

# A Government of Laws, not of Men

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The Israeli Supreme Court will hear this week (on September 12, 2023) petitions to invalidate an [amendment to one of Israel's Basic-Laws](#). The amendment, enacted in late July, denies the court the power to review the “reasonableness” of any governmental decision. This amendment is the first part of a larger judicial overhaul plan, initiated by the Israeli government. Based on the court's existing jurisprudence, I expect that the Supreme Court will declare the amendment unconstitutional, as it violates the core principle of the rule of law. In this post I offer a brief overview of the relevant background, before addressing the merits of the current case.

Israeli society is currently undergoing a period of turmoil. The immediate trigger has been the government's initiative, first presented in January 2023, to grant itself the authority to appoint Supreme Court Justices and significantly curtail the scope of judicial review. While the government possesses the necessary majority in the *Knesset* to enact its plan, the attempt has faced a notable setback, showcasing the power of well-organized popular protests in mobilizing economic and international responses that have proven effective. However, as indicated, one element of the government's plan has been enacted, namely the norm which denies all courts the power to review the “reasonableness” of governmental decisions.

The amendment is aimed at providing the government the powers to make decisions and employ policies that are currently considered illegal. Israel is characterized by an almost complete lack of parliamentary oversight of the government. The *Knesset* does not review concrete governmental decisions or policies, and it is not authorized to approve appointments of senior office-holders. Moreover, a wide range of governmental activities are not regulated by legislation, and the *Knesset* has never enacted an administrative procedures act. Consequently, the Supreme Court has stepped in, both by creating a judge-made administrative law, setting procedural requirements and regulating administrative discretion, and by implementing these norms in reviewing concrete governmental decisions. A central doctrine in this respect is that of “reasonableness,” which requires the government to take into account all relevant considerations and give them proper weight. This doctrine serves as a basis for reviewing a wide scope of decisions, in areas such as allocation of public resources, appointments and removal from office of senior officials, limitations on the powers of “care-taker” governments, and much more. The Court is strictly observing the principle of judicial self-restraint in implementing this doctrine, by determining that a decision is invalid only if it is “radically unreasonable,” and by completely refraining from implementing it with regard to legislation. It is nevertheless a central judicial doctrine for reviewing governmental decisions, serving as a vital deterring mechanism, to ensure that office holders act for the benefit of the public interest.

The amendment completely denies any court the power to issue a remedy based on finding that a decision is unreasonable, and even prohibits the court from

discussing the reasonableness of any decision made by a minister or the cabinet. Given that most powers are employed, at least formally, by ministers, rather than by independent agencies, the result is a very substantial curtailment of the power of judicial review. The purpose of this amendment is not only to provide the government with a general exemption from limitations set by the notion of the rule of law. The concrete aims of the current government in pursuing this so-called Legal Reform are far reaching. Based on the coalition agreements and the statements and policies of the ministers, it seems that the curtailment of judicial review serves three main purposes: (1) implementing policies that redefine the meaning of Israel as a Jewish state, towards a less liberal notion, in terms of both preferring interests of the Jewish majority over those of the Arab minority, and enforcing all citizens to act according to certain Jewish religious norms; (2) a shift towards political, party-based appointments of office-holders, including gate-keepers, in contradiction to the British-style tradition in Israel of a professional, non-partisan civil service; and (3) catering to the private interests of Prime Minister Netanyahu, who stands, while in office, for a criminal trial for corruption charges, by paving the way to the removal of central office holders relevant to the trial, primarily the Attorney General, and for a possible decision to withdraw the charges against him. This concern is the basis of the [court's ruling](#) that Netanyahu is prohibited from being involved in promoting legislation which curtails the scope of judicial review, due to his severe conflict of interests in this matter, a prohibition that Netanyahu extensively and openly violated, by taking the leading role in securing the successful completion of legislating the amendment.

It is generally agreed, by both supporters of the amendments and those who object it, that it results in substantially limiting the scope of judicial review. The debate is whether the *Knesset* is permitted to enact such a norm, or, to put it differently, whether the court's power of judicial review is subject to the *Knesset* decision to authorize or prohibit it. At issue here is the status of Israel's Basic-Laws.

In a nut-shell, Israel's Basic-Laws substitute a written Constitution. When Israel was founded, in 1948, the Declaration of Independence has set that the country will have a Constitution, and indeed, a Constitutional Assembly was elected. However, the Assembly decided not to enact a Constitution, mainly due to disagreements about the state's Constitutional Identity. As an alternative, it decided that the legislature will enact the Constitution in a piecemeal way, chapter by chapter, each called "Basic-Law," and once all chapters are enacted, they will be grouped together to serve as the Constitution. This decision, which was drafted in a deliberately ambiguous language, has left open central issues, such as the normative status of the Basic-Laws before they are grouped together, and the required majority for enacting them. The Supreme Court has [ruled](#), in 1995, that the Basic-Laws have a constitutional status, in the sense that their provisions limit the power of the legislature. It did not rule explicitly whether they are the Constitution and whether there are any limits to the *Knesset's* powers to enact Basic-Laws or amend them, given that, at least formally, they can be enacted and amended by a regular majority in parliament.

In a 2021 decision, the court [ruled](#) that the powers of amend Basic-Laws are limited. It stated that there are "fundamental principles" that even the "Constitutional Assembly" (namely the legislature) may not violate, and that these consist of what

the court characterized as “the core of Israel’s identity” as a democratic state. These include, the court ruled, “free and fair elections, recognizing the core of human rights, the rule of law, and the independence of the judiciary.” This principled ruling has not been implemented yet, and at issue before the court now is whether the amendment to the Basic-Law: the Judiciary, that denies the courts the power to review governmental decisions based on their reasonableness, violates these “fundamental principles.”

It is highly likely that the court will rule the amendment invalid. The amendment exempts the government from judicial review in a broad range of subjects, without setting any alternative mechanism for review. Given the centrality of the reasonableness requirement, denying the court the power to give remedy to citizens whose rights were harmed results in violating the core principle of democracy, namely that of limited government. In the famous words of Chief Justice Marshall in *Marbury v. Madison* (1803), “every right, when withheld, must have a remedy, and every injury its proper redress. [...] The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right.” The same is true in the case of Israel.

The challenges posed by the amendment under consideration are enhanced by the unique characteristics of the case. These include three main elements: (1) The amendment was enacted by a regular majority in the *Knesset*, supported only by the members of the coalition. It is a norm that was practically dictated to the legislature by the government, aiming at exempting the government from legal constraints. No independent branch, acting “behind a veil of ignorance,” evaluated the justification to enact such a fundamental change. (2) The amendment is just a first step in a broader plan for judicial overhaul, aiming at practically eliminating all aspects of judicial review, in order to implement radically illiberal policies. The choice not to legislate explicit authorization to the government to implement such policies, but rather just to do away with judicial review, is a strong indication of the illegitimacy of these policies. (3) The amendment is the result of an extensive violation of the prohibition imposed on Netanyahu in a previous Supreme Court [judgement](#) to be involved in promoting such legislation. It is a ruling that approved his service in the position of Prime Minister, despite his criminal proceedings. The amendment was enacted primarily due to Netanyahu’s actions, and an enforcement of the judgment requires invalidating this amendment, which is aimed to pave the way for impermissible intervention in Netanyahu’s criminal trial.

Combining the far-reaching consequences of the amendment with the fact that it is not a typical constitutional provision which is enacted by a qualified majority, along with the case unique and unusual features, justifies declaring the amendment unconstitutional. Denying the courts the power to review the reasonableness of any decision by a Minister or the government provides them with practically limitless discretion, in contradiction to the core principle of democracy about rule of law, not of persons.

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