

# The Folly of the Israeli Government in Restricting Reasonableness

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It is the eve of Tisha B'Av, the day that commemorates the destruction of the first and second temples in Jewish history. On the seventy-fifth anniversary of the establishment of the State of Israel, the words of the prophet Isaiah, who foresaw the destruction of the First Temple, are poignant: „[Y]our rulers are rebellious, and friends of thieves.“ Isaiah warned that the leaders of the Kingdom of Judah were straying from the righteous path and consorting with thieves. When this is the state of society, corruption mounds. As Isiah described, „everyone loves bribes and chases after gifts.“ Society is thus doomed to moral ruin: „[T]hey do not defend the orphan, nor does the widow’s plea come before them.“

On Monday, July 24, the Israeli legislature passed a constitutional amendment that would constrain the courts’ ability to use the reasonableness doctrine. The [reasonableness doctrine](#) is a [common law doctrine](#) developed by the Israeli courts to review executive decisions. It requires the executive branch, including all regulatory bodies, to take into account all relevant considerations and grant them proper weight. The primary duty to act in a reasonable way lies with the decision maker.

Despite internal and international pressure, the ministers of the Israeli government insisted that their base would not have forgiven them, had they given up their campaign against the reasonableness doctrine. [In a previous post](#), I discussed the dangers involved in curtailing the reasonableness doctrine in Israel. This post intends to expose how the government is unwittingly undermining its own agendas by abolishing reasonableness.

The government’s political base presumably consists of party activists who work day and night behind the scenes to promote their respective political parties. In return, these political activists seek to be appointed to public positions. They demanded that the Israeli government have a free hand in appointments, so that it could appoint anyone it wanted. Thus, the government, which controls a legislative majority, as is typical in a parliamentary system, amended Basic Law: the Judiciary to allow *inter alia* the government and its ministers to appoint personnel free from judicial review of the reasonableness of the appointments. The amendment states that the courts should not review the reasonableness of decisions of the government, the Prime Minister or ministers. Decisions specifically include also appointments or avoidance of action.

However, was it wise to give the political base what it wanted?

Anyone who has ever conducted a complex negotiation knows that sometimes weakness, or constraint, on the negotiators [becomes a strength](#), as argued by the Nobel laureate and game theory expert Thomas Schelling. Often, employees who

ask their bosses for a raise receive empathy. Many times, however, the bosses refuse to raise wages, claiming that the board of directors did not greenlight the raise. The bosses do not pay the full price of the refusal, because they get to hide behind the board of directors, who play the role of the „bad guy.“ In most situations, the employees cannot even directly check with the board of directors, if their case was indeed discussed. What is true at the level of the individual employer, is a *fortiori* true at the level of the state. Thus, the powerful United States stipulated in its Constitution that international treaties not only require the consent of the President but also require the approval of the Senate. This is not intended to undermine the US's foreign relations. On the contrary, it empowers the President in international negotiations. The President can stipulate strict demands on the grounds that only obtaining them will secure the Senate's approval of the international treaty. The President's weakness in the domestic political arena becomes their strength in international bargains. It allows the President to achieve otherwise nearly impossible treaty conditions.

The reasonableness doctrine fulfilled this exact function in the Israeli legal and political ecosystem. Israel is a small country with approximately 10 million people and a territory the size of New Jersey. Its governing coalitions are composed of multiple parties of varying sizes and ideologies because of its [proportional representation](#) electoral method. In this context, the reasonableness doctrine weakened the government's power to appoint public officials in order to help it when facing pressure from a base that can easily access the government.

Prior to this constitutional change, when a political activist of a party in the governing coalition would demand a senior appointment to a public position, a minister could deny the request, saying that the party would have very much liked to help, but their hands are tied. The minister could reason that the Israeli Supreme Court is likely to torpedo such an appointment on the basis of lack of reasonableness, and this would only risk tarnishing the activist's reputation. What will the ministers of tomorrow's government do? How will they face the flood of requests, when there are more political activists than appointments with which to sate their appetite? The restriction of the reasonableness doctrine will not only harm the ruling parties but will lead to severe corruption in the public sector.

What caused the fall of Jerusalem during the temple days? Jewish sources blame folly, corruption and extremism. By eliminating the requirement that appointments be reasonable, the government and its ministers weakened their own ability to maneuver when facing their base. The government and its ministers enjoyed the authority to determine whom to appoint to public positions even when the reasonableness doctrine was in force, even if they claim otherwise, but the reasonableness doctrine gave them the maneuvering space to nominate and appoint the worthiest among their candidates to public office.

Allowing appointments to be subject to judicial review based on reasonableness was one of the opposition's main demands as a precondition for a consensual constitutional amendment, in addition to freezing the constitutional revolution for an agreed-upon period. The coalition's refusal to accommodate the latter demand is reportedly what tanked the negotiations. A consensual constitutional amendment

could have relieved international and domestic pressure on Israel. Without the reasonableness doctrine, Israel is more conflicted than ever, and vulnerable to the spread of the scourge of corruption. The government shot itself in the foot both domestically and internationally.

*This post is based on my op-ed in [Globes](#) from July 25, 2023 (in Hebrew). I thank Yochai Rosner and my daughter Elisheva Feintuch for their help in preparing the English version.*

