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Critics warn of Israeli judicial apocalypse even as lawmakers work to create stronger democracy

Dear Friend of Israel, Friend of FLAME:

Many American pundits, politicians and mainstream media are predicting doomsday for Israel's democracy if Prime Minister Benjamin Netanyahu's government passes its proposed judicial reforms. Nothing could be further from the truth.

Those who make such apocalyptic claims either don't understand the structural crisis facing Israel's judicial system or simply selfishly favor the left-leaning judicial tribe that currently controls it.

Indisputably, Israel's judiciary is an undemocratic disaster that desperately requires repair. Any critic who doesn't first acknowledge this fact and suggest constructive solutions is a deceiver.

In fact, the Netanyahu government's judicial reforms intend to make Israel more democratic, not less. Reforms should add checks and balances missing in the Jewish state's judiciary and give ultimate power to democratically elected officials, as is the case in the U.S., Canada and the U.K., among many others.

Ironically, for more than forty years, Israel's Supreme Court did what supreme courts in other democracies do—translate the law based on its interpretation. However, in the 1990s, a cadre of unelected, activist judges took for themselves sweeping new judicial powers with virtually no legislative oversight.

As a result, the Israeli Supreme Court has virtually limitless power to decide on legal—as well as moral and political issues—based on a vague principle of “reasonableness.” This power hides behind the guise of “judicial review”—a process under which executive, legislative and administrative actions are subject to reversal by the judiciary . . . except Israel’s judges use a subjective standard to reach decisions.

It also doesn't help that Israel's Supreme Court Justices—rather than voters or

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elected officials—have an iron grip on choosing their successors, which has created an inbred, self-perpetuating club of judicial elites. In recent decades, this has invariably resulted in a leftist judiciary.

Just a few weeks ago, the Israel's Supreme Court ruled that a right-leaning government minister must be removed, though not because he had broken a law.

No wonder members of the Knesset, as well as Israeli citizens—who largely vote for rightist politicians—are chafing at the unbridled power of Israel's judiciary.

Essentially the new Israeli government is trying to impose influence on the Supreme Court by elected officials—a hallmark of almost all other Western democracies.

The reforms Prime Minister Netanyahu's government has proposed include giving elected officials a greater role in appointing new judges, limiting the Supreme Court's ability to strike down laws and other decisions, and an "override clause" allowing the Knesset to re-enact laws the Supreme Court has nullified.

To understand the need for judicial reform—and how it should look—we need to understand some fundamental facts about Israel's democracy and its highest court.

Unlike many democracies, Israel lacks a formal constitution. The closest thing the Jewish state has to a constitution is a set of Basic Laws that have higher standing than regular laws in the country.

One of Israel's Basic Laws defines the country's justice system, including the Supreme Court. But this Basic Law does *not* include a mechanism for judicial review. Thus, until the mid-1990s, the Supreme Court did not assume it had the power to strike down laws.

In 1995, Aharon Barak, new President of the Supreme Court, introduced the idea that the courts had the role of defending human rights and civil liberties in the absence of a constitution. He also believed that no issue should be outside the jurisdiction of the courts.

Under Barak, the Supreme Court began to use a "reasonableness test"—which determines whether or not public officials acted, or were about to act, in a way that is "reasonable." But this test is subjective, in which "reasonableness" is interpreted only as it suits elite Supreme Court judges. Nothing could be less democratic.

This broad-sweeping subjectivity eventually led to today's situation, in which the Supreme Court assumes it can strike down *any* piece of legislation or political appointment with no limit. In a democracy, the courts' ability to review and strike down government actions must have limits in law, so the judiciary cannot capriciously override decisions of democratically elected officials.

In fact, limits to judicial review are the norm in most democratic countries such as the U.S. and U.K. In the U.S., the Supreme Court can only strike down laws

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that contravene the U.S. Constitution.

In the U.K., from which Israel largely derives its system of government, the Supreme Court cannot undertake judicial review, and has no power to strike down decisions of Parliament.

Rather, the Israeli Supreme Court even claims the power to dismiss elected officials from their posts. This was done recently when the Court ordered Prime Minister Netanyahu to fire Arye Deri from the cabinet, but not because he had broken a law.

Critics of the current judicial structure argue that the Deri firing had no judicial basis—and that it overrides the will of the people. This is one of the injustices Prime Minister Netanyahu's government is hoping to correct.

Another injustice the Netanyahu government hopes to rectify is how Supreme Court Justices are chosen. The current system gives sitting Supreme Court Justices an absolute veto power over the choice of new judges—effectively removing the power to select judges from the elected government. The result has been the self-perpetuation of a Supreme Court all of whose members have similar political biases.

In the U.S., Supreme Court justices are appointed by the elected President and approved by elected Senators. In Canada, Supreme Court Justices are selected by the federal cabinet on the recommendation of the Prime Minister. In fact, the Israeli NGO, the Movement for Governance and Democracy, notes that in 30 countries, the judiciary has no role in appointing judges, making Israel's system of appointing judges virtually unique.

Hence, the Netanyahu government's proposal to give elected officials a greater role in choosing Supreme Court Justices will make the Court more accountable to Israeli voters.

According to a report by the Economist Intelligence Unit (EIU), Israel is already the world's 23rd most successful democracy—out-ranking even the U.S. and Western democracies like Spain and Italy. But like the U.S., Israel has its flaws, which its parliament has every right and responsibility to correct as it sees fit.

I urge you, when speaking with family, friends, colleagues—or in letters to the editor—to emphasize that Israel's judicial reform is not undemocratic. Rather, it's those who oppose reform who seek to perpetuate an unjust system and actually undermine Israel's democracy.

I hope you'll also take a minute, while you have this material front and center, to forward this message to friends, visit FLAME's lively Facebook page and review the P.S. immediately below. It describes FLAME's new *hasbarah* campaign—"Demand Justice for Jewish Students"—which exposes rising attacks on Jewish college students' identity and how these acts of antisemitism can be defeated.

Best regards,

James Sinkinson, President

Facts and Logic About the Middle East (FLAME)

P.S. You've surely seen headlines describing increasing attacks on Jewish students—in the classroom and in the public square—by radical anti-Zionist students, as well as faculty members. So far, university administrators have failed to prevent this kind of antisemitism on campus. At the heart of this discrimination, Israel's enemies outrageously claim that Zionism is not part of being Jewish. No wonder more and more Jewish students are hiding their Jewish identities on campus. I think you'll agree that we supporters of Israel need to speak out. FLAME's new hasbarah---explanatory message---"[Demand Justice for Jewish Students](#)" tells how new law suits based on Title VI anti-discrimination laws are putting pressure on college administrators to protect Jewish students from such attacks. I hope you'll review this convincing, fact-based editorial, which FLAME intends to publish in the *New York Times*, *Washington Post*, *New York Post*, *Miami Herald*, *Chicago Tribune*, *Houston Chronicle*, *Los Angeles Times* and *San Jose Mercury News*. This piece will also be sent to all members of Congress, Vice President Harris and President Biden. If you agree that this kind of public relations effort on Israel's behalf is critical, I urge you to [support us](#).

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