Statement by Canadian Law Professors and Jurists on the Proposed Legal Reforms in Israel

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The undersigned are Canadian law professors and jurists. We write out of concern that recent proposals to transform Israel's legal system will weaken democratic governance, undermine the rule of law, jeopardize the independence of the judiciary, impair the protection of human rights, and diminish the international respect currently accorded to Israeli legal institutions.

In the aftermath of the Holocaust and the other atrocities of the Second World War, the great project of legal reform throughout the world has been the establishment of systems of rights that protect human dignity. These systems exemplify the definitive legal repudiation ofthose (and similar) horrific events. Canadian and Israeli jurists have been partners in this project at the judicial, professional, and academic levels for decades. The transformation sponsored by the Israeli government would constitute a retrograde step that endangers the legal structure for protecting human dignity in Israel.

The lesson of the twentieth century in Europe and elsewhere is that democracy is more than electoral choice at periodic intervals. Democracy also presupposes a set of enduring legal norms and institutional arrangements that enshrine the rule of law, protect fundamental rights, and safeguard the freedom and dignity of all who are subject to official power. Strong and independent courts are integral to the democratic functioning of modern diverse societies.

The new proposed changes undermine these norms and their institutional frameworks. They undercut the independence of the judiciary by (i) giving the executive effective control over the process of appointing judges, (ii) severely restricting the power of the Supreme Court to determine the constitutionality of statutes, and (iii) empowering the governing coalition to override the invalidation of laws that infringe rights. They also weaken the rule of law by putting the hitherto independent legal advisor of each ministry under the control of its minister and by authorizing ministers to disregard their advisors' legal advice. Moreover, they abridge the protection against arbitrary administrative action by limiting the norm against unreasonable decision-making by public authorities.

Particularly at risk is the functioning of the Basic Law: Human Dignity and Liberty, the crown jewel of Israeli law. This Basic Law protects rights to dignity, property, privacy, life and bodily integrity, personal liberty, and freedom of movement to and from Israel. It also forms the jurisprudential basis for the right to equality, to self-expression, to marriage and parenthood, to freedom of conscience, to freedom regarding religion, to education, to healthcare, and to a dignified human existence. The government's proposals portend a future for Israel in which these rights lack effective judicial protection.

Given the exceptional concentration of political power in the Israeli system, any one of the government's proposals would be disturbing. Taken together they render government decisions effectively unassailable, regardless of their content.

Anyone subject to or affected by Israeli law would be exposed to the danger of abusive exercises of power by a government no longer accountable for violations of the most basic legal rights and principles. Israeli society would be deprived of the benefits of a reasoned and transparent judicial process that adjudicates in specific circumstances and upon established facts. Israel's international standing would be diminished by the perception that its Supreme Court had become the creature and extension of partisan politics.

Proponents of these changes point to Canada and other democracies to argue that the proposed changes are commonplace. This argument is disingenuous.

Israel's system of government differs from that of other democracies, like Canada's, in its exceptional concentration of political power. Other democracies have a suite of mechanisms that distribute or moderate the exercise of political power. Examples of these mechanism are: (1) a formalized constitution that the regular legislative process cannot change; (2) a comprehensive bill of rights that protects the dignity, liberty and equality of all by judicially enforcing a wide range of political, legal, social, and human rights; (3) the possibility of recourse to a transnational court of human rights to review government action; (4) an electoral process based on geographic constituencies, thereby inducing political parties to appeal to citizens generally rather than merely to the identity or beliefs of their core supporters; (5) bicameral legislatures that allow an upper house to deliberate upon the legislative proposals emanating from the elected representatives of the lower house; (6) a federal structure that divides power between local and national levels of government. These mechanisms disperse or limit political power and provide safeguards against its intemperate exercise.

In contrast, in Israel the prime minister and his coalition partners in the cabinet wield concentrated political power through their control of the legislature. The only constraint on the exercise of political power is the Supreme Court's role in upholding the rule of law, interpreting the Basic Laws, and applying the fundamental concepts of legal ordering. In adjudicating the extraordinarily difficult controversies that have come before it, the Supreme Court of Israel has established itself as one of the world's most respected judicial institutions.

Any legal system, including Israel's, can be improved. But if reform is to be legitimate, it cannot take the form of the partisan and hurried enactment of massive institutional changes that endanger human rights, undermine judicial independence, and compromise the rule of law.

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