



## Oversight Mechanisms for Filing Indictments in Israel

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*This paper examines a critical deficiency in Israel's criminal justice system: the absence of any meaningful pre-indictment oversight of prosecutorial decisions. Unlike other judicial systems, the prosecution in Israel has sole authority to determine whether charges should be filed, with no independent review mechanism before indictment. Citizens should be more protected from such concentration of power, and balance must be restored to a system that has deviated from its adversarial foundations toward a problematic "presumption of prosecution".*

The **first chapter** reviews the prosecution process in Israel.

The **second chapter** surveys judicial oversight of Israel's prosecutorial process, detailing the "protection from justice" doctrine; administrative petitions; plea deals; and the impact of plea deals on the rate of criminal processes handled in court.

The **third chapter** looks at the criminal law enforcement apparatus in Israel, highlighting its over-criminalization.

The **fourth chapter** lays out the critique of the way indictments are filed, breaking it down to what the current oversight mechanisms for filing indictments are, and what such mechanisms look like around the world.

The **fifth chapter** examines the hearing institution, explaining why it is an important yet insufficient oversight mechanism.

The **sixth chapter** details policy recommendations to institute the proper oversight of filing indictments in Israel.

### Summary

The authority to prosecute is one of the most injurious the law grants to a government agency. Criminal indictments have the potential to severely damage a person's personal, public, and professional life. When it comes to serious crimes, or when public figures are involved, defendants may lose their job or public position based on the indictment alone. Such severity demands balance, in the form of oversight and

review by an independent agency. However, under current conditions, Israel's criminal prosecution apparatus is the only agency authorized to determine whether a person is to be prosecuted. No other body or mechanism has the authority to review its work before an indictment is filed in court, thereby granting the prosecution enormous power. Moreover, nearly all indictments are resolved without trial in plea deals – 95% at local courts and 85% at district courts. Plea deals require judicial approval, but in practice, courts intervene only in extremely outlier cases. The result is that when it comes to plea deals, the criminal prosecution not only prosecutes but effectively judges and sentences as well.

Israel's adversarial judicial system assumes that the truth of each case will be revealed in court after an accused person was indicted, when the prosecutorial evidence is carefully examined and defendants have the opportunity to mount a detailed defense. However, the discussion of an indictment in court means the defendant has already suffered a large degree of damage from the very process of prosecution.

Furthermore, in contravention of its own foundational principles, Israel's prosecutorial apparatus has come to be based on "a presumption of prosecution". In other words, the default position is to file an indictment rather than to thoroughly examine the question of whether prosecution is advisable. This presumption is exacerbated by Israel's abnormally high conviction rate in court - close to 99%. At all levels of prosecution, the working assumption has transformed from "innocent until proven guilty" into "authorities all act lawfully, honestly and professionally", so that any arrest made leads almost automatically to prosecution and conviction.

The primary legal tools defendants have to try and cancel an indictment are a request for "protection from justice" (analogous to the American "abuse of process"), and an administrative suit against the prosecution. However, both are available to them only after an indictment was actually filed. Moreover, in practice, the Court applies strict criteria for accepting cases on the grounds of protection from justice, and does so only rarely. And while the second mechanism exists on paper, there is no known case in which a decision to prosecute was revoked by an administrative petition.

Israeli law and jurisprudence provide defendants who are accused of the most severe classification of crime - "*peshah*" (felony) - offenses punishable by imprisonment for more than three years - the right to a hearing before an indictment is filed. The hearing mechanism adds a layer of defense, but it is insufficient on its own. Firstly, it is extended only to suspects of the most severe crimes, but even then, it has no institutional procedure. Each prosecutorial agency sets its own internal rules for holding hearings, and each has sole discretion to decide whether the investigative materials or full text of the indictment should be made available to the suspect.

In comparison, other judicial systems around the world maintain permanent mechanisms for reviewing indictments before filing. Criminal inquisitorial

(continental) systems common to Europe have an intermediary stage, where the decision to prosecute is reviewed by an examining judge. Federal law in the US mandates approval by a grand jury in a preliminary hearing before filing in court. Israel itself used to have a form of preliminary check similar to Europe, with the law stipulating that all indictments must be reviewed and approved by an examining judge before being filed. However, this requirement was canceled in 1956.

## **Recommendations**

Israeli law must provide protections for suspects both in cases of felonies (*pesha*) and misdemeanors (*avon*), protections that allow for a review of the charges and an examination of the evidence and the defendants' response to the indictment before formal prosecution and trial. These measures should include:

1. **Notifying all suspects of the intent to prosecute;**
2. **Conducting hearings** for suspects:
  - A. This right should be expanded to include crimes classified "*avon*" (misdemeanors), meaning offenses punishable by imprisonment for more than three months but less than three years.
  - B. All suspects, upon receiving notification of the intent to prosecute, should have the right to postpone their defense until the decision to prosecute has been finalized and the indictment formulated.
  - C. Suspects should have the option to file a reasoned request to withdraw a pending indictment;
  - D. Regulations should be formulated regarding: when to grant suspects of crimes classified as "*khet*" (infraction) the right to a hearing as well; when to hold oral hearings; and when to extend the deadline for filing requests or for transferring material to suspects.
3. **Instituting the mechanism of a preliminary judicial investigation** to minimize as much as possible the filing of indictments based on insufficient evidence, and to prevent hasty or malicious prosecutions. While internal mechanisms have their advantages, they are insufficient in checking the enormous power of the prosecutorial apparatus. Therefore, such preliminary investigation should be conducted by the independent and separate branch of the judiciary. The preliminary investigation should be conducted by a magistrate judge, in a technical procedure that does not include the parties' presence but focuses on examining the evidentiary base for the pending indictment. Along with the evidence file, the judge will be presented with the defendant's response after they had the chance to review the indictment set to be filed against them. The examining judge may also summon representatives of the prosecution for consultation or clarification.