundamental principles included in the coalition agreement between the Likud Party and the RZP states “the Jewish people have an exclusive and inalienable right over all areas of the Land of Israel.” It underscores the “unique” right for self-determination granted for Jews only by the JNL, and its original aim is to expand Israeli sovereignty over the West Bank, thus leading to de facto annexation.

With that goal in mind, Bezalel Smotrich, chair of the RZP, insisted to include in the coalition agreement with the Likud Party a commitment on being appointed as an additional minister in the Ministry of Defense headed by Yoav Galant (Likud Party). This would grant him major authorities over civil matters in the OPT. However, the current “Basic Law: The Government” did not yet allow the appointment of two ministers in one ministry. Thus, a major amendment to that Basic Law was necessary to allow Smotrich’s appointment as an additional minister.

Amending the Basic Law so that Smotrich gets appointed has crucial impact on Palestinians in the OPT. Based on the coalition agreement, as well as the final agreement signed by the two ministers on 23 February 2023 and that settled the authority of each minister, major authorities related to the OPT were transferred from the Minister of Defense, to Smotrich. These include the jurisdiction of the Military Commander and the Coordinator of Government Activities in the Territories (COGAT).

In this way, Smotrich is being granted full control over the governance of civil issues in the Occupied West Bank. This includes authority over appointing officials and legal advisors, as well confirming legal responses submitted by the Attorney General office to courts in legal proceedings concerning the OPT. In other words, Smotrich has the power to decide and design policies over broad issues, including those leading to de facto annexation of the WB and granting wide impunity in committing war crimes.

- Another Basic Law the coalition intends to enact is the “Basic Law: Immigration”, which has been in public debate for decades. It aims to anchor Israel’s immigration policy, including the entry of Palestinians from the OPT or residents of Arab States, defined as “Enemy States,” to Israel. Tens of thousands of Palestinians and Arabs will be influenced by this Basic Law, as the prohibition of entry will affect family unifications between spouses and family members with Palestinian citizens and permanent residents in East Jerusalem. This ban already exists in a regular law that was initially enacted as a temporary law in 2003 yet is still in effect until today. Families and human rights organizations approached the Israeli SCT twice demanding the cancelation of this temporary law and declaring it unconstitutional as it violates Palestinian rights for equality, family life and dignity, yet the SCT dismissed all petitions in a narrow majority vote. Meanwhile, a third round of petitions is pending nowadays before the SCT against a recent enactment of that same prohibition in another temporary law (of 2022). If the government coalition includes this ban within the new “Basic Law: Immigration”, the court will be banned from reviewing it. In other words, thousands of affected people will lack the minimum access to challenge this sweeping prohibition to unite with their spouses and families.

- Moreover, the government coalition intends to propose another amendment to the “Basic Law: The Knesset”, which targets Arab political participation therein. It proposes to expand the disqualification of parties and individuals from running for elections on the premise of mere support for terrorism committed by an individual and not only support for armed conflict of a “terrorist organization” or an “enemy state”, as stated in the current language of the Basic Law. In addition, it allows the disqualification of a single party running for elections with a political list, and limits the SCT’s power of judicial review in appeals against the Central Elections Committee’s disqualification decisions.

• Furthermore, the Levin Plan proposes to enact a new “Basic Law: Legislation”, which will cancel the “Basic Law: Human Dignity and Liberty”. This Basic Law currently anchors basic rights (such as dignity, life, property, and privacy) and grants them constitutional status. It also states the “Limitation Clause,” which enables the violation of the anchored rights only by a law and in a proportionate matter. Based on Levin’s Plan, however, the “Basic Law: Legislation” will propose to cancel old Basic Laws that were confirmed by less than 61 votes of Knesset members (MKs) and will apply directly on the “Basic Law: Human Dignity and Liberty” as it was confirmed by 32 votes in 1992.

## Restricting Judicial Review over Regular Laws

Levin’s Plan intends to restrict the SCT’s authority to cancel laws, and it proposes that the SCT may cancel a law only with a vast majority of all judges serving at the SCT. Today, the SCT has the power to disqualify laws if convinced that the infringement of constitutional rights is in contrast with the “Limitation Clause” anchored in the “Basic Law: Human Dignity and Liberty” and “Basic Law: The Freedom of Occupation and Employment”.

Nevertheless, despite the several petitions challenging discriminatory laws against Palestinians throughout the years, the SCT has not exercised its power intensively. The SCT only disqualified 22 laws, few of which were related to Palestinian rights. For example, the SCT declared as unconstitutional a law that prohibited income support recipients from owning or using a car that impacted Palestinian citizens among others. The SCT also canceled a law that granted tax exemptions without clear criteria while excluding poor towns in Israel, including Arab towns.

Few other laws that related to the rights of Palestinians in the OPT were disqualified by the SCT. In 2006, it disqualified a law that exempted Israel from liability for damages to Palestinians caused by the Israeli army. In 2010, it disqualified a temporary law that enabled harsh detention procedures for those suspected in security offenses. In 2020, it disqualified the so-called “Regularization Law” that legalizes the confiscation of privately-owned Palestinian land. And finally, in 2021 it disqualified a law that enables the revocation of social security allowances from parents of minor Palestinian prisoners.

With that said, major laws – including those intentionally enacted to target Palestinian identity, equality, freedom of expression, and citizenship – were upheld by the SCT. For example, in 2006 and 2012, the SCT dismissed petitions submitted against laws that prohibited the entry of Palestinians from the OPT (as well as residents from ‘enemy states’) to Israel for the purpose of family unification. In 2012, it upheld the so-called “Nakba Law” which prohibits state funded organizations from commemorating the Palestinian collective narrative of the 1948 War. In 2014, it upheld the so-called “Admission Committees Law” which allows Jewish community towns to exclude Palestinian citizens. In 2015, it upheld the so-called “Anti-Boycott Law” that prohibited state funded organizations from calling for boycott against Israel and enabled civil compensation law suits against such callers. And in 2022, it upheld an amendment to the “Citizenship Law” that enables the revocation of citizenship in case of ‘breach of loyalty’ defined by the law as ‘terror acts’ and applied only on Palestinians.

If Levin’s Plan passes, the Knesset will go forward in enacting discriminatory laws targeting Palestinians, knowing full well that the SCT is granted very limited power in reviewing the laws. The bills that were proposed before Knesset committees since the new government was sworn indicate that the current coalition is adamant in enacting such laws, especially since many of them are being enacted under the ‘counter-terrorism’ excuse.

An example of this when the Knesset, on February 15, 2023, enacted a law that enables the revocation of citizenship and permanent residency of Palestinian prisoners who were indicted and thus imprisoned for security felonies and received financial aid from the Palestinian authority. The law also states that those prisoners will be expelled after their release from Israeli jails to the OPT (WB and Gaza Strip) and they will be forbidden from entering Israel. This law contributes to the strengthening of separate ethnic paths of citizenship while undermining the citizen-hood of Palestinians.

In the legislation process are several other harmful bills, such as a bill allowing the deportation to the OPT of families of prisoners indicted in terror acts; a bill preventing Palestinian prisoners from receiving lifesaving medical treatments; a bill allowing death penalty of Palestinians indicted of murder based on ideological motives against the State of Israel or against “the presence of the Jewish People in its land”; a bill subjecting the Israeli



Police under the direct responsibility of the Minister of National Security, Itamar Ben-Gvir, to grant the minister the authority to decide and design its policies; a bill authorizing the police to conduct searches in private houses without search warrants issued by courts; a bill prohibiting the use of a Palestinian flag in public spaces; a bill prohibiting Arab student unions from holding Palestinian flags in academic institutions and preventing their establishment on grounds of 'support for terrorism'; a bill terminating teachers' employment at the Ministry of Education on grounds of 'supporting terror'; and a bill allowing discrimination in delivering service or products to the public based on religious grounds.

## The Enactment of the Override Clause

The Levin Plan suggests amending the "Basic Law: The Judiciary" to include an "Override Clause." This will grant the Knesset the authority to re-enact disqualified laws with a low majority of Knesset members and thus bypass the SCT's decisions.

If the Knesset enacts the "Override Clause", laws targeting Palestinian rights and which were previously disqualified might be re-legislated. An example of this could be re-enacting the "Civil Wrongs (Liability of the State)" Law which exempted the State from liability for damages caused by the Israeli military, thus denying Palestinians of their right to demand compensation for damages. In addition, and in line with the coalition agreement goals, the Knesset might re-enact the so-called Regularization Law, which allowed Israel to "legalize" the expropriation of privately-owned Palestinian land for illegal settlement construction. This law aimed to legalize almost 3,500 structures all over the WB, and if re-enacted, it will not only apply on those thousands of structures but will also accelerate the illegal expropriation of additional privately-owned Palestinian land.

## Canceling the Judicial Reasonableness Test

The "reasonableness" test is a judiciary tool that the SCT has adopted and expanded throughout the years. Basically, it enables the SCT to cancel administrative decisions issued by governmental authorities on the grounds the decisions were 'extremely unreasonable'. The Levin Plan intends to abolish this test, thus preventing the court from reviewing the government's decisions no matter how harmful they are to human rights.

Canceling this test will certainly affect every person whose rights have been violated by the public authorities, yet it will particularly have a major influence on Palestinians in the OPT. Since the Israeli Occupation of Palestinian territories in 1967, the Supreme Court allowed Palestinians to submit petitions challenging harmful administrative decisions, mainly those conducted or issued by the Israeli army and Ministry of Defense. Since then, hundreds of thousands of petitions were submitted to the SCT by individuals, institutions, and human rights organizations challenging harmful administrative decisions, which also were in violation of international humanitarian law. Indeed, the Israeli SCT has rarely ruled in favor of these petitions. For example, out of thousands of petitions submitted after the imposed blockade on Gaza in 2007, the SCT accepted only two cases related to Palestinian residents of the Gaza Strip. The first was a petition submitted by a young Gazan Journalist who was severely wounded by Israeli snipers during the Great March of Return, so the SCT – in contrast to the army and MOD's refusal – allowed him to exit from Gaza to the WB to receive lifesaving medical treatment. The second was a petition submitted by women cancer patients in Gaza who were denied entry to Israel for receiving lifesaving treatment based on the collective punishment grounds that they were married to members of Hamas.

Despite the fact that the SCT has not been a protector of the rights of Palestinians, the mere right to challenge administrative decisions on any ground, including the reasonableness test, is nevertheless crucial as it pertains to the fundamental right to access the courts and reach for effective remedy, as anchored in international humanitarian law.

## Restricting the Right for Legal Standing Before Courts

Levin's Plan intends to limit the legal standing of public petitioners, targeting mainly civil society organizations working for human rights, and prevent access to courts in public interest cases. This restriction will ultimately affect Palestinians on both sides of the Green Line as most court petitions that challenge constitutionality of laws and governmental decisions are submitted by these human rights organizations.

This restriction is proposed as part of the ongoing attempts to shrink the space for human rights organizations who are challenging, documenting, and exposing Israeli violations of Palestinian rights. One example of this is a bill that the Knesset is currently discussing, which aims to restrict foreign governmental funding for NGOs.

## Appointments of Judges and Legal Advisers to Ministries

Levin's Plan proposes major changes in the appointments of judges and legal advisers to ministries. Essentially, it aims to change the composition of the Judicial Selections Committee through granting politicians (government and Knesset) majority of votes in all appointments. This will allow them to appoint judges based on their political interests and desires. In addition, the proposal requires candidates to pass a public hearing before the Knesset, and includes changing the current system of appointing the Chief Justice of the Supreme Court from a seniority system to an appointment made by the government.

On top of that, Levin's Plan intends to undermine the role of legal advisors to ministries by changing the appointment process from professional to ministerial, thereby enabling the ministers to choose their own loyal legal advisers who will report directly to them rather than to the Attorney General.

These changes will certainly increase the already existing appointments of conservative right-wing judges and legal advisers, which in turn will increase the legalization of harmful laws and governmental decisions against Palestinians in both sides of the Green Line.

## Conclusion

Putting the Levin Plan into effect, once it is confirmed, and implementing the coalition agreements will have a severe impact on the lives of Palestinians – in both sides of the Green Line. For example, it will accelerate the enacting (or re-enacting) of harmful laws that target Palestinians in all fields of human rights, it will grant the Israeli military and officials impunity over committing war crimes in the Occupied Palestinian Territory (OPT), it will attain de facto annexation of the West Bank, and deepening the already-existing institutionalized and systematic racial discrimination against Palestinian citizens and increase the ethnic Jewish supremacy and domination over Palestinians.



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