

The Supreme Court on the Reasonableness Standard: The Underlying Issues

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On September 12, 2023, the Supreme Court held a hearing on the petitions against an amendment to the Basic Law: The Judiciary, which eliminates the Courts's authority to overturn decisions by the Government and the ministers on the grounds of "unreasonableness." The petitioners and the Attorney General argue that the amendment should be nullified, due both to flaws in the legislative process and to its contradicting the core values of Israel as a Jewish and democratic state. The Government and the Knesset, on the other hand, contend that the Court does not have the jurisdiction to nullify an amendment to a Basic Law, and certainly not in the present case, which concerns the rejection of grounds for review that do not exist in most other countries. It is too early to assess how the Court will rule. It has until the middle of January to give its decision, which could even become superfluous if a compromise is achieved that includes a refinement of the law. There is no doubt that this is one of the most extraordinary and sensitive legal proceedings ever held in Israel. However, it should be emphasized that the reasonableness standard is not at the heart of the momentous dispute that is dividing the nation, and the Court's final verdict - whether it approves the amendment or annuls it - should not be seen as the end of the socio-political storm.

On July 24, 2023, the Israeli government passed [Amendment No. 3 to the Basic Law: The Judiciary](#) (hereafter: the amendment), whereby the Courts are prevented from examining the reasonableness of decisions taken by the Government, the Prime Minister, or the ministers. Several petitions against the amendment were submitted to the Supreme Court, as well as applications to join as amicus curiae. The arguments against the amendment focus on flaws in the legislative process, on material defects in the amendment, and on its damaging consequences. The petitions also address the jurisdiction of the Court to discuss the legality of the amendment of the Basic Law. In an unusual occurrence, the Attorney General, in her response to the petitions, [expressed support](#) for the petitions and the arguments that were raised, and joined the request that the Court nullify the amendment. On the other hand, the Government, represented by a private attorney, submitted its response that strongly opposed the Supreme Court's

intervention in Basic Laws in general, stressing also that there was no justification for intervention in this amendment on its merits. The response filed on behalf of the Knesset likewise argued that the Supreme Court should refrain from intervention. On September 12, for the first time in history, all fifteen justices of the Supreme Court sat together, to hear the petitioners and the respondents in a marathon 13-hour session. The ruling can be given up to three months after the retirement date of Chief Justice Esther Hayut and Justice Anat Baron next month, in other words by the middle of January 2024.

These petitions are part of a series of petitions, addressing various actions of the government and the coalition as part of what has been labeled “judicial reform.” In addition to the aforesaid petition, on September 28, 2023, an extended panel of eleven justices will hear the petitions regarding the [Amendment to the Basic Law: The Government \(Amendment 12\)](#), which deals with the process of declaring the incapacity of the Prime Minister, and in an additional case the Supreme Court is expected to hear a petition regarding the non-convening of the Judicial Selection Committee.

The Arguments of the Petitioners and the Attorney General

Arguments Relating to the Legislative Process

The petitions specify many flaws in the legislative process. It is claimed that the discussions on the amendment were hasty, continuous, and intensive, and were conducted with no time to hear the views of professional experts and in a manner that harmed the ability of members of the Knesset Constitution, Law, and Justice Committee (hereafter Constitutional Committee) to study the amendment and actively influence the process. During the process none of the changes proposed by the legal advisors of the committee, members of the opposition, or academic experts and public representatives were incorporated into the amendment. Moreover, the second and third readings in the Knesset were not exhaustive and reservations expressed by Knesset members were not examined individually.

Furthermore, it is claimed that the chairman of the Constitutional Committee, MK Simcha Rothman, made improper use of the mechanism established in the Knesset Rules of Procedure by presenting the bill as a draft law on behalf of the committee. As such, he avoided the lengthy and thorough process of advancing a government draft law, which would require the involvement of the Attorney General’s office and compliance with Ministry of Justice procedures. At the same time, MK Rothman refrained from submitting the proposal as a private draft law, which would require a preliminary reading in the Knesset and a waiting period of 45 days before proceeding with the legislative process. Thus, the public was

precluded from examining the proposal, and there was no requirement to obtain the approval of the ministerial Legislative Committee. It was argued that making use of the mechanism of submitting bills on behalf of the Constitution Committee deviated from the way this mechanism has been used in the past, namely, to promote bills over the professional matters under its authority passed by the committee with broad agreement.

An additional argument raises the need to distinguish between the process of legislating Basic Laws, which have a constitutional status, and legislating a “regular” law. Legislation of norms of “constitutional” status requires strict observance of a proper legislative process that reflects broad consensus. In the present case, the legislative process was conducted at lightning speed to serve narrow, temporary political coalition needs, in a one-sided way that did not consider the views of experts or Knesset members from the opposition, and did not consider the implications of the amendment. This was all contrary to previous instances of legislating and amending Basic Laws.

Substantive Arguments on the Essence of the Amendment

At the substantive level, it is argued that limiting the Court’s powers to oversee the Government contradicts fundamental principles of governance in Israel, endangering the separation of powers, and subjects the public to arbitrary Government decisions. Due to deficiencies in the checks and balances system in Israel when compared to mechanisms that are accepted worldwide – a constitution, two houses of parliament, regional elections, a federal structure, a strong legislative authority or one that is subordinate to supranational institutions – abolishing the Court’s oversight of the Government could dangerously weaken the already defective balance of powers.

Compared to other grounds for review (extraneous considerations, arbitrariness, discrimination, bias, inequality, lack of factual basis, or proportionality), the reasonableness standard serves as a crucial tool for the Court, especially in light of the evidential difficulty of establishing other grounds, and as a “residual judicial means” in exceptional cases. The amendment abolishes the reasonableness standard entirely and forbids its use even in extreme situations. In this way it creates a “vacuum” in Israeli administrative law and removes an important means for oversight of Government actions. Furthermore, removing the authority of the courts to review the reasonableness of the decisions of the Government and its ministers means the de facto nullification of the standard, leading in practice to the abolition of the basic duty of “elected public officials” to act reasonably and for the public benefit: this is a basic part of the executive branch’s nature as a trustee

for the public, whose duty is to act exclusively on its behalf. This is a fundamental change in the basic structure of Israeli democracy, because the law deals a mortal blow to the principle of the rule of law.

It is argued that the amendment will deprive “ordinary citizens” of the possibility to argue against unreasonable decisions that affect their rights. Although the amendment refers to the reasonableness of decisions at the ministerial level, ministers will be able to take upon themselves decisions on matters under the authority of the professional echelons and thus immunize them against judicial review on the question of reasonableness.

A central danger of removing the reasonableness standard is that it will enable improper appointments and dismissals by the Government and its ministers and will increase the potential for corruption. The amendment could also lead to unsuitable appointments of “gatekeepers” (such as the Attorney General). Of further concern is that the advance of a practice of political appointments will lead every new Government to replace all public officials appointed by its predecessor with its own people. This would lead to an unhealthy dynamic of a political public service that is unprofessional and focused on achieving its narrow political aims. Another example of concern is the potential for politically motivated indictments filed by those in charge of criminal prosecutions nominated by the politicians.

Other arguments focus on the determination in the amendment that there will be no judicial review on the grounds of reasonableness in decisions “to refrain from exercising any authority.” It is argued that this means that ministers will be able to hold the public interest “hostage.” When a minister refrains from exercising his or her powers, this may violate individuals’ basic rights and the general public’s interests in the various areas of life. The reasonableness test is the principal material grounds for challenging arbitrary and harmful abstentions from the exercise of power, because in such cases there is generally no evidence for establishing the reason for the abstention from action. It is argued that adding this stipulation explicitly in the amendment is intended to serve a narrow and immediate interest of preventing judicial review over the Justice Minister’s defiance of his duty to convene the Judicial Selection Committee.

In addition, review by means of the reasonableness standard is the only way to enforce a standard of conduct on transitional governments that, by their nature, act to maximize narrow political benefits. This applies particularly to appointments during election campaigns and the implementation of “election economics.” In these contexts, the reasonableness standard is designed to shape the “fairness”

of the election system and oblige the Government to act with restraint at such sensitive times.

It is argued that the amendment should not be treated as an isolated case, but as part of a larger set of changes, intended to pave the way for further legislation that will change the nature of the regime. Accordingly, it must be examined as part of a broad process of planned changes, for example a change to the composition of the Judicial Selection Committee, an attack on the independence of the Attorney General, and a restriction on judicial review over legislation. Such a move embodies the risk of starting a process of “democratic decline” which includes weakened brakes on government power, control of the judicial system in a way that could infringe upon human rights, political appointments of prosecutors and interference in decisions on criminal matters, government takeover of the media, more intensive scrutiny of civil society organizations, weakening and delegitimizing of the opposition, limitations on freedom of expression, and changes to the election laws. Similar moves have already occurred in other countries, such as Poland and Hungary. A comparative survey shows that isolated moves can accumulate so that at a certain moment, a liberal democracy (such as Israel) becomes a “hollow” democracy. Thus, once the Courts are neutralized, it will be difficult or even impossible to stop the consequences for democracy. This is particularly true in Israel, where the mechanisms for oversight of the executive branch are already weak.

Possible Implications of the Legislation

The arguments against the amendment also refer to its possible harmful implications in other areas, including concern of harm to national security, human rights, environmental protection, and health, and its effect on Israel's foreign relations, particularly the special relationship with its most central ally, the United States. It is also claimed that the amendment will increase the risk of exposing members of the security forces to criminal proceedings in international forums, particularly in the International Criminal Court in The Hague (ICC), but also in other countries. This is because weakening the law enforcement system and the power of the Courts could adversely affect Israel's ability to rely on the principle of complementarity, that is, the claim that there is no room for foreign intervention if the concerned state itself investigates matters genuinely and professionally. The amendment could also enable ministers to dismiss senior officials in the security establishment, including the Military Advocate General, who is responsible for the rule of law in the IDF, and open the way to the use of improper security means and measures with no controls or review. Furthermore, there is a concern that

Israel's allies will no longer stand by it in the international arena if it is perceived as a state that does not respect the rule of law.

The Court's Jurisdiction to Intervene in the Legislation of Basic Laws

Aside from the arguments against the merits of the amendment, the petitioners and the Attorney General address the claim that the Court does not have the authority to review Basic Laws. To date the Court has refrained from invalidating Basic Laws and amendments to them. There are two central arguments on this matter.

The first argument is based on the doctrine of the "unconstitutional constitutional amendment," whereby a constitutional provision that will bring down the entire constitutional structure falls outside the boundaries of the constituent authority granted to the Knesset. It is argued that when the Knesset legislates a new Basic Law or amends an existing Basic Law, it must preserve the basic structure of the Basic Law and is not authorized to undermine the fundamental principles of Israel as a democratic and Jewish state. Therefore, if an amendment to a Basic Law severely compromises the rule of law or the principle of separation of powers (for example, by preventing the Court from supervising the other branches), the Court has the power to cancel the legislation. Preventing effective judicial review on the grounds of the unreasonableness of Government actions constitutes an irreversible blow to the core of the regime and therefore there is justification for the Court to intervene and annul the unconstitutional change.

The second argument is based on the doctrine of the "abuse of constituent power," which refers to the use of a Basic Law for an unconstitutional purpose. The element of "abuse" focuses on the use of constituent power in a way that expresses contempt for the constitution, bypasses proper public and political debate, and derives from narrow coalitionary needs. It is argued that a norm that is not suitable for the constitutional fabric cannot be granted constitutional status just by labeling it a "Basic Law." The current amendment lacks the fundamental identifying signs that characterize constitutional norms. The explanatory notes and the memorandum of the law provide no explanation why the amendment should be in the framework of a Basic Law. There is also no reason provided why the amendment refers only to judicial authority and does not impose any limits on the authority of the elected officials. Moreover, the motives of those proposing the law were to extract an immediate political benefit from the Knesset's constituent power. It is aimed to enable the Government and the Prime Minister to dismiss gatekeepers, appoint government ministers, and avoid convening the Judicial Selection Committee. Thus the amendment clashes with the stability

principle, whereby constitutional amendments should not serve temporary, short-term, and narrow political interests. All these are clear evidence that this is not a case of a material constitutional norm and involves abuse of constituent power. Accordingly, although the law is defined as a Basic Law, it must be made subject to judicial review.

In addition, it has been argued that when there are both procedural and substantive defects in the legislative process, it can justify judicial review of the law. Even if procedural defects alone may not be enough to invalidate a law, it is possible to consider substantive defects in the content of the law as well. When both types of defects are present, they can provide sufficient justification for rejecting the law. This applies even in the case of Basic Laws. In the current situation there were both technical and substantive flaws in the legislative process, which together make it possible to carry out a judicial review and invalidate the amendment.

Requested Remedies

The primary remedy requested in the petitions is the nullification of the amendment to the Basic Law. However, possibilities of “softer” remedies were also raised, such as: delaying the applicability of the amendment until the term of the next Knesset commences; returning the amendment to the legislature for repair of defects in the legislative process (both procedural and substantive); declaring “relative nullity” and deleting some of the provisions of the amendment, in order to fix any lack of clarity and sweeping provisions; declaring a limited interpretation (reading down) of the amendment, whereby the restriction on the Court’s power of intervention will not apply to resolutions that are extremely unreasonable, arbitrary, or preposterous; downgrading the amendment to the status of a regular law since the process prior to the amendment did not meet the requirements for legislating Basic Laws.

The Arguments of the Government and the Knesset

The Court’s Lack of Jurisdiction to Review Basic Laws

The Government’s main argument is that the Court has no jurisdiction to review the validity of Basic Laws. A similar argument was raised in the position paper submitted by the Knesset. This is by virtue of the principle of sovereignty of the people and separation of powers, and the implementation of the principle of rule of law, whereby no institution stands above the law, including the Court. The Court derives its authority to review legislation from the sovereign’s empowerment. Therefore, it cannot create its own source of authority. The Court has determined

that it has the power to review (regular) legislation that conflicts with Basic Laws, according to a doctrine that it adopted in the 1990s (which itself is subject to criticism), based on the supremacy of the Basic Laws enacted by the Knesset in its capacity as a constituent assembly. There is no basis for determining that the Court has the power to review Basic Laws, thus placing itself above the sovereign.

According to the Government, there is no reason to adopt the doctrine of an “unconstitutional constitutional amendment.” In support of this argument, the Government presents a comprehensive comparative analysis, arguing that no developed country uses a doctrine that allows the rejection of a constitutional amendment that does not conflict with an explicit provision of the constitution. The Government demonstrates that only a few developing countries, such as India, Colombia, Bangladesh, and Slovakia, have rejected constitutional amendments on the grounds of conflicting with the basic structure of an existing constitution. It argues that since Israel has no constitution, nullifying a constitutional amendment that allegedly contradicts notions of basic principles is even more far-reaching.

At the substantive level, in the absence of a formal constitution, the Court has no fulcrum to establish a constitutional review. The attempt to establish such a review on undefined basic principles is problematic and diverges from the basic concept of a democratic regime, whereby the determination of these principles is made by the people or its elected representatives, and not by non-elected judges. Additionally, relying on these principles, whose content is undefined and subject to disagreement, will undermine legal certainty and negatively impact the relationship between the branches of government. Similarly, it is problematic to base a constitutional review on the clash with the state's designation as “Jewish and democratic.” These are vague concepts, whose content is subject to debate, as is the balance between them. Neither is it proper to rely on the Declaration of Independence for constitutional review, since with all its historical importance, it is not a legal document of constitutional status.

As for the claim of “abuse of constituent power,” it is argued that it should be rejected at two levels: First, the doctrine itself should be rejected, as it permits the judicial branch to invade the legislative branch's jurisdiction. Second, at the substantive level, the amendment in question is a constitutional amendment in essence, and there is no basis to the claim that it deals with a normal law “disguised” as a Basic Law or an amendment for narrow political needs. It is a stable amendment that sets a general legal rule that will apply in all cases, and it deals with the relationship between the judicial branch and the executive branch, which is clearly a constitutional matter. The Knesset's position stresses that there

is no basis for the assertion that the law rests on an invalid political motive. It also states that the claim by the petitioners that the amendment represents abuse of constituent power creates an absurdity, since the only way to introduce changes into the scope of judicial review is through an amendment to the Basic Law: The Judiciary.

Lack of Grounds for Intervention due to Procedural Flaws

In the government's view, there is no constitutional requirement in Israel for a special procedure to legislate Basic Laws. The petitioners are trying to create such procedures by way of judicial legislation, and this must be rejected. In addition, the legislative process involved extensive discussions and input from many experts, and it cannot be said that Knesset members were unable to adopt an informed view on the amendment before the vote. The Knesset's response provides a detailed account of the legislative process, and an assertion that, despite certain flaws, it was largely conducted properly, and certainly not in a way that justifies its disqualification.

The Substantive Arguments about the Amendment Itself

According to the government, the argument that the amendment to the Basic Law constitutes an extreme case that threatens the core of democracy, justifying the Court's intervention, lacks any foundation and is evidence of the danger of adopting a doctrine that allows judicial intervention in basic legislation. The amendment changes a certain aspect of the limits of the Court's jurisdiction in the area of administrative review and restricts the use of the reasonableness grounds. The use made by courts in Israel of the reasonableness standard is unique to Israel and has reached abnormal dimensions, contrary to accepted practice worldwide and contrary to the requirements of a proper separation of powers. There is a profound disagreement among Supreme Court justices over the use of this grounds for intervention. According to the Government, there is no dispute over the fact that judicial review of the work of the Government and other administrative authorities is necessary to prevent abuse of ruling power. The dispute is not over the importance of the rule of law or the obligation to observe the law, but over the balance between the powers and the scope of judicial review over the exercise of authority by the Government and its members. The petitioners have a legitimate ideological political position, but so do the supporters of the legislation. According to the Knesset, it is not possible to state that the amendment strikes at the heart of Israel's definition as a Jewish and democratic state, since it is not yet clear how the amendment will be implemented and how it will be interpreted by the courts. Therefore, the time is not yet right for petitions

on this subject. The Knesset also argues that it is not possible to treat the amendment as part of a complete overhaul since there is no certainty over the continuation of the process.

The Government rejects the argument that posing any kind of limit on the power of the Court is an unconstitutional constitutional amendment. Accepting this argument means that the power of the Court is unbounded and that the Court is placed above sovereignty and above the law. Every ruling institution must act within a normative framework. The legislature has the right to determine statutory limits for judicial review. This was ruled in the past, and this is accepted in other countries worldwide. Restricting the scope of judicial review, and especially a restriction that does not affect basic rights, cannot be deemed a denial of the minimum requirement for defining a state as democratic. As for the arguments about the impropriety of limiting judicial intervention in decisions regarding the appointment of senior officials, the state maintains that no democratic country grants the power to intervene in such appointments on grounds of reasonableness, so that the amendment to the Basic Law only brings the situation in line with that prevailing in most Western democracies.

To the argument that the Court has the task of balancing the power of the majority, the Government responds that the job of the Court is only to restrain the Government so that it acts within the framework of its powers and the law. The existence of checks and balances between the powers is essential, but it does not justify granting unlimited power or unlimited authority to the Court. The Government rejects the entire argument that limiting judicial review on the grounds of the reasonableness of the actions of publicly elected members of the executive branch strikes at the heart of democracy. The ones who are supposed to review the reasonableness of the Government's actions are the parliament and the public at the next elections. The Government also rejects the approach that in view of the fears of extreme moves on the part of the Government that could undermine the basis of the democratic regime, the Court must play the role of the "responsible adult" to prevent this. It is argued that there is no basis to the assumption that justice and morality are necessarily always on the side of the judicial branch. Moreover, if the parliament passes a law that obliterates the democratic structure of the country, it is doubtful whether any judicial ruling could prevent its implementation, assuming that the Court itself does not join the move.

Implications of the Amendment

In the Government's view, it is not the role of the Court to examine policy considerations, and therefore it would be improper to examine the security and political implications of the amendment. Furthermore, the argument that the amendment will put IDF soldiers in danger of being put on trial by the ICC is essentially wrong. First, according to Israel, the ICC has no jurisdiction over IDF soldiers. Contrary to this position, an investigation was launched in 2021, which meanwhile is not progressing. The decision to open an investigation was political, and in any case was taken long before this amendment was proposed. Limiting the ability of the Court to review decisions on the grounds of reasonableness will not affect this investigation. In addition, implementation of the complementarity principle, namely, that the ICC cannot intervene if a country is able to investigate itself, will not be affected by the amendment, which deals with judicial review on the grounds of the reasonableness of Government administrative decisions and does not affect the criminal system in Israel in any way.

Requested Remedies

According to the Government and the Knesset, there is no reason for the Court to invalidate the amendment. The Government also stresses that there is no place for alternative remedies. Thus, there is no reason for the Court to grant a limited interpretation that "twists" the language of the law, which is clear. Nor would it be proper to delay implementation of the law since the Court does not have the authority to issue such an instruction.

The Government's position hints that if the Court decides to contrive new requirements on the necessary procedures of enacting Basic Laws, contrary to the Government's view, then it would also be proper for it to apply equally strict rules for its own powers of judicial review, such as the demand for a special majority of the panel in order to annul the law.

Conclusion

There is no doubt that when state authorities that are supposed to act out of a shared purpose of promoting the national good stand opposed to each other in a conflict dynamic, the result is a troubling reality. Tension between the Courts and the Government and claims of exaggerated judicial intervention have existed in the past, but the Court was never presented as the enemy of the people. Similarly, even when the Government tried to limit judicial intervention, it was not seen as trying to undermine the very idea of the rule of law and the foundations of a democratic regime. The expectation that the current crisis of trust and deep rift in the country can be resolved by a Supreme Court ruling is unrealistic. This is particularly true when the Supreme Court has become a punching bag for one

side and the great savior for the other. There is a need for responsible behavior by those who hold the reins of government to adopt a non-partisan approach and work to calm the public's genuine fears for the fate of the nation – fears that are fueled by the conduct of the Government and statements by some of its ministers. On the other side, the leaders of the protests must stop presenting the Court's ruling as something that will decide the fate of democracy. With all due respect to the reasonableness standard for judicial intervention, it is not the heart of the matter, and any decision that is reached by the Court – whether it approves the amendment or rejects it – will not be the end of the story.