

Game of Chicken

Rivka Weill

2023-09-13T14:58:49

Yesterday, on September 12th, the Israeli Supreme Court, sitting *en banc*, [heard eight petitions](#) challenging a hotly contested constitutional amendment. The Court [has rarely](#) sat *en banc* in the past, and this is the first time that it sits in a composition of fifteen justices, attesting to the importance that the Court attributes to this decision. The amendment modifies [Basic Law: the Judiciary](#), which protects judicial independence, lays out the process of judicial selection for all the state courts and grants the Supreme Court the authority to supervise state action when the Court convenes in its capacity as a High Court of Justice.

Though Israel's Basic Laws are treated [as supreme](#), most may be amended by simple legislative majorities. This constitutional amendment passed with the coalition support alone: 64 out of 120 members of Israel's parliament, the Knesset. [It states](#) that no court may hear cases or issue injunctions that deem governmental or ministerial actions unreasonable. This also includes cases in which the government decides to abstain from action or to appoint public officials. The amendment is a major strategic set-piece in the hard-right government's constitutional revolution, which aims to erode [the independence](#) of Israel's democratic institutions, including [the Court](#) and the Attorney General's Office (AG), as well as to politicize the Police, the Media, the Academia and more.

The AG, who typically represents the government, decided to join the petitioners' arguments. The AG therefore allowed the government to hire an independent counsel to make its case. In this blog, I will explain each side's arguments and the strategic considerations behind the AG's unprecedented move to push the Court to explicitly invalidate a constitutional amendment. I will show how both sides ultimately found themselves dragged into a game of chicken from which they could not back down.

The Case Against the Constitutional Amendment

The petitioners argue that this constitutional amendment should be struck down by the Court as unconstitutional. In their view, it runs contrary to Israel's core constitutional identity as both Jewish and Democratic since it undermines the rule of law and separation of powers within the Israeli system. No one disputes that the government and its ministers must still act reasonably. However, without judicial supervision, the government would be *de facto* free to violate the law. Judicial supervision is especially crucial since Israel has a parliamentary, unicameral, unitary system, which lends itself to a [weak separation of powers](#) between a dominant executive and the legislature. The petitioners are particularly concerned that the amendment would erode checks on the actions of [caretaker/lameduck governments](#), promote [corruption](#) in the public sector through the appointment of loyalists and

removal of independent civil servants, and undermine the protection of interests and rights that are not [constitutionally recognized](#).

Furthermore, the petitioners argue that this amendment amounts to a misuse of constituent power. Constituent power should be general in nature, and not exercised to promote personal interests of the executive. Yet, this constitutional amendment seeks to empower the government to [accomplish problematic agendas](#) while shielding its actions from judicial intervention. Such agendas include reinstating Aryeh Deri as a minister despite his criminal convictions, firing the AG to potentially benefit [Prime Minister \(PM\) Netanyahu's criminal trial](#), appointing radical loyalists to senior bureaucratic positions and continually preventing the Judicial Selection Committee from convening.

The petitioners further argue that the amendment has been passed hastily, without sufficient deliberation by Knesset members. However, this argument seems to be less weighty, since the Court's President has clarified that, should the Court decide to intervene, it would not be due to the enactment process.

The Government's Defense

The government does not believe that the Court has the authority to invalidate constitutional amendments.

While Germany and many other countries have [explicit eternity clauses](#) that identify core values that may not be amended, Israel does not. Some countries have resolved a similar issue by reading [implicit eternity clauses](#) into their constitutional basic structure, like India (though [I have argued](#) that this approach has actually been [pioneered by the US](#)). However, Israel cannot easily do that either. It has never even completed the process of constitutional adoption, and, therefore, it is quite problematic to judicially identify a core constitutional basic structure.

Invalidating the amendment, the government argues, would thus amount to a despotic act, or even a coup. In line with this, the government has also promoted, as early as January, a bill to [explicitly constrain](#) the Court's power of judicial review over constitutional texts. Many prominent government members — including the PM, the Knesset Speaker and the Chair of the Constitution Committee — openly warned the Court in the past few days not to intervene. They have hinted, and some even explicitly stated, that they would not abide by a decision to invalidate the Basic Law.

[The government further contends](#) that its constitutional amendment is justified and constitutional. It simply aims to strengthen the democratic character of the Israeli political system. The government has accused the Court of being an elitist institution that does not represent the democratic will of the people in its makeup as well as verdicts. The Court has been intervening too freely and too often in governmental actions to its taste. The Court does not utilize the reasonableness doctrine only to strike down “objectively” unreasonable decisions. Rather, it intervenes whenever it does not “like” the government's actions, replacing executive discretion with the Court's preferences. The government acknowledges that its decisions need to

be reasonable, but it is the responsibility of the executive to act reasonably, and the public and the legislature – rather than the Court – to hold it accountable. The government claims that this amendment is narrow, since it limits judicial intervention “only” in the decisions of the government and its ministers, who are nationally elected, rather than the executive branch more generally. Also, the Court may still hold that government action is illegal, discriminatory, motivated by ill considerations, disproportional, or has been reached through a flawed process.

The AG’s Unprecedented Position

The AG is pushing the Court to invalidate this constitutional amendment. The AG’s position is unprecedented in a few respects: First, the prevailing Israeli judicial interpretive method is [purposive interpretation](#), which grants more weight to a judicially inferred “objective” purpose than to the subjective purpose truly intended by the Knesset. The Court typically requires that this objective purpose align with Israel’s constitutional identity as Jewish and democratic. Yet, the AG argues in this case that no interpretation may “save” the constitutional amendment from invalidation. Prior to the amendment’s passage, the AG, as well as Knesset legal advisers have suggested an array of alternatives that would have mitigated the amendment’s unconstitutionality. For example, the Knesset could have clarified that the British [Wednesbury standard](#) still applies, such that the Court would still be able to intervene in acts that are so unreasonable that no reasonable person would have pursued them. The Knesset could have also immunized only general policy decisions from intervention rather than individuals. Alternatively, it could have clarified that the amendment does not apply when ministers delegate authority to subordinates or assume authority typically exercised by them. Since the Members of Knesset (MKs) explicitly rejected these various proposals, supposedly, the Court may not resurrect these proposals through interpretation now, claiming that they have been intended by the Knesset all along. However, while this argument may appear compelling, the Court has already [engaged in reinterpretation](#) in spite of explicit contrary legislative intent in several past cases to avoid invalidation of statutes.

Second, the AG has appealed to the Court to evaluate this constitutional amendment in the context of the government’s larger agenda, which amounts to a constitutional overhaul. Yet, most of this agenda has not yet been passed into law with the support of a legislative majority. In effect, the AG has asked the Supreme Court to make its ruling while accounting even for government bills that are not guaranteed to ever become laws. This is by no means the conventional approach to constitutional law, or even law in general.

Therefore, the AG argues in favor of explicit nullification of the constitutional amendment and declared that nothing short of that would suffice.

So why is the AG advancing this line of arguments? Why is the AG advocating for explicitly striking down a constitutional amendment, arguably for the first time in Israel’s history?

The AG's Strategic Calculus

Someone petty might suggest that the AG is motivated by a desire to save her own skin. For months, the government has been eager to establish the power and the pretext to fire her without judicial intervention. I am certain that the AG is indeed worried about getting fired, but not because of selfish considerations. Rather, because she is aware of how replacing her with a government loyalist, or institutionally weakening the AG's Office, would affect Israel's rule of law, given the government's plans.

The AG fears that this amendment would have irreversible effects. When people within Israel's civil sector understand that they may be fired because the Court may no longer use the reasonableness doctrine to protect them, then even when there is no explicit threat hanging over their heads, they would still behave differently. They would lose independence, corrupting the bureaucracy. Unlike presidential systems, in which a broader layer of the bureaucracy is politically appointed, more of the bureaucracy [in parliamentary systems](#) like Israel tends to be professional and outlast particular administrations. This arrangement [provides Israel](#) with some kind of friction built into the executive power and is crucial for Israel's separation of powers structure.

No less importantly, the AG understands that this is a strategic battle that must be fought at this time. In October, the Court's President, Esther Hayut, must depart, upon reaching the mandatory retirement age of 70. Along with her will retire Justice Anat Baron. In one fell swoop, the Court would lose two liberal members. The government has been anticipating this moment and seeks to reform the Judicial Selection Committee in order to appoint radical successors to the Court. It also plans to appoint its own candidate as the Court's new president, ignoring a longstanding [constitutional convention](#) that the Court's president is appointed by seniority.

The AG understands that the Court must act now if it wants to take a stand against the government's constitutional revolution. In the future, it would be much more weakly positioned to resist the next stage of the constitutional overhaul, sans members, leadership and the strategic reasonableness doctrine.

The Court's Authority to Review Constitutional Amendments

So, is the government right? Does the Court truly not possess the authority to review constitutional provisions?

All parties seem to agree that the Court has never invalidated a constitutional amendment based on its content. Rather, it has utilized [the doctrine of misuse of constituent authority](#) to warn of future invalidation, if the Knesset would reconstitute a temporary Basic Law dealing with budgetary matters. This doctrine requires Basic Laws to adhere to formal rule of law principles (such as generality and stability) and does not examine their content.

I would argue, however, that the Court has already embraced supra-constitutional principles and acted upon them to *implicitly* invalidate Basic Laws. In the Hasson decision, the Court used [the constitutional avoidance doctrine](#) to interpret Basic Law: Israel—Nation State of the Jewish People as implicitly incorporating the constitutional right to equality. This interpretation enabled the Court to find that Basic Law: National State is not discriminatory towards the Arab minority.

The Court's reasoning in the Hasson decision left open the question of whether the unconstitutional constitutional amendment doctrine (UCA) can be applied in the Israeli system. However, [I argue that](#), by utilizing the constitutional avoidance doctrine, the Court has implicitly also embraced the UCA. After all, the constitutional avoidance doctrine is only applicable if one assumes that the judicial interpretation is "saving" the constitutional statute from unconstitutionality. In other words, if not for the judicial interpretation, the [constitutional statute](#) would have been voided as an unconstitutional constitutional amendment. In fact, in his arguments yesterday, the Chair of the Constitution Committee, MK Simcha Rothman, seems to have implicitly embraced my position. When the Court inquired whether it should utilize the constitutional avoidance doctrine to interpret the reasonableness amendment, Rothman replied that this would implicitly employ the UCA doctrine.

Even if you do not accept the argument that the Court has already embraced the UCA and implicitly invalidated a constitutional amendment, then the basis for intervention in Basic Laws remains well-established. The Court has [a long line of jurisprudence](#) that identifies Israel's supra constitutional values as being a Jewish and democratic state, and thus provides grounds for invalidating constitutional provisions that run contrary to these values. Section 7A of Basic Law: the Knesset implicitly identifies Israel's supra-constitutional values as Jewish and democratic by articulating that any political party or candidate that is opposed to these values may be banned from running to office. [I treat](#) the ban as equivalent to an eternity clause. Or, more accurately, as its mirror image. By banning parties from elections it prevents them from amending Israel's eternal, supra-constitutional values. Bans on political parties function in similar ways in the majority of countries that require legislative, and often also popular, support to amend the constitution.

Over the years, [the Court has anchored](#) the role of Israel's Jewish and Democratic identity through [common law constitutionalism](#). In obiter, [in the Hasson decision](#), it even considered adopting my proposition to textually recognize section 7A of Basic Law: the Knesset as the anchoring for Israel's supra-constitutional values. In the current proceedings, the Court has also considered anchoring Israel's supra-constitutional values in the Declaration of Independence, as suggested by the Court's former president, Aharon Barak.

But, will the Court use this authority to invalidate the amendment?

A Game of Chicken

All parties understand the gravity of the moment. And thus, the government and the Court found themselves in a game of chicken. They are like two cars driving towards collision, each hoping the other would “chicken out” and swerve out of the way first.

Now that the AG has made her case, it is harder for the Court to do anything but invalidate the amendment. Otherwise, the government could use it to argue that the public drama regarding this amendment was unjustified and its actions are rather moderate. After all, even the Court did not feel the need to strike the constitutional amendment down. This would give the government the legitimacy to continue with its overhaul plan. It would also set up the precedent that judicial power can be curtailed, which is all the more dangerous given this government’s plans.

Nor can the government back down. If the Court invalidates this amendment, which applied to [a common law judicial doctrine](#), the Court will most probably strike down future parts of the government’s overhaul plan, which includes much more radical alterations to Israel’s existing Basic Laws and institutional fabric. PM Netanyahu repeatedly refused to commit to abiding by the Court’s decision.

Israel’s Court and government are thus set on a collision path in which other institutions and the public may eventually need to choose sides. However this plays out, the result will be painful and costly to Israeli society.

I profoundly thank my daughter Elisheva Feintuch and Dan Kritzer for their research assistance.

