

Did Israel Lose its Sanity?

Rivka Weill

2023-07-12T12:00:49

Israel is in the midst of an acute struggle over its constitutional identity. We are witnessing a government adamant about revolutionizing Israel's constitution ("Basic Laws"), which may [typically be amended by a simple majority of the legislature](#) and is thus prey to the whims of an extreme government. In light of Prime Minister Benjamin Netanyahu's criminal trial, roughly half of Israel's parliament ("Knesset") boycotted Netanyahu. To form a governing coalition, his Likud Party signed agreements with some of the more extreme political parties. Alas, these agreements commit the government to pursue a constitutional revolution. The most recent move on the government's agenda, passing a constitutional amendment that would severely restrict the reasonableness doctrine, would bring Israel closer to the brink of constitutional chaos. In this blog, I explain the theoretical arguments in favor and against the proposal and lay out the implications, should this proposal go through, given the government's true, concerning motivations that are already evident on the grounds.

Recap: How Did We Get Here?

Upon its formation, in January 2023, the government attempted to launch what it termed as the "first step" in amending the Basic Laws. It proposed to limit judicial power so that only the Supreme Court could review the constitutionality of statutes and only with a super majority of justices. The Court would be explicitly prohibited from reviewing the constitutionality of Basic Laws or amendments thereof. The government also sought to revise the judicial appointment method, so that it would control the selection, promotion and possibly removal of judges, [spelling the end of judicial independence](#).

Hundreds of thousands of worried Israelis took to the streets and have been demonstrating consistently over the past half a year on a weekly basis. In light of this fierce public backlash as well as international condemnation, the government re-evaluated its strategy. With the President of Israel, Isaac Herzog, serving as a mediator, the government attempted to negotiate a softer package with the leading opposition parties. By June, [the opposition halted the negotiations](#) when the government failed to comply with its commitment to elect the government's representative to the Judicial Selection Committee.

Instead, the government reverted to promoting its agenda unilaterally. It decided to embark on a constitutional amendment that would dismantle the judicial authority to review the reasonableness of executive decisions of the government, of ministers and of other elected officials. This has been part of the original plan all along but has now become the first prioritized item. [The bill passed the first reading in the Knesset on July 10th](#) based on coalition support alone. The government plans to enact it before the end of the legislative summer session in July.

The Case Against the Reasonableness Doctrine

The government and its supporters claim that the Israeli Supreme Court has invented out of thin air the idea that it can be in charge of the reasonableness of government action. This judicial power is based on [common law development alone](#). The challenge is that reasonableness is subjective. By definition, this doctrine requires the government to evaluate all relevant considerations and give them proper weight. This allows the judiciary leeway to intervene by claiming that the government has overlooked a consideration or undervalued another.

The government further argues that the doctrine is unparalleled in comparative terms. [Unlike the US](#), it is not restricted by a deference doctrine to the discretion of the executive as an elected or professional body. Nor is it exercised only in cases of extreme unreasonableness in which anyone could agree that an administrative action was objectively unreasonable. Rather, the Israeli justices often dispute whether a government action is unreasonable. In essence, the reasonableness doctrine replaces executive judgment with judicial discretion. This doctrine thus provides an overly broad, unwarranted, and undemocratic basis for judicial intervention in government actions.

This status quo severs the link between authority, responsibility, and accountability. The government is accountable to the public that elected it but does not have the authority to pursue its policies free from judicial intervention. It should be held accountable by the public, which can vote it out of office, rather than the judiciary.

Furthermore, striking down the reasonableness doctrine will still leave the judiciary with many other tools at its disposal to review government's decisions. The courts may still hold that executive decisions are illegal, discriminatory, motivated by arbitrary or ill considerations, disproportional, or have been reached through a flawed process.

The Case For the Reasonableness Doctrine

Those who oppose the government's amendment warn that Israel has a [weak separation of powers](#) structure. Israel is a parliamentary system where the government coalition forms out of the legislature and depends on maintaining the confidence of a legislative majority. It is not a presidential system where the executive and legislative can check each other. Nor does Israel have a bicameral legislature with an upper and lower house that can balance each other. It is unicameral. Nor is Israel a federal system. It is a small state with approximately [10 million people](#) and the territorial size of New Jersey. In these circumstances, the only substantial counterforce to the elected branches is the judiciary.

Supporters of the doctrine argue that the reasonableness doctrine is wholly democratic. When the Court strikes down a decision as unreasonable, it signals concern to the political actors and to the public. It requires a second look at the executive action, but the judicial decision can be undone by the legislature. The doctrine applies only to the executive branch while the Knesset may enact

unreasonable laws. Thus, the same majority that controls both the government and the Knesset in a parliamentary system may overrule a judicial decision of unreasonableness through statute. Thus, reasonableness [enhances the accountability of the government](#) and strengthens the legislature's supervisory role in relation to the executive.

In addition, supporters argue that reasonableness is much needed in the Israeli context. When Israeli courts exercise administrative review, they do not allow interrogating witnesses but rather rely on affidavits alone. There is no normal adversarial process. Thus, it is often impossible to prove that an executive decision was ill-motivated and resulted from a desire to benefit family, friends, or donors. The courts may use reasonableness to invalidate a decision they suspect, but have no proof, that it is ill-motivated.

Furthermore, we require the private sector to act reasonably, so how can we not apply the same standard to public officials? After all, if a lawyer or a doctor pursues the wrong procedure, they would be liable under tort laws. How can public officials, who must value the people's interests above their own, not be held at the very least to the same standards?

The Bigger Picture

One could argue that either position is reasonable from an analytic perspective. However, understanding the context is crucial. The attack on the reasonableness doctrine is but a first shot in a larger campaign to undo the [judicial legacy of Aharon Barak](#), the legendary former President of the Israeli Supreme Court. Through [a series of strategic landmark cases](#), he gradually expanded judicial power. Upon his appointment to the Court, one of Barak's earliest moves was to establish that reasonableness provides an independent basis to exercise judicial review over executive action, in the Yellow Pages decision of 1980. This paved the way for a bigger revolution in 1988, in the Ressler decision, in which Barak's Court held that practically no issue was non-justiciable and any public petitioner may approach the Supreme Court in its capacity as a High Court of Justice. Why are all matters justiciable? If there is no other legal standard to intervene, the Court can always inquire whether an act was reasonable. Eliminating reasonableness opens the possibility of restricting the Court's purview of justiciability.

What kind of decisions may the government want to keep the Court away from?

Well, notably, reasonableness has been used to intervene in governmental decisions about appointing and removing administrative officials. This has been a tool in fighting corruption, since Israel is a small country where everyone knows each other, and it is relatively easy to stretch and reach those in power.

Aryeh Deri, who is the head of the *Shas* party and a prominent member of the governing coalition, has been disqualified from office using this doctrine. Deri has a track record as a convicted felon going back to the early 2000s and in 2022 has been convicted again on tax fraud charges. In January 2023, Netanyahu appointed

him as Minister of Health and of Interior, an appointment the Court was quick to reject. Many justices based their decision to disqualify Deri on the grounds that it was “*unreasonable in the extreme*” to appoint him given his [background](#). Deri has remained a member of the Knesset. Eliminating the reasonableness doctrine could possibly allow the coalition to get him back into the government.

More generally, this sets the stage for removing officials from the public sector, starting with the Attorney General (AG), Gali Baharav-Miara. Israeli governments in general do not deliberate at length in full session. The government as a whole is too big a body and gathers mostly to vote on resolved matters. Yet, on July 9th, the entire government [summoned the AG](#) to question her about the criminal enforcement policy against protesters of the current government’s constitutional agenda. Members of the coalition inquired why the AG does not hold enough protesters to trial for blocking streets and disrupting public order. Some ministers claimed that, in 2005, the AG’s office was stringent in suppressing the protests against the disengagement from Gaza. And now the protesters are treated more leniently. It seems that the government is setting up pretexts to fire Baharav-Miara. Many ministers even called for it openly. Without the reasonableness doctrine, it would be much easier to fire the AG and get away with it. An independent AG, who serves also as the head of the prosecutorial power, is extremely important in Israel given its weak separation of powers.

Furthermore, without reasonableness, it will be much harder to supervise the police, which have been increasingly [using more brutality](#) against the protesters. The minister in charge of internal security (including the police) is Itamar Ben Gvir, [who was convicted](#) of supporting terrorist organizations and inciting racism. He is in an ongoing power struggle over directly managing the police’s actions. Many of the police senior staff have quit or been fired. Now, Ben Gvir needs to appoint a new chief for the police as well as other senior staff. The Court has traditionally relied on the reasonableness doctrine to disqualify dangerous picks. Meanwhile, a member of Ben Gvir’s party has proposed a [bill](#) that would enhance the Minister’s authority over suspects significantly, including direct power to detain and arrest.

These are only a few glaring examples. Other pending key appointments include the new [Governor of the Bank](#) of Israel and more senior officials in the public sector.

In this current context, for a government bent on removing barriers to corruption, squashing opposition by using more force against democratic protesters and packing the executive branch with political loyalists, removing reasonableness is a major step towards accomplishing its goals. Yet, it is but a first step and some members already declared their intent to proceed with taking over the judiciary.

However, Israel’s democracy is not doomed just yet. The Court, the AG office, the academia and civil society organizations are strong and resistant. The Court has tools to deal with the abolition of the reasonableness doctrine. It could interpret the amendment narrowly to prevent ministers from aggrandizing power through exercising discretion instead of their subordinates to shield decisions from reasonableness review. It could develop proportionality as a substitute for reasonableness that would apply more generally in balancing dilemmas even outside

the context of protection of rights. It could even possibly declare the constitutional amendment that abolishes reasonableness [unconstitutional](#) as applied to the appointment of Deri or the removal of Baharav-Miara on the grounds that it runs against the rule of law that requires even constitutional law to be general in nature. But, what is clear, is that if this bill is enacted, it would definitely mean the escalation of the fight over the soul of Israel's democracy.

I thank my daughter, Elisheva Feintuch, for her help in preparing this blog.

