



THE ISRAELI LAW PROFESSORS' FORUM FOR DEMOCRACY

The Argumentative Structures **Utilized by Supporters of the Regime Overhaul**

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This paper analyzes the various argumentative forms utilized by proponents of the judicial overhaul in public discourse. We find that:

- Under the appearance of a rational, evidence-based debate, the arguments' forms in fact preclude such deliberation.
- The factual arguments concerning the law and the judiciary are misleading, the conclusions drawn from them are incompatible with the problems identified, and the overarching implications, namely, undermining democracy, are hidden or denied.
- The accumulation of these arguments, which flood the media in multiple versions, amplifies the argumentative harm generated by them.

Studies of rhetoric and persuasion underscore the significance of the structure and style of arguments, alongside their content, to assess their persuasive potential. A significant part of an argument's power lies in its form, namely in aspects that do not pertain to its explicit content—not “what” but rather “how.” Many of our previous position papers focused on the content of the government's planned regime changes. In contrast, this paper highlights prominent argumentative structures used by supporters of the regime overhaul. We examine arguments that purport to present facts about the Israeli legal system and presume to draw logical conclusions from those facts. We demonstrate how, in addition to cases in which advocates of the overhaul present patently wrong facts, certain forms of argumentation are misleading even when specific facts are not necessarily wrong, or only partly wrong.

Analyses of the kind proposed in this paper, have proliferated in recent years in information studies, particularly in the contexts of information pollution, information disorder, and what is sometimes referred to as post-truth or post-fact. The proliferation of studies on these topics occurs against the backdrop of deep crises in public communication, political polarization in democratic states, and democratic backsliding.[1]

What sets this paper apart is its focus on arguments about law. As emphasized by Kim Lane Scheppele, the processes leading to the collapse of democracies in current times revolve around law: new autocrats use legal means and rely on the appearance of legitimate legal forms, which are essential for their legitimacy and for distancing themselves from popular tropes on twentieth-century authoritarianism (the "Hitler scenario" and the "Stalin scenario," in her terms).[2] It is therefore unsurprising that sessions on the judicial overhaul at the Constitution, Law, and Justice Committee of the Knesset have been titled "Zion shall be redeemed through law: reintroducing justice to the legal system". Hence, the importance of examining the argumentative structures of the law.

Speakers who present factual arguments in this context purport to act within the framework of rational public deliberation and thus justify the regime overhaul. They draw on the language and norms of evidence-based persuasion and might gain legitimacy through the fairness and truth-seeking associated with this type of language. For this reason, their arguments should be examined to establish whether they indeed meet the minimal requirements of this mode of persuasion.

We examine argumentative structures in relation to the three basic stages of argumentation: **presenting evidence, drawing conclusions, and responding to criticism.** Typical argumentative moves that make the argument misleading can be found in each stage. Numerous cases have been extensively analyzed in the Law Professors' Forum's various position papers and are briefly presented here as examples. For a full understanding of the content of each example and its broader context, readers are referred to the relevant position papers. It bears emphasis that the arguments we analyze here do not distinguish between the three stages mentioned above. On the contrary, one prominent finding is that supporters of the regime overhaul blur these distinctions in their argumentation, making it difficult to identify the failures we discuss.

The study reveals several prominent argumentative structures:

Firstly, claiming that a “problem” exists by misleadingly using evidence that portrays the legal system as having unlimited (or almost unlimited) power, while simultaneously depicting it as flawed and oppressive. This move includes:

1. Selectively using facts in several contexts (comparative law; references to authoritative legal figures; multiple citations; and lack of citations).
2. Presenting an exception as the rule.
3. Presenting a legal decision as barring political action when politicians have in fact other routes of action.
4. Presenting an outdated historical context as if it were the current state of affairs.
5. Attributing to the legal system overstated responsibility for complex events.
6. Mixing truths with falsehoods in a way that lends credibility to the latter and supports a negative and threatening portrayal of the legal system.

Secondly, presenting solutions that do not address the alleged problem. This move includes:

1. Presenting an alleged problem alongside a solution that does not effectively address it.
2. Presenting a variety of changes to the legal system that could each be reasonable alone, but when combined, lack coherence, and do not solve alleged problems but undermine democracy (a phenomenon known as “Frankenstate”^[3]).

Thirdly, failure to engage with criticism. This move includes:

1. Adopting a rhetorical commitment to dialogue while avoiding it in practice.
2. Denying the true implication of the “reform” as undermining democracy in various forms that we analyze: focusing on details without the bigger picture (“can’t see the forest for the trees”); diverting attention to side issues; turning the discussion from structural to personal questions; asserting that “everything will be okay.”

An additional move, relevant to all three stages, involves the appropriation of liberal terminology. This move retains on outer form of a liberal democratic discourse while emptying it of its commonly-accepted meanings, and replacing them with contrary

ideas. In this context, we address the terms: balance; democracy; separation of powers; “strengthening” the rule of law/public confidence/democracy; liberalism; equality; and the rule of law.

In analyzing these argumentative forms we are not concerned with the subjective intentions of speakers, but rather with the effects of their argumentative structures, although intentions and effects may coincide.

It bears emphasis that a comprehensive analysis of arguments marshaled by supporters of the regime overhaul would involve additional aspects that exceed the scope of this paper. Thus, we do not address questions of evoking emotions except when they are directly related to the factual discussion. A complete analysis would delve much more deeply into the negative aspects of demonization, vilification, and hostility toward the legal system, legal professionals, or opponents of the regime overhaul; and the positive aspects of group loyalty, ideology, passion, religious faith, and more. In these contexts, rhetorical style, narrative structures, symbols that appear in texts, and visual and performative content are all relevant (for example, in speeches and media coverage, elements of rhythm, tone, soundtrack, omissions, space design, and photographic style).

Furthermore, we do not address the technological environment and media ecosystem in which the arguments operate, nor other contextual aspects such as the sources of funding, the audiences, and the social, institutional, intellectual, political, and economic history that may explain the origins and development of the argument, and are relevant for its reception. Finally, we do not address argumentative structures that do not pertain to the legal context specifically, even though they are used in it, such as whataboutism. While these are all interrelated, and the full implications of arguments cannot be understood outside this broader picture, this paper has a specific goal: it focuses solely on argumentative structures dealing with facts about the legal system.

Given the flooding of arguments supporting the regime overhaul, the analysis is based on only a few examples. Some of these received public attention, for example, the Minister of Justice Yariv Levin’s speech announcing the judicial overhaul (January 4, 2023), Prime Minister Binyamin Netanyahu’s speech three months later, in which he stated that he was getting involved in “the event” (March 23, 2023), and a document known as “The Supreme Court’s Injustices”. We also examined examples from different genres: discussions in the Knesset’s Constitution Committee and background materials provided to it, a “report” aired on Channel 14 (a channel supportive of the regime overhaul), legislative bills’ explanatory notes, and publications associated with “Kohelet Forum” and supporters of the regime

overhaul. For the sake of focus and illustration, we mainly discuss arguments made since the announcement of the regime overhaul in January 2023, even though the foundations for them had been prepared over the years.

[1] E.g., *The Disinformation Age: Politics, Technology, and Disruptive Communication in the United States* (W. Lance Bennett & Steven Livingston eds. Cambridge University Press, 2020); Andrew M. Guess & Benjamin A. Lyons, *Misinformation, Disinformation, and Online Propaganda*, in *Social Media and Democracy: The State of the Field, Prospects for Reform* 10 (Nathaniel Persily & Joshua A. Tucker eds. Cambridge University Press, 2020).

[2] Kim Lane Scheppele, *Autocratic Legalism*, 85 *Chicago Law Review* 545 (2018). Similarly, the political scientist Erica Frantz warns that the legal arena is the most dangerous when elected leaders try to destroy democracy from within.

[3] Kim Lane Scheppele, *The Rule of Law and the Frankenstate: Why Governance Checklists Do Not Work*, 26 *Governance* 559 (2013).