



## THE ISRAELI LAW PROFESSORS' FORUM FOR DEMOCRACY

### Israel's Recent "Unreasonableness Amendment" and its Implications

Published 28<sup>h</sup> July, 2023\*

**In this memo we explain the "Unreasonableness Amendment," which was enacted by the Israeli Knesset on July 24<sup>th</sup>, 2023, its meaning, and the coming steps.**

---

\* The Israeli Law Professors' Forum for Democracy is an ad hoc and voluntary group of experts on Israeli law working to protect and promote liberal democracy in Israel. The forum engages in research and analysis of legislative bills, writes policy papers, and provides information and explanation for the public as well as for professional audiences. The forum actively opposes initiatives and actions aimed at abolishing the independence of the judiciary and subordinating it to the government and to partisan political considerations of the executive branch, as well as initiatives aimed at harming democratic institutions, equal and free elections, the right to equality, free speech, freedom of religion and other human rights.

The members of the Israeli Law Professors' Forum for Democracy hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. Therefore, the position papers and other professional materials produced by us reflect the prevailing position of the members, even when not held unanimously. We are, however, united in the opinion that the host of the government's proposals - which are an unprecedented and severe attack on the independence of the judiciary, the Attorney General and other government legal advisors, the police, the military, public broadcasting, higher education, and other government agencies - will seriously damage the rule of law and undermine Israel's democratic character. Accordingly, we joined this forum to make our professional opinion available to the public at this fateful time. The list of Forum members is available at <https://lawprofsforum.org>, where you can also find all our position papers that are free to circulate. Follow us on Twitter: [@lawprofsforum](https://twitter.com/lawprofsforum). Contact us: [lawprofessorsforum@gmail.com](mailto:lawprofessorsforum@gmail.com).

## **1. What is the “Unreasonableness Amendment”**

Despite the mass public protests, the objection of many legal, economic, military and other experts and former senior officials, and the decision of reservists in the air force and other units not to continue their voluntary military service if the law is amended, on Monday 24 July 2023 the “Unreasonableness Amendment” passed the second and third readings in the Knesset and became law. The law takes the form of an amendment to Section 15 of the Basic Law: The Judiciary. This section defines the jurisdiction of the Supreme Court sitting as a High Court of Justice to review governmental acts and decisions. According to the Amendment, no court of law, including the High Court of Justice, may consider and/or pass judgment on the reasonableness of any “decision” of the Cabinet, the prime minister, or any minister; nor may a court give an order on the said matter based on its purported unreasonableness. The amendment defines a “decision” as “any decision – including in matters relating to appointments, or a decision to avoid exercising any authority.”

## **2. The Legal Meaning of the Amendment**

Israel’s administrative law is part of the country’s common law, namely, law created over the years through judicial precedents. Much of this law concerns the grounds for judicial review over administrative actions and decisions, exercised mainly, but not solely, by the Supreme Court, sitting as the High Court of Justice (“Bagatz”). How does the unreasonableness doctrine fit into the law regarding such review?

The first and most basic grounds for review of administrative action are lack of legal authority for the particular administrative act (*ultra vires*). When formal legislative authority to make the decision, or perform the act, has been established, the manner in which such authority has been used in the particular case is subject to review. Such review may be based on the lack of a proper procedure (such as failure to afford a hearing to persons likely to be affected by the act or decision) or on improper use of the discretion that the particular law grants the administrative authority involved.

There are a number of grounds for deciding that the administrative discretion was used improperly: that the purpose for which it was used is not the purpose for which the law granted the power to the administrative authority; that illegitimate factors were considered in making the decision; that the decision was discriminatory, or that there was no proper factual foundation for the decision.

However, even when no such grounds exist, the courts may overrule a decision if it is manifestly *unreasonable*. In theory, the notion of unreasonableness can be used whenever the decision-maker considered all relevant factors, but the weight assigned to some factors was so unbalanced as to render the decision manifestly unreasonable. In practice, however, the unreasonableness doctrine has been employed in rare cases, such as to overrule appointments of ministers and senior public officials who were either indicted for serious offences of corruption, or have in the past committed serious offences, or when the court knows that the actual reasons for the decision were improper or corrupt. In a major 1993 seminal (and controversial) decision, the Court decided that it was unreasonable for Prime Minister Yitzhak Rabin not to use his authority to dismiss a cabinet minister who was charged with serious crimes of corruption.

The decision of the Supreme Court to force PM Rabin to dismiss the said minister, and a subsequent 2023 decision of the Court to strike down the appointment of the same individual as a cabinet minister in PM Netanyahu's current government after he had been recently convicted of tax offences, was one of the main factors that led to the demands to abolish unreasonableness as grounds for judicial review of decisions by the Cabinet and its ministers. The ostensible argument of the proponents of the law to abolish the unreasonableness doctrine is that such decisions should remain in the hands of elected politicians rather than in the hands of the Court.

### **3. The Political Context of the Amendment**

When examined abstractly, removed from the present political and constitutional context the “unreasonableness amendment” may not seem that drastic to outside observers. After all, the courts still retain the power to review governmental action on other grounds, and the amendment only applies to decisions of the Cabinet and government ministers. However, it is essential to see the amendment in its proper political and constitutional context. This amendment is the first part of a comprehensive plan proposed by the Minister of Justice in January 2023, a few days after the present government assumed power. That plan involves weakening the power and independence of the Supreme Court and unprecedentedly shifting power to the executive by a series of systematic steps, which include: overhauling the system of selecting judges and justices so as to accord the governing coalition total control over their selection; immunizing basic laws from judicial review (with no limitations on what basic laws might include or the process of their enactment); severely limiting judicial review over ordinary legislation; providing the coalition in the Knesset with override power to reinstate legislation that has been struck down by the court as unconstitutional;

and severely weakening the power of legal advisers in all government departments and agencies, by making them political appointees who may be appointed and dismissed at will and whose legal advice, ordinarily binding, may be ignored. There is no precedent in Israel's constitutional history for legislation that bluntly and directly seeks to diminish the jurisdiction of the Israeli courts to review administrative action. It is clear that the unreasonableness amendment is simply the first part of the government's plan to weaken the judiciary and to free the government from any effective constraint on unbridled use of its powers. It is also crucial to understand this change in the broader context of the existing constitutional framework in Israel: even before all these changes would be enacted, the executive branch in Israel is already extraordinarily powerful compared to most democracies. It effectively controls parliament and its lawmaking agenda (including the enactment of basic laws), and it lacks all the constraints and checks and balances that exist in the U.S. and many other constitutional democracies (such as an entrenched constitution, bicameralism, presidential veto, federalism, etc.). Hence, the clear intention of the government's plans is to create an authoritarian regime in which the executive branch not only controls the legislative branch but can also do more or less what it likes, with no effective oversight or legal controls (with formally free elections giving it legitimacy). The unreasonableness amendment is thus only the first step towards executive authoritarianism, stripping the courts from an entire body of jurisprudence that served as a primary constraint on executive arbitrariness, illegality, and corruption. Realizing the context and severity of this measure, which otherwise could mistakenly pass as a legal technicality, gave rise to the unprecedented protest and public resistance manifested in Israeli streets, media and public sphere.

#### **4. The Lack of Public Consent**

Both the Israeli public and informed foreign observers quickly understood that the so-called "legal reform" would effect a profound constitutional shift and regime change. This created tremendous pressure on PM Netanyahu not to proceed with these "legal reforms" without wide public consent. According to press reports PM Netanyahu gave assurances both to international credit rating agencies and to some foreign governments, including the U.S., that he would abstain from pushing through with the "reform" without first securing wide public support for any legislative measures. The governing coalition in fact did take part in discussions under the auspices of the State President, Mr. Yitzhak Herzog, who hoped to reach consensus between the coalition and the opposition. However, these discussions broke down; with some observers doubting that there was

ever a bona fide willingness on the part of the government to compromise. Passage of the unreasonableness amendment in the face of unprecedented public opposition is the ultimate proof that any assurances by PM Netanyahu that he will seek wide public support of further measures expanding executive power and altering the constitutional structure of the country are of little or no value. One would hope that this message becomes clear to all foreign governments.

## **5. The Likely Immediate Effects of the Amendment**

The immediate danger of the amendment is not so much in the field of individual rights, as protection of these rights does not rely directly on the unreasonableness doctrine. Rather, it is in the field of corruption, both in the use (or rather misuse) of public funds and in the field of government appointments and removal of officials from office. The Cabinet and its ministers will now feel free to use public monies solely to serve their own narrow political interests, ignoring any notion of the public good that is supposed to guide every democratically elected government. It is likely that we will be faced with a spate of highly inappropriate appointments to the most important and sensitive positions in the public administration and government corporations. The principal immediate threat could be a government decision to dismiss the Attorney General who heads the state public prosecution, and to replace her with a lawyer who will be favourable to halting the prosecution of Netanyahu on charges of corruption. Another fear is that the Court will not be able to intervene in the refusal of the Minister of Justice to convene the Committee for the Selection of Judges, even though the members of Knesset in the Committee have been duly elected. The more general danger, moreover, is that obliterating reasonableness as a legal standard would be seen by the government and its ministers as a general license to act unreasonably.

It must also be stressed that the effect of the amendment cannot be gauged solely by the number of cases in which the Supreme Court will be constrained from intervening in corrupt and manifestly unreasonable actions. The Amendment will weaken the power of legal advisers at all government levels to curb illegal, corrupt, and politically-motivated decisions. A principal tool for curbing such decisions and acts at the departmental level are legal advisors' warnings that such acts would likely be struck down by administrative courts on grounds of manifest unreasonableness. This crucial process of nipping institutional (as well as personal) corruption at the bud has now been eliminated, with no alternative mitigating measure instated in its place.

## **6. The Amendment and the Occupied Territories**

The government plan of so-called “legal reform” cannot be divorced from its other policies, including those regarding the occupied West Bank. While the Supreme Court has not been active in overruling government policies and practices in the West Bank, even when these policies and practices were incompatible with international law, it has sometimes intervened in implementation of policy in concrete cases when it found that the implementation was highly unreasonable. Seemingly, the amendment cuts off this possibility of a remedy to individual Palestinians, thus weakening even further the highly limited legal protections they have enjoyed until now. In light of the consistent IDF failure to offer physical protection to Palestinians whose lives, bodily security and property are threatened on a daily basis by the IDF and Israeli settlers, the message purveyed by weakening the possibility of a judicial remedy for Palestinians cannot be ignored.

## **7. What Now in the Legal Field?**

A number of groups have already submitted petitions to the Supreme Court challenging the constitutionality of the amendment on various grounds. One of the challenges these petitions face is that this amendment was enacted as a Basic Law, and there is, as yet, no precedent for the court striking down a Basic Law clause. The Netanyahu government has taken the line that Basic Laws are not subject to judicial review, while petitioners and other legal experts argue that the Court has several legal grounds to intervene. The Court will have to decide whether to accept arguments based on the idea of misuse of constitutional power, or of an “unconstitutional constitutional amendment.” While the Court has mentioned these doctrines in previous decisions, it has stopped short so far from actually employing them to strike down a section in a Basic Law. The Court will also have to consider whether to interfere in the amendment on the grounds of flaws in the parliamentary process in enacting the law. The Court has in the past invalidated a law which was passed without proper procedure. Whether it will do so in the present case remains to be seen.

## **8. What now in the Political Field?**

The Knesset will go into recess at the end of this month and for the moment it will not be possible for the government to enact further parts of its “legal reform.” However, passage of the amendment must leave people with no illusions. One cannot rely on this government to abandon any parts of its original plan. One part of the plan, the change in the composition of the Committee for the

Selection of Judges, has already passed its first reading in the Knesset and may be enacted within the course of a few days, after the Knesset reconvenes. Hence, on the domestic level the political struggle must, and will, continue. It is an essential step in the attempt to halt the present government's plan to dismantle Israel's democratic institutions.

The present Amendment should also send a message to foreign governments. They should not be persuaded by PM Netanyahu's rhetoric about strengthening democracy. His plans are aimed at weakening the checks and balances that are an essential part of any democratic regime, and not on enhancing the democratic nature of the state.

President Biden stated that the present government is the most extreme government in Israel's history. This was an accurate statement. It should be appreciated, however, that the government is not extreme because some extremists somehow managed to join it. All ministers in the government were appointed to their posts by PM Netanyahu. If the government is extreme, and it is, it is PM Netanyahu who holds responsibility for this. Without PM Netanyahu, people who now hold the most sensitive government positions would have remained on the margins of the Israeli political arena. It is clear that the government is taking a much more extreme position than that held by the Israeli people. For the past few months, public polls have consistently shown that a stable majority of Israelis (and even significant portions of Israelis who voted for this government) do not support the government's plans. For the past few months, hundreds of thousands of Israelis have taken to the streets, week after week, to defend their democracy.

Foreign governments should support the Israeli people, not their extreme government.

**Written by:**

Professor David Kretzmer, Emeritus Professor of Constitutional Law, Hebrew University of Jerusalem

With:

Professor Ittai Bar-Siman-Tov, Professor of Constitutional Law and Legislation, Bar-Ilan University

Professor Eyal Benvenisti, University of Cambridge and Hebrew University of Jerusalem

Dr. Natalie Davidson, Senior Lecturer of Constitutional and International Law, The Buchmann Faculty of Law, Tel Aviv University

Professor David Enoch, Professor of Law and Philosophy, The Hebrew University of Jerusalem

Professor Daphna Hacker, The Buchmann Faculty of Law and NCJW Women and Gender Studies Program, Tel Aviv University

Professor Tamar Hostovsky Brandes, Professor of Constitutional and International Law, Ono Academic College

Dr. Ronit Levine-Schnur, Professor of Public Law, Reichman University

Professor Eliav Lieblich, Professor of International Law, The Buchmann Faculty of Law, Tel Aviv University

Professor Jonathan Yovel, Professor of Law and Humanities, University of Haifa