

Israel – In Search of Constitutional Common Sense

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Abstract: The Israeli radical judicial overhaul program, aiming to seriously weaken the judiciary, has led the country to the brink of chaos and violence, with hundreds of thousands of demonstrators in the streets, society tearing itself apart and numerous sectors of society, such as medical service or reservists of IDF, announcing a suspension of their service to a nation they fear will no longer be a democracy. Despite the strong social protest, Knesset – representing an extremely right-wing coalition – adopted on the July 24, 2023 the amendment to *Basic Law: The Judiciary* to bar the judiciary from striking down decisions of the government and its ministers on the grounds of such decisions being unreasonable. The measure known as the reasonableness clause (standard) is rooted in English and American case law and it is frequently used in Israel to control administrative activity. It allows the courts to strike down governmental and administrative decisions and their regulations seen as having not taken into account all the relevant considerations of a particular issue, or not given the correct weight to those considerations – even if they do not violate any particular law or administrative rulings. The current right-wing coalition, led by Benjamin Netanyahu, argues that the clause as it stands gives too much power to the judiciary, especially the Supreme Court sitting as a High Court of Justice, to interfere with the actions of the executive, and that the powers of judges, who are not elected by the public, remain out of control in this procedure. Opponents of the government’s amendment argue that this standard is crucial in helping to protect civil rights that

are not fully defined in Israeli law. Eliminating the standard of reasonableness will be another step towards giving the government unlimited power. It violates not only the separation of powers principle and the rule of law but it also harms the right to good administration. Irrespective of the Supreme Court's decision on the constitutionality of the government's amendment, the struggle to maintain the democratic principles of the Israeli system will continue.

1. Introduction

Israel is currently experiencing the most serious constitutional crisis since the country was founded in 1948. For eight months, thousands of people were protesting against the far-right political revolution pushed by the government of Benjamin Netanyahu, weakening the courts, especially the Supreme Court, destroying the principle of separation of powers, the rule of law and guarantees of human rights. The protesters represent more than half of Israeli society¹ and include most of the world of science, important NGOs and such sensitive segments of society as highly qualified IDF reservists, doctors, financial sector employees, and entrepreneurs, not to mention the prosecutor general, former judges and lawyers. The government's plan to "reform" the judiciary threatens to politicize it and is already having a negative impact on Israel's economy, as does the prospect of implementing a state budget that openly polarizes society by financially privileging the electorate of religious (Orthodox) and extreme nationalist parties.

In such an atmosphere, on July 24, 2023, the Knesset, regardless of the constitutional nature of the provisions being adopted – in an accelerated procedure – adopted an amendment to the Basic Law: Judiciary, in a wording that expressly prohibits all courts, including the Supreme Court, from examining and resolving complaints (petitions) against governmental and other administrative decisions, including appointments, based on the judicial standard of reasonableness, sometimes also translated

¹ The Israel Democracy Institute frequently publishes and discusses the Israeli Voice Index, which provides detailed analysis of public opinion polls on current state policies. See: Tamar Hermann and Or Anabi, "Overhauling the Judicial System – What Do Israelis Think?," IDI, February 3, 2023, accessed September 12, 2023, <https://en.idi.org.il/articles/47607>.

as rationality. Just a few hours after the adoption of this amendment (by a majority of 64 to 0 due to the opposition's boycott of the vote), several complaints were submitted to the Supreme Court accusing this change of unconstitutionality – inconsistency with the constitutional act of the Basic Law: Human Dignity and Freedom, which defined Israel as an equally Jewish and democratic state and with the basic political values resulting from the Declaration of Independence. The complainants considered that this principle was relatively unchangeable and therefore the Knesset, even in its constitutional mode, was not competent to adopt an unconstitutional constitutional amendment² Extremely quickly, the Supreme Court declared the complaints admissible, at the same time setting the date of the first hearing for September 2023 and, equally importantly, issued the so-called injunction indefinitely suspending the implementation of the adopted change. Meanwhile, Prime Minister Netanyahu declared that this was “the only minor correction of the justice system and a foretaste of further ‘democratic’ changes in the judiciary.” Opponents of the government's plan, in turn, stated that it was the first step towards eliminating democracy in Israel and establishing a system of government modelled on Hungary and Poland. As a result, demonstrations and other forms of opposition to these political changes are becoming more intense and police actions are becoming more brutal.

Observers of the described events may be surprised by the size of the protests and wonder what the reasons are for the long-standing dispute over the judicial reasonableness clause (or its lack – unreasonableness), with the removal of which the government began the package of political changes. The explanation for the great wave of public revolt against Netanyahu's government's policies is simple – although somewhat surprising.

² It should be explained that the objection to the adoption of the constitution more fully, after the creation of the state, led to the so-called Harrari compromise, according to which the Knesset, acting as a constitutional body, adopts the so-called fundamental laws Basic laws, which form part of the constitution. Despite the lack of procedural differences in the adoption of ordinary laws, it was recognized over time, mainly thanks to the position of the Supreme Court, that fundamental laws are higher in the hierarchy of sources of written law than other acts. On unconstitutional constitutional amendments, cf. Yaniv Roznai, *Unconstitutional Constitutional Amendments. The Limits of Amendment Powers* (Oxford University Press, 2019).

It turned out that, despite the initial fears of the low level of involvement of an average Israeli citizen in the defense of their individual and collective freedoms and rights,³ spontaneous and unprecedented mass social opposition has accompanied the government's plans from the very beginning. This is the result of the high level of general education, the functioning of the inhabitants of Israel in a liberal democracy for over 40 years and the dissemination by the Supreme Court – especially during the term of office of A. Barak, an outstanding judge and humanist – of the catalog of human rights, judicial guarantees and values and democratic principles such as the rule of law and the separation of powers.⁴

The severity of the current conflict between the government and Israeli civil society also results from the protesters' awareness of the further politicization of the judiciary. From the winter of 2022, it is common knowledge that subsequent laws will concern the possibility for the Knesset to annul judgments of the Supreme Court, acting mainly as the HCJ in cases of violation of fundamental rights, by a majority of 61 votes (out of 120), abolishing the competences shaped by court decisions and consisting in repealing

³ According to Assaf Meydani, who pointed out this problem in 2013, Israeli citizens rather expect NGOs to act in matters related to human rights violations, and if they react on their own, it is only during the implementation phase of state policy and not at the stage of its preparation; Assaf Meydani, *Anatomy of Human Rights in Israel* (Cambridge University Press, 2014), 29–38, 66–80.

⁴ The effort to democratize the principles of functioning of the State of Israel and create a civil society is rightly attributed to A. Barak and his judicial and scientific community. His work is continued by a large number of outstanding and influential academicians, among whom worth mentioning are Suzie Navot, Yuval Shany, Amir Fuchs, Tamar Hostovsky-Brandes, Jeremy Sharon, Adam Shinar, Yaniv Roznai and many others. Working dynamically within IDI and similar NGOs, they constantly explain and comment on political events in publications and actively participate in numerous demonstrations; Jeremy Sharon, "A Time for Reason: Will the High Court Strike Down Government's Reasonableness Law?," *Times of Israel*, July 26, 2023, accessed July 16, 2023, <https://www.timesofisrael.com/a-time-for-reason-will-the-high-court-strike-down-governments-reasonableness-law>; Yaniv Roznai and Okubasu Munabi, "Stability of Constitutional Structures and Identity Amidst 'Political Settlement': Lessons from Kenya and Israel," *Comparative Constitutional Studies* 1, no. 1 (2023): 101–23; Yaniv Roznai, Rosalind Dixon, and David Landau, "Judicial Reform or Abusive Constitutionalism in Israel," *Israel Law Review. Forthcoming. UNSW Law Research Paper*, no. 23–55, accessed September 4, 2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4556656&fbclid=IwAR2ZamiVnyGfXYIRD58VQGKNicRTYGaTZKOH0mvl-j2ux2bBf3AJsk-JM2k.

certain provisions of the constitution, introducing the principle of filling the positions of government legal advisers by political nominations, changing the composition of the Selection Committee for judicial positions so that the majority of its members also come from political appointments.⁵

2. Searching for Reasonableness

Before moving on to examining the reasons for and against using the unreasonableness clause to a specific extent, or even questioning it completely, a few remarks should be made. This clause (also referred to as a doctrine, standard, criterion, or condition) has a long history and extensive literature.⁶ The judicial standard for assessing the operation of public administration from the point of view of reasonableness and rationality is part of the achievements of British common law and has been adopted primarily,

⁵ See constantly updated calendar of the government's plan for changes in the judiciary published by Israeli Policy Forum, Judicial Legislation Tracker, accessed September 11, 2023, <https://israelpolicyforum.org/judicial-legislation-tracker>; see also: Suzie Navot, "The Reasonableness Issue Requires Serious, Informed, and Consensual Discussion," IDI, July 14, 2023, accessed July 16, 2023, <https://en.idi.org.il/articles/50172>. This author clearly and convincingly warns about the effects of judicial "reforms": "the government wants unlimited power to be able to do whatever it wants and appoint whomever it wants to the highest positions. To achieve this, the government needs to overturn Supreme Court rulings to gain a kind of immunity and act without control". In turn, Y. Shany, presenting numerous negative effects of the government's package of changes in the judiciary, draws attention to the specificity of the Israeli governance system – problems with corruption at the highest levels of government and the so-called non-governability; see also: Meydani, *Anatomy of Human Rights*, 6–8, 40–4; Yuval Shany, "Eliminating the Standard of Reasonableness Would be Another Step towards Giving the Government Unlimited Power," IDI, July 6, 2023, accessed July 7, 2023, <https://en.idi.org.il/articles/50104>.

⁶ See for example Robert Alexy, "Reasonableness of the Law," in *Reasonableness and Law*, eds. Giorgio Bongiovanni, Giovanni Sartor, and Chiara Valentini (Springer, 2009): 3–15; Jerry Mashaw, *Reasoned Administration and Democracy Legitimacy* (Cambridge University Press, 2018), 40–76; David Zaring, "Rule by reasonableness," *Administrative Law Review* 63, no. 3 (2011): 525–60; Colin S. Diver, "Israeli Administrative Law from American Perspective," *Mishpat Umimshal, Haifa University Law and Government Review* 4 (1997); Yitzhak Zamir, "Unreasonableness, Balance of Interests and Proportionality," *Tel Aviv University Studies in Law* 11, (1992): 131–6; Ariel Bendor, "Are There Any Limits to Justiciability," *Indiana International Law and Comparative Law Review* 7, no. 2 (1997); Daphne Barak-Erez, "Israeli Administrative Law at the Crossroads: Between the English and American Model," *Israeli Law Review* 40, no. 1 (2008) and literature indicated in these publications.

but not only, in countries with a legal system based on the so-called judge-made-law and is currently one of the guarantees of good administration and the human right to it. The adoption in Israel of the basic institutions of the British legal system from the British Mandate period, i.e. the time before the establishment of the State of Israel, naturally influenced the adoption of the unreasonableness clause into the Israeli legal order as customary law created by the courts.⁷

From its very birth, this principle had an undefined character. The criterion of reasonable action by the administration was primarily understood as “action that any reasonable authority would take.” Over time, it began to be pointed out that unreasonable activity of the administration is, among other things, the result of “caprice, arbitrariness, obvious injustice, bad faith,” etc.⁸ The essence of unreasonable action was finally recognized by the Supreme Court of Israel as an action (decision) that reflects an improper balancing of circumstances considered by the administrative body in the decision-making process.⁹ The Israeli reasonableness (or unreasonableness) clause, however, differs from the British or American originals, which

⁷ The judicial creation of law in the so-called mixed legal system of Israel is a phenomenon that has been present since the Mandate period. Its essence was clearly formulated by Aharon Barak: “A judge of the Supreme Court is not a mirror [of statutory law]. He is an artist, creating a picture with his own hands. Creates ‘legislation’ by engaging in judicial legislation. Judicial creativity is a natural feature of law. Law without discretionary authority is a body without a soul. Such creativity – judicial law-making – is the task of the Supreme Court.”; Aharon Barak, “The Role of the Supreme Court in Democracy,” *Hastings Law Review* 53, (2002): 1205–16. This does not mean that this role of the Supreme Court is not contested, especially given its visible activism. American judge Richard Posner wrote in 2007 that “what Barak created in its entirety was to give the court power that our most aggressive Supreme Court judges had never dreamed of,” quoted by Ariel Bendor and Zeev Segal, “The Judicial Discretion of Justice A. Barak,” *Tulsa Law Review* 47, no. 2 (2013): 465–77; Hearing this assessment, A. Barak could recall the words of T. Jefferson: [although the will of the majority in every case should prevail, in order for it to be correct, it must be reasonable], and this control rests with the court.

⁸ Zamir, “Unreasonableness, Balance of Interests and Proportionality,” 131 et seq.

⁹ See: High Court of Justice, 1980, Dapey Zahav Limited v. Broadcasting Authority, application no. 389/80, Isr. Sc 35(10) 421; more on this topic, cf. Barak-Erez, “Israeli Administrative Law at the Crossroads,” 63 et seq.; Neil MacCormick, *Rhetoric and the Rule of Law: A Theory of Legal Reasoning* (Oxford University Press, 2005), 173; Diana Kapiszewski, Gordon Silverstein and Robert A. Kagan, *Consequential Courts. Judicial Roles in Global Perspective* (Cambridge University Press, 2013), 255.

allow questioning an administration's act only in the event of a clear (extreme) lack of reasonableness, i.e. an extremely defective implementation of the administration's discretionary power. The Israeli court, using the reasonableness clause, adopted its broader formula, enabling the assessment and correction of an administrative act considered to be the result of unreasonable action, also without the additional condition of "extremeness." This position can be justified by the lack of a full constitution and legislation specifying the principles, scope and forms of operation of administrative bodies, and especially the lack of standards limiting the executive power. In this context, the reasonableness clause is of fundamental importance as an effective tool for judicial control of the executive power. The accumulation of power in the hands of the executive constitutes a threat to state security in any political system.¹⁰

The increasing role of the state in Israel since the 1980s and the dissemination of the judicial catalogue of guarantees of human rights have influenced the increasingly wider use of the clause in question by the Supreme Court and since the adoption of the above-mentioned Basic Law: Human dignity and freedom in 1992, the use of the proportionality standard.¹¹ Since then, both clauses – reasonableness and proportionality – have become one of the main tools for judicial assessment of the proper functioning of the executive power. Initially (in the 1990s), especially in theoretical considerations, balancing interests (circumstances) and using the proportionality standard were considered a category of assessing unreasonable action of the administration.¹² Difficulty in separating the two clauses was also noticed. It was also postulated that the development of their use would serve to clearly differentiate them depending on the subject of the case. In 1992, D. Barak-Erez suggested that rulings on matters of competences and relations within the executive power should be assessed according to the reasonableness standard. In turn, when deciding issues involving direct interference of the administration in human and citizen rights,

¹⁰ Mohammed S. Wattad, "The Reasonableness Standard: A Critical Administrative Tool for Oversight of Executive Authority," *The Institute of National Security Studies*, July 24, 2023, accessed July 25, 2023, https://www.inss.org.il/social_media/the-reasonableness-standard-a-critical-administrative-tool-for-oversight-of-the-executive-authority/.

¹¹ Barak-Erez, "Israeli Administrative Law at the Crossroads," 63.

¹² See: Zamir, "Unreasonableness, Balance of Interests and Proportionality," 131–2.

the court should use the standard of proportionality.¹³ However, the reality of court decisions turned out to be more complex. First, when the court uses the reasonableness clause, it does not always indicate whether what is at issue is only the lack of reasonableness of the administrative action or whether it is of an extremely unreasonable nature. Second, the court, as it seems, uses the reasonableness standard to strengthen its position in matters relating to human and citizen rights and freedoms subject to restrictions by the administration. It is therefore worth taking a look at examples of selected judgments to make it easier to assess comments both criticizing and supporting the use of the reasonableness clause in respect of the administration in its decision-making process and in its issuance of normative acts – those issued on the basis of statutory delegation and the autonomous ones. Ten cases were selected for analysis in which the administration interfered with the fundamental rights of citizens and four cases concerning relations within the central executive power.¹⁴ Among the first ten cases,¹⁵ the majority (eight) concerned two or more fundamen-

¹³ Barak-Erez, “Israeli Administrative Law at the Crossroads,” 64.

¹⁴ The author consulted the accuracy of the selection of cases with Amir Fuchs, Senior Researcher, Center for Democratic Values and Institutions, IDI.

¹⁵ First ten cases: High Court of Justice, Judgment of 2 February 2021, Idan Mercaz Dimona Ltd. v. Government of Israel, application no. 6939/20, unreported, (HCJ 6939/20), regarding restrictions on the freedom to conduct commercial activities due to the restrictions of the COVID-19 pandemic; High Court of Justice, Judgment of 26 April 2020, Ben Meir. v. Prime Minister, application no. 2109/20, unreported, (HCJ 2109/20), regarding the scope of collecting data of sensitive persons diagnosed with the COVID-19 virus by the Security Agency; High Court of Justice, Judgment of 1 March 2021, Association of Civil Rights in Israel v. Knesset, application n. 6732/20, unreported, (HCJ 6732/20), regarding the violation of the right to privacy and the use of inadequate anti-virus protection measures; High Court of Justice, Judgment of 4 April 2021, Israel My Home v. Government of Israel, application no. 5469/20, unreported, (HCJ 5469/20), regarding restrictions on participation in gatherings, including the distance of 1,000 m from the place of residence; High Court of Justice, Judgment of 3 December 2020, application no. 5314/20, unreported (HCJ 5314/20), regarding the legality of government emergency regulations adopted by the government at the beginning of the outbreak of the COVID-19 pandemic; High Court of Justice, Judgment of 7 April 2020, Yedidya Loewenthal v. Prime Minister, application no. 2435/20, unreported, (HCJ 2435/20), which questioned the government’s decision to temporarily declare the city of Bnei-Brak a “restricted area” due to the high infection rate in the city as violating residents’ constitutional rights to freedom of work, liberty, human dignity and freedom of movement; High Court of Justice, Judgment of 14 April 2020, Adalah – Legal Center for

tal rights, ranging from personal liberty, the right of free movement, freedom of assembly, the right to privacy, the right to good administration, and the right to conduct a business. The Supreme Court, acting in these cases as a single-instance HCJ, considered both administrative decisions (seven cases), as well as regulations of the central executive power and orders of administrative agencies subordinated to the government or ministers. Inspecting the administration of the HCJ only in exceptional circumstances, it relied on one criterion: in case HCJ 2109/20, finding excessive interference with the right to privacy by providing the Israel Security Agency, by decision of the government, with the power to collect sensitive data about those who test positive for COVID-19, applying the standard of proportionality and, at the same time, reminding the government that limitations on fundamental rights should be clearly stated in the law. In the second ruling, applying only the standard of reasonableness and stating in case HCJ 8397/06 that protecting students from bomb threats by creating by ministerial decision a “protected zone” for them that does not provide a real guarantee of safety, is extremely unreasonable. At the same time, the court set a five-month deadline for completing the investment ensuring proper protection of students. In other cases, the court used both the proportionality and reasonableness criteria. What is noteworthy in the analyzed judgments is the frequent use of the reasonableness standard in cases where

Arab Minority Rights v. Prime Minister, application no. 2359/20, (HCJ 2359/20), unreported, regarding the rejection of the Bedouin petition for funding for travel for COVID-19 tests; High Court of Justice, Judgment of 14 March 2021, Oren Shemesh v. Prime Minister, application no. 1107/21, unreported, (HCJ 1107/21), regarding passenger service limits at Ben Gurion Airport during the pandemic; High Court of Justice, Judgment of 4 March 2004, Yoav Hess et al. v. IDF West Bank Military Commander, application no. 10356/20, unreported, (HCJ 10356/20), regarding the order to expropriate land through the IDF’s decision to widen the road for pilgrims to holy places; High Court of Justice, Judgment of 29 May 2007, Wasser v. Ministry of Defence, application no. 8397/06 IsrSC 62(2) 198, (HCJ 8397/06), regarding the establishment by decision of the Minister of Defense of a security zone for students in schools in towns located next to the Gaza Strip, in which the court found that the rationing of protection and security guarantees was irrational; see also Ittai Bar-Siman-Tov, Itay Cohen, and Chani Koth, “The Changing Role of Judicial Review during Prolonged Emergencies: The Israeli Supreme Court during COVID-19,” *Legal Policy and Pandemics: The Journal of the Global Pandemic Network*, Bar Ilan University Faculty of Law Research Paper 1, no. 1–2–3 (2021): 271–7.

there was no direct interference with fundamental rights. This proves both the practical difficulty of distinguishing the two clauses used by the court and the indolence of the public administration, which simultaneously acts in violation of the principles of proportionality and reasonableness.

The last four HCJ rulings concern key principles of the organization and functioning of the executive power – the Prime Minister and his cabinet – which are not regulated by law.¹⁶ It is worth recalling that the executive in Israel has been struggling with the problem of non-governability (the inability of political and official decision-makers to conduct long-term policy and implement it effectively) for several decades, including: the consequences of the unregulated rules for appointing high positions in the administration and the non-normalized relations within the executive power. When deciding on these important issues, the Court ruled in two cases that the appointment of a person with a criminal history (e.g. a conviction for corruption) as a minister, or as a general director who is subject to an act of pardon before being formally convicted, does not meet the criterion of reasonableness of action (case HCJ 3094/93).¹⁷ In the third case (HCJ 5261/04), the Court found that it was rational for the prime minister to dismiss two ministers in order to implement the policy of the coalition government, and in the last case (HCJ 5167/00), the Court specified what powers were vested in the government (which often is a transitional government) during the period between its resignation and the appointment of a new cabinet, extensively developing an understanding of the rationale for continuing its core competencies. In this case, by failing to act in a state of necessity, the Court expressly superseded the statutory powers of the Knesset.

¹⁶ See High Court of Justice, Judgment of 8 September 1993, *Movement for Quality in Government v. State of Israel*, application no. 3094/93, IsrSC 47(5) 404; IsrSJ 10 258, (HCJ 3094/93); High Court Of Justice, Judgment of 26 October 2004, *Fuchs v. Prime Minister*, application no. 5261/04, PD 59 (2), 446, 7 (HCJ 5261/04); High Court of Justice, Judgment of 23 March 1993, *Eisenberg v. Minister of Building and Housing*, application no. 6163/92, IsrSc 47(2) 229, (HCJ 6163/92); High Court of Justice, Judgment of 25 January 2001, *Weiss v. Prime Minister*, application no. 5167/00, PD 55 (2), 455, (HCJ 5167/00).

¹⁷ For more on this topic, see: Daniel Friedmann, *The Purse and the Sword* (Oxford University Press, 2016), 111–20.

The Supreme Court of Israel has been aware, especially since the 1980s and during the presidency of Aharon Barak, that by relatively often issuing rulings based on the reasonableness clause, which is difficult to define, it exposes itself to accusations of abuse of judicial power by replacing the decision-making freedom of the executive with its own discretion.¹⁸ For this reason, the HCJ often emphasized that such an intention was alien to it and at the same time pointed out that the discretionary power of the administration cannot mean either freedom or arbitrariness of the proceedings, much less the lack of judicial control. Similarly, the HCJ, guided in its actions by good faith and obvious public interest, sometimes reduced the discretion of administrative decisions to zero, claiming, as in the judgment of HCJ 3094/93 (justification by A. Barak), that the discretion of an administrative decision sometimes means only an obligation or prohibition of a specific action.¹⁹ There are also judgments in which the Court, fearing the accusation of making decisions in the so-called political questions, ignores – as relevant circumstances – political considerations of administrative decisions, especially those resulting from the need to maintain the existence of the coalition government. This may undoubtedly distort the Court's selection of important issues and the assessment of their proper balancing by the administration.²⁰

Mainly academic criticism of the Supreme Court's use of the reasonableness clause, noticing some of its shortcomings, most often concluded that, in Israeli conditions, it is a necessary institution because in other democracies there are many other means of inhibition that do not exist in

¹⁸ See critical remarks by Eugene Kantorovich, "Why Netanyahu Is Right to Go After Overmighty Supreme Court," *The Jewish Chronicle*, February 2, 2023, accessed June 12, 2023, <https://www.thejc.com/lets-talk/all/why-netanyahu-is-right-to-go-after-overmighty-supreme-court-2PO7FKJsgtBxFECAULuBeD>; Yotam Eyal, "Hypocrisy Unmasked: The Supreme Court's 'Reasonableness' Clause," *Israeli National News*, January 30, 2023, accessed October 12, 2023, <https://www.israelnationalnews.com/news/373488>.

¹⁹ See justification of case HCJ 3094/93, in particular, point 17 [...] "authority is in duty bound to exercise a power when the factual circumstances are such that the basic values of our constitutional and legal system make failure to exercise it so unreasonable as to go to the root of the matter."

²⁰ For more on this topic, see: Bendor, "Are There Any Limits to Justiciability?"

Israel (as pointed out by Yoav Dotan).²¹ The complete statutory removal of this clause will be “throwing the baby out with the bathwater” (as discussed by Amir Fuchs),²² especially since the practice of government operation confirms the validity of Yitzhak Zamir’s thesis about the low level of legal and ethical culture of administration.²³

It should be noted that the weakening of the position of the Supreme Court – a change that begins with the removal of the reasonableness clause – aims at the gradual abolition of the systemic role of this body as an independent entity with the ability to inhibit and balance the government and parliament. So what arguments do the politicians of the ruling parties and some constitutionalists have to justify their such far-reaching plans? One should start by noting that among the supporters of the government project, one does not find, with a few exceptions, recognized authorities of the world of legal science,²⁴ judges, lawyers, former prime ministers or

²¹ Prof. Yoav Dotan, a former dean of the Faculty of Law at the Hebrew University and a conservative legal scholar, has critiqued in writing on numerous occasions the use of the reasonableness clause by the courts. However, speaking in the Constitution Committee in Knesset, he took exception to what he said was the “coarse” way the current bill had been “stitched together”, and to the “blanket” exemption from review by reasonableness that it would impose on decisions made by all elected officials. “If the government decided to build a new metropolis in the Gush Dan [region of central Israel], I don’t see why the reasonableness of a court should be preferable to that of the government,” said Dotan, making a distinction between policy set by the full cabinet and that set by ministers; see: Jeremy Sharon, “The Reason for Reasonableness: A Doctrine at the Heart of the Overhaul Explained,” *Times of Israel*, July 8, 2023, accessed July 16, 2023, <https://www.timesofisrael.com/the-reason-for-reasonableness-a-doctrine-at-the-heart-of-the-overhaul-explained/>.

²² Globes Whistleblower Team, “Why Is Reasonableness Making Us So Unreasonable?,” accessed September 12, 2023, <https://en.globes.co.il/en/article-why-is-reasonableness-making-us-so-unreasonable-1001451948>.

²³ Yitzhak Zamir, “Courts and Politics in Israel,” *Public Law*, no. 529 (winter 1991): 534–5; Menachem Hofnung, “The Unintended Consequences of Unplanned Constitutional Reform: Constitutional Politics in Israel,” *American Journal of Comparative Law* 44, no. 4 (1996): 585–604.

²⁴ It is significant that even the fierce opponent of the Supreme Court’s activism, former Minister of Justice, prof. Daniel Friedmann preferred to hide his support for the plan to weaken the judiciary under the guise of creating a compromise project, which in fact did not change much in relation to the government’s proposals; see: Suzie Navot, “Does Israel Really Need Judicial Reform? 5 Better Ways to Fix Judiciary,” IDI, March 10, 2022, accessed June 12, 2023, <https://en.idi.org.il/articles/47921>; Navot, “The Reasonableness

other high state officials. The government sponsors of the project, headed by the Prime Minister, try to look for arguments and quote statements that are convenient for them, for example by A. Barak or other former judges of the Supreme Court. This is met with sharp retorts and reprimands from the cited authorities, who state that their statements concerned the court's self-limitation, and not the elimination of the clause by statute.²⁵ At this stage, the arguments of supporters of the government's "reform" of the judiciary are dominated by general, mainly populist theses, stating that the Supreme Court is a usurper exercising powers that it often created itself, and its main "sin" is claiming the position of the main legislator and excessively limiting administration's freedom of decision, which prevents it from functioning efficiently as an entity implementing the will of the nation.

Further allegations concern the replacement of powers typical of administration, resulting from decision-making freedom, with the discretionary and arbitrary will of judges and the Court's violation of the principle of separation of powers by abusing the standards of reasonableness as a criterion for assessing the activity of the executive.

In response to the above-mentioned allegations, defenders of the current position of the Supreme Court (and the rest of the secular judiciary) claim that for decades, the Knesset, recognizing its inefficiency in regulating constitutional issues, tacitly agreed to the flexible expansion of the Court's jurisdiction and followed the court's jurisprudence. Similarly, the Court's judgments were respected by subsequent governments even though they criticized the activist profile it adopted. It must be remembered that for a very long time, the Supreme Court enjoyed high social authority. The thesis that the Court does not have the legitimacy to perform the control function of inhibiting and balancing the administration is untrue. "Judicial review" has already established itself as a socially accepted concept and institution in Israel. The only difference in the form of legitimization is

Issue"; Navot, "There's No 'Compromise' in the Coalition's Play for Unlimited Power," IDI, March 22, 2023, accessed July 16, 2023, <https://en.idi.org.il/articles/48542>.

²⁵ See the statements of Aharon Barak and Noam Sohlberg cited Toi Staff, "Ex-top judge refutes PM's use of his name: Reasonableness bill undermines rule of law," *Times of Israel*, July 23, 2023, accessed July 23, 2023, <https://sephardicu.com/featured/ex-top-judge-refutes-pms-use-of-his-name-reasonableness-bill-undermines-rule-of-law/>, A. Barak stated directly: "quoting me to justify this act is indecent and inappropriate."

the fact that it is based on common law, i.e. the judicial practice of courts. However, the principles of common law developed by the Supreme Court have been considered sources of law since the beginning of Israel's existence, which is confirmed by the 1980 Foundation of Law Act.

3. Conclusions

The Supreme Court's activism, criticized and currently sharply attacked by those in power, is the result of the lack of a constitution in the form of a complete and superior source of law. Despite the adoption of several basic laws, the Knesset still faces many challenges regarding the regulation of the state system. Activism or, as some say, excessive activism of the Court, involves hard work performed out of concern for the implementation of the values and principles of a democratic state and its legal order – filling legal loopholes through judicial interpretation.²⁶ It is a fact, admitted by some judges of the Court, that sometimes this body does too zealously replace the sluggish Parliament.²⁷ Some judges (including A. Barak and N. Sohlberg) believe that courts use the reasonableness standard too often. However, this hyperactivity should not be limited by statutory regulation, but by the court's self-limitation. An effective tool supporting such an attitude would be statutory definitions of the forms and limits of public administration activity, including principles, procedures and substantive and ethical qualifications when filling government positions and other high-ranking state functions, such as the prosecutor general or state auditor. Moreover, the removal of the reasonableness clause may affect the system of judicial protection of human rights, as it will enable the government and the Knesset – due to the similarities between the reasonableness and proportionality clauses – to contest the Court's use of the latter. It is therefore not surprising that with the act repealing the standard of reasonableness, the ruling coalition began implementing its plan of “reforms” of the justice system, treating

²⁶ See Aharon Barak, “Interpretation in the Law,” Vol. 3 of constitutional interpretation (Tel Aviv: Nevo Publishing, 1994), 347 et seq.

²⁷ In the author's conversation with Aharon Barak in October 2019, this outstanding judge and professor repeated several times: if the Knesset is not satisfied with what the Supreme Court is doing, let it change it – of course, in accordance with the appropriate procedures and the principles of correct, democratic legislation.

it as a “systemic lockpick” opening the way to its incapacitation, starting with the Supreme Court.

Analyzing the arguments of opponents and supporters of the reasonableness clause, it can be noted that although not in every case the Court applied it reasonably, it is difficult to find many judgments that are irrational, unreasonable or issued contrary to good knowledge, violating democratic values and reason of state. The government, the prime minister and ministers – on the contrary – have committed dozens of acts that clearly violate legality and reasonableness due to corruption, lack of ethical principles, bias, subjective and narrowly political motives.

The functioning of a democratic state is based on a constant pursuit of balance in the relations between the main actors of political life – the parliament, the government and the judiciary. In principle, no authority has a position to dominate the other authorities. This happens thanks to the complex system of checks and balances, which is largely based on the exercise by the checking organ of certain powers, characteristic of the competences of the body subjected to balancing.²⁸ In Israel’s political system, the prime minister and government not only have executive powers but they actually and permanently control the Knesset. As a result, the formal powers of the Israeli parliament are often not exercised, including the highly important control of the government’s policy and its law-making activity. In the absence of a constitution or relevant fundamental laws, control of administration, especially of the government, through an independent and effective judicial review is the main and sometimes exclusive guarantee of the rule of law and the protection of human rights. If one accepts the view that the reasonableness test is one of the important bases for the protection of internal national security and freedoms and rights, then its elimination may have serious negative consequences as it may open the way to the usurpation of power by the government and become a threat to the existence of the state. The tragic events that began with the Hamas terrorist attack seem to confirm this.

²⁸ This was aptly formulated by Richard E. Neustadt, who stated that the division of power means a situation in which organizationally separated institutions participate in the performance of state functions; Richard E. Neustadt, *Presidential Power* (New York: John Wiley and Sons, 1980), 26.

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