

# Did the Israeli Supreme Court Kill the Constitutional Coup?

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October 7, 2023, was supposed to be the 40<sup>th</sup> Saturday in which Israelis would demonstrate in masses against the government's plan for constitutional changes that would have undermined judicial independence and the possibility of judicial review. But that morning, Israelis woke up to a new reality. The Hamas attacks on Israel have sparked a war that remains ongoing. Within five days, Benny Gantz and his centrist "National Unity" party joined Netanyahu's government to form a "national emergency government." The [agreement](#) forming this union included a clause determining that during the tenure of the emergency government, no laws would be legislated unless agreed upon by both Netanyahu and Gantz. Many interpreted this determination to mean that [Netanyahu's "judicial reform" is dead](#). However, the agreement was made over two months after the Knesset, Israel's parliament, already passed a major prong of this "reform"; i.e., [Amendment Number 3](#) to Basic Law: The Judiciary, prohibiting judicial review of actions of the government, the prime minister, or any minister based on the "reasonableness" doctrine. This amendment has now been [struck down](#) by the Israeli Supreme Court seating as the High Court of Justice (HCJ) in a [judgment](#) issued on January 1, 2024.

In this post, I offer a brief analysis of this 738-page-long judgment. I explain the main rationale of the judgment. I consider, given that Basic Laws in Israel enjoy constitutional status and supremacy over regular legislation, what the judgment implies about the topic of judicial review of constitutional amendments in Israel. Next, I argue that through this judgment and its background, important lessons can be learned from the Israeli case for the study of what various scholars have titled "[autocratic legalism](#)," "[democratic backsliding](#)," and "[populist constitutionalism](#)." The judgment illustrates how societal and judicial vigilance in recognizing "early warning" signals of potential "constitutional capture" may play a significant role in battling such processes. Finally, I contend that notwithstanding this judgment and the halting of the legislative process, the threat of democratic backsliding in Israel persists. The ongoing war has, in fact, paved the way for further anti-democratic measures, some of which were upheld by the very same Court that struck down the anti-reasonableness amendment.

The post continues my previous three posts, [where I described, analyzed, and contextualized the government's proposed "reform"](#) that was declared in January 2023; [assessed](#) the opposition it encountered while drawing preliminary conclusions; and [analyzed](#) the amendment which was now struck down, explaining its crucial role in the government's constitutional capture plan.

# The Court's Judgment on the Limits of the Constituent Authority

The Court struck down the amendment by a narrow majority of 8:7. The views of the Justices, however, can be further dissected along additional lines of divergence. Most significantly, 12 Justices found that the HCJ has the authority to conduct judicial review and to strike down constitutional amendments in the exceptional cases where the Knesset exceeded its constituent power. Another Justice considered such intervention possible only as a last resort in exceptional and extreme cases of violations of fundamental individual rights. Only two Justices held the view that the Court cannot undertake judicial review of Basic Laws.

Furthermore, among the seven dissenting Justices, three opined that rather than striking it down, the amendment should have been given a narrow, “enabling” interpretation. This would restrict the nullification of actions based on an expanded interpretation of “reasonableness” that, according to them, had developed in the case law since the 1980s. In this view, the amendment should not be interpreted as restricting judicial review of decisions deemed arbitrary or capricious, but rather as prohibiting review based on an unreasonable balance between different considerations.

However, the majority of the Justices deemed the proposed interpretative method inapplicable in this case. Instead, they chose to strike down the amendment, considering this action to be necessary according to previous judgments where the Court held that the Knesset's constituent authority is not unlimited. This doctrine, which outgoing President Esther Hayut identified as Israel's version of the “[unconstitutional constitutional amendment](#)” doctrine, was primarily developed during the Court's upholding [of the controversial “Nation State” Basic Law](#). In that case, the HCJ held that the Knesset, when acting as the constituent branch, cannot de facto or de jure deny Israel's core identity characteristics as a “Jewish and democratic state.” This “identity” can be discerned, according to Hayut, from Israel's Declaration of Independence, the existing Basic Laws, legislation, and previous judgments. Consequently, Hayut's perspective anchors the limits of constituent power in the existing constitutional structure as a whole. Notably, she distinguished this approach from those that aim to draw restrictions directly from the Declaration of Independence or those that rely on unwritten supra-constitutional principles. (In contrast, Justice Yitzhak Amit, in his concurring opinion, cited all three sources as possible origins for adapting the unconstitutional constitutional amendment doctrine in Israel).

While the judgment concerning the Nation State Basic Law already made this determination, it left open the question of whether the HCJ can exercise judicial review to enforce these restrictions on the Knesset's constituent power. Thus, the major novelty of the current judgment lies in its assertion that the Court can, and indeed must, strike down a Basic Law (or an amendment to a Basic Law) in the rare cases where the Knesset exceeded its constituent authority.

In explaining this judgment, Hayut emphasized the unique nature of the Israeli constitutional enterprise, evident in (1) its gradual, chapter-by-chapter construction (i.e., through Basic Laws) over several decades; (2) the lack of a special procedure for making constitutional norms, with Basic Laws being adapted and amended using the same process as regular legislation, and without a special majority requirement in most instances; and (3) the exceptional control that the political majority, and especially the government, maintains over the execution of the constituent authority. The latter is true not only as the Knesset is the power authorized to legislate both regular legislation and Basic Laws, but also given the significant influence of the government over the legislative process through the coalition's parliamentary majority. Hayut also emphasized the reality that unlike in the past, recent Basic Laws, including the amendment in question, were adopted based on the votes of the coalition alone – i.e., by the existing political majority, and not as a joint national enterprise.

Emphasizing similar elements, Justice Amit observed that denying the Court's ability to conduct judicial review of Basic Laws would effectively grant the executive unchecked power, as it could act through the constituent power and exploit the majority power, leading to abusive constitutionalism. In her concurring opinion, Justice Ruth Ronen pointed to the institutional conflict of interest that arises when the constituent branch limits the power of the judicial branch to review actions of the executive branch. Given the executive branch's de facto control over both the legislative and constituent branches, the Knesset faces a conflict of interest when it bolsters the power of the executive branch and weakens that of the judiciary, necessitating a higher level of scrutiny. Such scrutiny is especially critical regarding an amendment advocated for only by the coalition that controls the executive, with no support of any opposition member of parliament. Justice Ofer Groskopf also seriously considered the implications of the Knesset's dual role as constitutional assembly and legislature, writing that the constitutional limits on the Knesset's legislature would be meaningless if the Knesset could undo any limits in its capacity as a constitutional assembly.

In my [previous](#) posts, I described the situation where Basic Laws are legislated in the same forum and by the same procedure and majority as regular legislation, yet enjoy supremacy over regular legislation, as Israel's constitutional paradox. I argued that this paradox makes Israel's constitutional structure especially vulnerable to authoritarian constitutional reforms, which can entrench anti-democratic moves. This paradox seems to resonate in Hayut's holding that the three above-mentioned characteristics make it extremely risky to leave the restrictions on the Knesset's constituent authority unenforceable by the HCJ. This paradox is also reflected in the various opinions from other Justices cited above. Clearly, the Justices consider restrictions on the constituent power particularly necessary in Israel. In fact, two Justices (Amit and Anat Baron) suggested that given the ease with which Basic Laws can be amended, the threshold for judicial review of Basic Laws should probably be lower than the one currently set by the Court.

Consequently, Hayut concluded that the amendment, which entirely eliminates reasonableness-based judicial review of decisions made by the government,

ministers, and the Prime Minister, infringes upon two fundamental characteristics of the state's democratic nature: the separation of powers and the rule of law. As a result, this amendment was deemed to have been enacted ultra vires and is therefore null and void. Hayut held that for the amendment to be nullified, it is not necessary for it to render Israel undemocratic; it is sufficient that it violates core principles in a manner that "rocks the cornerstone of our still consolidating constitution."

In building up to this conclusion, the majority of the Justices pointed to the central role of "reasonableness" in Israeli administrative law, as a doctrine enabling consideration of whether the administrative authority assessed all relevant factors when making a decision and whether it gave each consideration its due weight. The majority engaged with many examples of how curtailing judicial review based on reasonableness may affect the protection of rights and the rule of law in a way that other administrative law doctrines, such as proportionality, might not.

## Addressing the Risk of Autocratic Legalism

[Amendment Number 3](#) determined that no court, including the Supreme Court when sitting as the High Court of Justice, may engage with and/or pass judgment on the reasonableness of any "decision" of the government, the Prime Minister, or any minister; nor may a court give an order on the said matter. The amendment continued to define "decision" as "any decision – including in matters relating to appointments, or a decision to avoid exercising any authority." As I explained in my [previous post](#), after the failure of the coalition government to complete the legislation that would have allowed it to take over the Judicial Appointments Committee, it saw the curtailment of the reasonableness doctrine as a crucial step in its [constitutional capture](#) plan. Indeed, the definition of a "decision" that could not be reviewed under the amendment to the reasonableness doctrine, particularly the language concerning "a decision to avoid exercising any authority," was evidently an attempt to thwart petitions challenging Minister of Justice Yariv Levin's continued avoidance of exercising his authority by not convening the Committee until he has managed to take control of it over it. Conversely, the language regarding "matters relating to appointments" was intended to allow the government to fire rule-of-law guardians such as Attorney General Gali Baharav Miara, a staunch opponent of the constitutional coup, and to appoint instead candidates who support its authoritarian moves. Thus, the "Reasonableness" Amendment was critical for the coalition's plans to capture the major rule-of-law institutions in Israel in ways that would facilitate its plan of governing with no limits.

However, while these were the underlying reasons for the coalition's choice to advance this amendment, the risk existed that the amendment would survive public and judicial scrutiny. There were many reasons to suspect such an outcome.

Firstly, even some liberal scholars have voiced critique of the reasonableness doctrine, considering its interpretation and use by the HCJ too expansive. Other scholars, who do not share this view, still doubt that curtailing "reasonableness" review fundamentally undermines democracy. Moreover, as [Kim Lane Scheppele](#)

[has argued](#), many of the changes that result in the de-liberalization of constitutional systems are technical and hard for ordinary citizens to understand – which could certainly be said about the amendment in question. From this perspective, the risk existed that the public and the Court would interpret this amendment as a change that is not so dramatic, failing to see it as part of an attack on judicial independence and the rule of law and thus enabling it to survive scrutiny. This is the risk Scheppele identified in writing about “legalistic autocrats” taking gradual steps to undermine checks on executive power, using the rhetoric of democracy and the methods of law, with the risk to democracy sometimes overlooked until it is too late.

However, these risks did not materialize. The judgment clearly demonstrates that the Justices (who in fact read and cited Scheppele) were aware of this risk. For example, Hayut rejected the government’s argument that judgments should not be made based on horror scenarios. She asserted that the necessity to preempt extreme scenarios forms the basis of many constitutional arrangements. Hayut cautioned against disregarding the possibility that a significant erosion of the state’s democratic core could occur incrementally and emphasized that judicial review can aid in halting constitutional backsliding before a total system collapse ensues.. Justice Amit went even further, noting that this Amendment is merely the first of a few proposed amendments, and that considering it alongside these proposed amendments reveals the risks it entails to be even greater, as it comprises part of a web of legislation aiming to radically alter the checks-and-balances in the legal system. Indeed, Amit noted the concern that the choice to start with one single legislative move may point to the government’s intention to follow in the footsteps of other countries in which democracy was weakened and dimmed through a series of processes and changes of democratic norms. Highlighting this risk, Amit pointed to Scheppele’s article [Autocratic Legalism](#), which [was published in book format in Hebrew translation and resonated substantially](#) in Israel in 2023. Justice Daphne Barak Erez also invoked Scheppele, [citing her warning regarding the “Frankenstate”](#) created by assembling various problematic constitutional arrangements from different countries, without considering their contexts.

In her work, Scheppele points to the importance for authoritarian leaders of taking over the courts; hence, of making judicial appointments. This is a critical step, as a court that has already been captured will uphold further moves that undermine democracy. In the Israeli case, the coalition’s failure to date to take over the Court has now resulted in a judgment that struck down a major component of its anti-constitutional coup. Notably, this component was designed to allow it to capture the Court and other rule-of-law institutions without scrutiny. This risk was clearly apparent to the Court: A recurring theme in the judgments of various Justices from the majority opinion was the central role reasonableness plays in the review of appointments to public service; given this role, the public would remain unprotected if senior public officials were to be fired based solely on political reasons. This vulnerability, Hayut emphasized, has particularly grave consequences vis-à-vis officials involved in law enforcement, such as the Attorney General, State Attorney, and Chief of Police. The amendment in question makes their appointment all dependent on the political level in a way that may undermine their independence. Justice Barak-Erez also noted how the appointment and dismissal of other officials,



like the Army Chief of Staff, the head of the Israel Security Agency, and others, is in the government's hands, with reasonableness being the main tool for judicial review – in a way fundamentally undermined by the amendment.

Overall, the huge public opposition to the government's plan which took the form of mass protests over 40 weeks, illustrates that the public, thanks to much [educational work](#), was not tricked into accepting legislative amendments, including the anti-reasonableness amendment, as mere technical matters. Instead, the public fully understood what's at stake. This, alongside the Court's cognizance of the risks highlighted by scholars like Scheppele, significantly thwarted the coalition's plan. The coalition's failure to do what authoritarian leaders like Viktor Orban did in Hungary – namely, to take over the judiciary first and to replace the Justices – enabled this judgment, which prevented the attempts to use a back channel to reach the same results.

## **Risks, Potential Pitfalls, and the Horror that Cannot be Ignored**

At this moment it is very tempting to celebrate the decision, and there is much to celebrate in what the Court held. However, there are significant risks and potential pitfalls.

First, notwithstanding the very important fact that a significant majority of 12 (or in fact 13) Justices held that Basic Laws are not immune from review, the decision itself was delivered by a narrow majority of 8:7. The Justices that sided with the majority on the possibility of judicial review of Basic Laws but with the minority on the outcome demonstrated a highly restricted approach to the exercise of such judicial review. Significantly, this was one of the last judgments in which outgoing President Hayut and Justice Baron participated. Given the coalition's failure to take over the Judicial Appointments Committee, Minister of Justice Levin is still abusing his authority as Chair of the Judicial Appointments Committee and refusing to appoint new Supreme Court Justices (and a new President of the Court). In fact, had this judgment been given after January 16 in the Court's current composition, the concrete result would have been to uphold the Amendment. This points to the risk that the Court may uphold other authoritarian legislative moves. At the moment, the emergency coalition agreements block such moves, and potentially, the changing political circumstances following the war might remove this issue from the agenda altogether. However, the risk remains that if Netanyahu's coalition survives, the judgment will only fuel its desire to capture the court to avert similar judgments in the future.

Second, while judicial review of Basic Laws is considered a liberal project required to protect democracy, all majority Justices mentioned Israel's existence as both Jewish and democratic as the core values that Basic Laws cannot undermine. This may in the future present a [risk](#) to potential amendments that seek to make Israel a "[state of all its citizens](#)" in a way that emphasizes equal citizenship at the expense of the "Jewishness" of the state.

Third, although the ongoing war brought the constitutional changes to a halt, it did not end the attacks on democracy. In fact, under the shadow of war, new restrictions on democracy emerged, including on rights to demonstrate and on prisoners' rights. Addressing these restrictions extends beyond the scope of this post, but a [recent report from The Association for Civil Rights in Israel](#) is essential reading on this matter. Some of these measures were upheld by the HCJ in very problematic judgments (see cases [regarding restrictions on demonstrations](#) and [regarding lack of information on Palestinian detainees from Gaza](#)) that stray far from the rhetoric of democracy in the reasonableness ruling.

Lastly, and related to the previous point, the gap remains between the Court's liberal rulings and the reality of a long-standing [occupation](#) that undermines democracy, [with the Court regularly upholding measures violating Palestinian rights that are taken by the occupation forces](#), even if these measures are in violation of international law. Can we celebrate the protection of democracy, the rule of law, and the separation of powers when Palestinians are subject to a regime that denies them the most basic rights? This question resonates now more than ever, when the Israel-Hamas war, which started with a horrible massacre of Israeli citizens by Hamas, and the taking of Israeli hostages, including children and elderly, many of whom are still held by Hamas, has now involved the killings of more than twenty thousand Palestinians, many of them children, with whole families often wiped out by the Israeli army and with [Gaza on the brink of falling into famine](#). One cannot overstate the constitutional significance of the judgment delivered on the first day of 2024. However, it is not possible to celebrate it without at the same time [acting to end the horror](#) we are now facing. Otherwise, all our discussions of democracy and human rights will remain hollow.

