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SYMPOSIUM ARTICLE

Releasing the Government from Acting Reasonably; or, the Government Says Goodbye to Reasonableness

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Abstract

The Knesset has recently amended Basic Law: The Judiciary to eliminate the ability of the courts to issue an injunction against the government or any of its ministers based on the reasonableness of their decisions. This article examines this amendment from various angles. The first section posits the amendment as part of a larger plan of the coalition to eliminate judicial review and provide the government with unlimited power. The second section emphasises that the amendment was legislated by the Knesset for itself, raising concern over a conflict of interest. This is followed by a brief explanation of the reasonableness standard in Israeli law, and an assessment of the duty to act reasonably, which stems from the democratic principle of the rule of law. The next two sections assess the many risks that the amendment creates, such as the types of decision that could be made without adhering to a standard of reasonableness, and the trimming of the power of the Attorney General as a legal 'gatekeeper'. Special emphasis is given to the dangers that the amendment holds for the quality and diversity of the civil service. Finally, the article discusses the multiple reasons why the government should not be immune from a reasonableness check and tackles the arguments against the use of the standard of reasonableness by the courts.

This multifaceted analysis leads to the conclusion that the elimination of the reasonableness standard undermines basic features of democracy and fractures the social contract between the citizens and the government. Therefore, it should not be immune from judicial review.

Keywords: reasonableness; judicial review; Israel; administrative law

1. The amendment

Basic Law: The Judiciary has been amended by the addition of the stipulation that those vested by law with judicial authority will not hear cases about or issue an injunction against the government, the Prime Minister or the ministers, based on the reasonableness of their decisions, including appointments and inaction.[1]

Any critique of this legislation, which frees these officials from having to meet the standard of reasonableness, must be made against the background of the judicial overhaul that the coalition has emblazoned on its banner. Taken together, the several elements of the plan yield a clear picture. The goal is, quite simply, to eliminate judicial review and give the government (the coalition)[2] unlimited power. This inverts the principles of freedom of action for the citizens (freedom to do whatever has not been legally prohibited) and of the government being bound by the law (prohibition from doing whatever has not been legally permitted). The government is exempt from this and is granted total freedom, whereas the liberties of citizens can be repudiated should the government so desire. The unlimited power that the government is seeking meets several objectives:

- benefiting Netanyahu, especially with regard to his ongoing trial;
- permitting governmental corruption without limits;
- enabling the coalition to realise its overarching goals – full control of the Occupied Territories and displacement of their Palestinian residents;
- establishment of a nationalistic and religious Jewish state with Jewish supremacy, accompanied by the eradication of the humanistic and liberal foundations of our political system;
- backing the efforts of the ultra-Orthodox leadership to ensure perpetual control of the ultra-Orthodox community, and for ultra-Orthodox men to receive a full exemption from compulsory military service.

When the coalition's hope of realising all these ambitions by means of a rapid and swift political coup against the judicial system was stopped (at least for now), it turned into a gradual process. One of the most important stages of this process is the elimination of the standard of reasonableness as applied to 'elected officials'. Below we will look closely at this idea, but it is important to see the entire forest and not just the individual trees, because this is just one of the first steps in the campaign to wipe out democracy. It should also be seen against the background of the dangerous and destructive motive that underlies

[1] Basic Law: The Judiciary (Amendment No 3).

[2] The government in Israel is made up of the parties in the coalition. Thus, the government has a majority in the Knesset (the parliament) through which it controls decisions made in the Knesset, using the tool of coalitional discipline (i.e., the imposition of voting discipline on members of the coalition). The lack of separation between the legislative and the executive branches impinges on the ability of the legislative branch to exercise oversight of the executive branch, and de facto turns the Israeli governing system into a two-branch system, with the Israeli judiciary being the only check on the Israeli government.

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it, with its anticipated outcome – pushing the entire institution of judicial review down a slope and ultimately over the cliff.

2. A preliminary note: The Knesset legislates for itself

When the Knesset, the coalition and ministers define the content and limits of judicial review (in this specific matter, and in general), they are setting rules that apply to themselves – sketching out the boundaries of what they may and may not do. Hence, it can be suspected that they will do this in a self-serving way. This clearly poses an innate conflict of interest. To avoid it, the bare minimum required is that proposed legislation on such matters be based on the work of experts and enacted with a very broad consensus, or apply to future Knessets only. These conditions were not fulfilled in this case.

The new law is breathtaking in its disregard of basic legal principles of democratic governance. A trustee who accepts the duty to protect a relatively minor asset is bound by the terms of trusteeship to act in a reasonable fashion. Should the government, which is charged with protecting the full scale of public interests – matters of life and death – and holds all strings of power, be exempt from a similar duty? Is the government so keen to take unreasonable steps that it is willing to disclose publicly its intention?

3. The role of the duty to act reasonably

One of the basic tenets of the rule of law is that the executive is bound by law and its actions must be authorised by law. This authorisation includes the duty of public officials to pursue the purposes that underlie the authorising law according to the correct balance between them.[3]

The authorisation also necessarily includes two additional duties: namely (i) that public officials act honestly and in good faith for the public interest, and (ii) that they act responsibly and diligently, exercising common sense and good judgment – in a word, reasonably. These duties reflect the most pressing and elementary expectations of the citizens. They provide content to the duty of allegiance that public officials owe to the public and endow the rule of law with substance. If one of these duties is not fulfilled, the decision reached exceeds the legal authority invested in the public official and is ultra vires.

It is widely agreed that under the second duty a public official must consider all relevant considerations (and no other considerations). Skewing blatantly the weight given to one or more of them leads to a decision that

[3] HCJ 73/53 *'Kol Ha'am' Co Ltd v Minister of the Interior* (16 October 1953) 892, in which the High Court of Justice held that 'the use of the power ... calls, on the part of the Minister of Interior, for the weighing of the interests involved in the public peace on the one hand, and in the freedom of the press on the other, and preferring the former interest only after full weight has been given to the public need for freedom of expression. The guiding principle ought always to be: is it probable that as a consequence of the publication, a danger to the public peace has been disclosed; the bare tendency in that direction in the matter published will not suffice to fulfil that requirement'. The Court found that in suspending the newspapers, the Minister of the Interior did not balance the two principles correctly, and he 'gravely exceeded his jurisdiction'.

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runs counter to common sense. There is no significant difference between a relevant consideration that is ignored entirely and one that is allotted negligible weight. Therefore, it is required that cases of manifest failure to weigh relevant considerations are included under unreasonableness. A reasonable decision is not necessarily an optimal or a good one. It can even be a wrong decision, as long as it is within the ambit of what an average public official could have decided.[4] If the decision is reached in a proper process of deliberation, and was approached with responsibility and care, it will also be reasonable.[5] The second function of reasonableness takes us back to the duty to act honestly. The problem is that it is impossible to have direct access to the mind of a decision maker and to her actual motives and reasons. If indeed 'foul play' was involved, it will be hidden and disguised. It is an essential function of reasonableness to detect those cases through the end result that is otherwise incomprehensible.[6] The only logical explanation for such a perverse decision in these cases is lack of good faith, improper motives, or extraneous considerations, which cannot be proven directly.

This is why the standard of reasonableness is indispensable. The greater the concern with corrupt decisions, the more that reasonableness is needed and essential.

4. Is there a good reason for the amendment? Does it matter so much?

This is a classic case where the system has worked very well and there is no objective reason to modify it. In practice, over the years the Supreme Court, even when it was an 'activist' court, has been extremely restrained and cautious about intervening in government policy and actions, and certainly about finding them to be extremely unreasonable.[7] This is exemplified by rulings on the critical issue of settlements in the Occupied Territories or, when Netanyahu was Finance Minister, on economic policy that harmed the weaker strata.[8] So: 'if it ain't broke, don't fix it' – the law is unnecessary.

[4] Daphne Barak-Erez, *Administrative Law* (Israel Bar Publishing House 2010) 763; HCJ 297/82 *Berger v Minister of the Interior* (12 June 1983).

[5] HCJ 987/94 *Euronet Golden Lines (1992) Ltd v Minister of Communications* (16 November 1994) opinion of Justice Zamir, para 11.

[6] Noam Sohlberg, 'On Subjective Values and Objective Judges' (2020) 18 *Hashiloach* 37; HCJ 581/87 *Zucker v Minister of the Interior* (9 January 1989) opinion of Justice Ariel, para 17.

[7] Quantitative research has shown repeatedly that the Israeli High Court of Justice tends to reject petitions against the government: Maoz Rosenthal, Gad Barzilai and Assaf Meydani, 'Judicial Review in a Defective Democracy' (2022) 9 *Journal of Law and Courts* 137, 151; Menachem Hofnung and Keren Weinshall, 'Judicial Setbacks, Material Gains: Terror Litigation at the Israeli High Court of Justice' (2010) 7 *Journal of Empirical Legal Studies* 664, 679–80; For research on the use of the standard of reasonableness see Elad Gil and Bell Yosef, 'The Use of the Standard of Reasonableness in Overseeing Public Appointments', *Tachlith Institute*, 3 July 2023 (in Hebrew), https://www.tachlith.org.il/post/reasonableness (showing that since 2003 the Israeli High Court of Justice has rejected 52 of the 64 petitions to strike down a public appointment on the basis of reasonableness; of the 12 petitions upheld, only 7 were based on the standard of reasonableness).

[8] HCJ 4481/91 *Bargil v Government of Israel* (25 August 1993); HCJ 366/03 *Commitment to Peace and Social Justice Society and Others v Minister of Finance* (12 December 2005).

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However, given that judicial intervention is so uncommon, a countervailing argument can be advanced: Why the fury? Why the opposition to the new law? The immediate answer is the normal wisdom of conservatism: avoiding changes for which there is no need or justification. Moreover, even if unreasonable decisions are not numerous, they still should be nullified.

The second answer, which is the crux of the matter, relates to what can and cannot be learned from the past. I believe it is a fundamental error to assume that what has been in the past is what will be in the future. On the contrary; the current coalition has executed a sharply detrimental redirection of Israeli politics, shattering the fundamental values on which the state was founded, in pursuit of its grand objectives described briefly above.

One could envisage future decisions that encourage violence and government corruption; educational policies that aim to uproot liberal democracy; cultural policies that censor works critical of the government; media policy that enables a government takeover of channels and stations and, with them, of the public discourse in order to stifle dissent; policies that are inimical to the general welfare being subordinated to coalition considerations that allocate unwarranted benefits to certain sectors; racist policing, and so on. This list does not even mention the Occupied Territories, where there is no need for legislation and there is vast potential for infringing the rights of those who have no control over their destiny. This is because the Occupied Territories are controlled by administrative orders of the Military Commander, and not governed by legislation of the Knesset. The protection of the Palestinian residents' basic rights is limited to administrative judicial oversight, and Israeli courts have generally been reluctant to intervene.[9] Such decisions could have a negative effect on human rights and the fundamental values of our system of government, especially equality, integrity and fairness. They would also affect the public climate, the quality and functioning of the civil service, and have a serious impact on education. Under a government motivated by a radical ideology – in part transcendental – which aims to eliminate or cripple the professional elite committed to the welfare of all citizens, there would be nothing to hold back such decisions. Any forces that could check or delay them would simply be eliminated.

One could claim that other legal doctrines (such as proportionality or conflict of interest) continue to apply even after the elimination of the reasonableness doctrine, and that these doctrines can address many of the issues that have previously been resolved by applying the reasonableness standard. However, other doctrines do not wholly overlap with the reasonableness doctrine, and they are more difficult to prove in administrative proceedings, which are based on written declarations, without the ability to cross-examine witnesses.[10]

[9] David Kretzmer and Yaël Ronen, *The Occupation of Justice: Supreme Court of Israel and the Occupied Territories* (2nd edn, Oxford University Press 2021) 489.

[10] Amichai Cohen and Yuval Shani, 'From All-Out Assault to Salami Slicing Tactics: Israel's Crisis Continues', *Lawfare*, 20 July 2023, https://www.lawfaremedia.org/article/from-all-out-assault-to-salami-slicing-tactics-israel-s-crisis-continues; Sohlberg (n 6).

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It is not inconceivable that the same means employed to oppress and infringe the rights of disenfranchised groups, such as asylum seekers and Palestinians, would be employed against Israeli citizens tagged as opponents of the regime.

The legislation also trims the power of the Attorney General to stand in the breach (as long as that position is filled by someone worthy of the title). If the Court cannot overturn extreme governmental actions, the Attorney General's opinion that a certain policy should not be adopted, because it is likely to be struck down by the Court, becomes irrelevant. This would weaken the Attorney General's status and augment the government's unchecked power. The law leaves the judiciary powerless in the face of outrageous policy decisions; even worse, it turns the judiciary into a collaborator with these decisions. The public as a whole would be helpless. Our rights, legitimate interests and welfare could be trampled on without remedy.

This legislation also curtails the checks and balances put on a transitional government (a government that rules after the Knesset has been dissolved and before elections take place, or a new government has been formed). The standard of reasonableness is the main tool in which the Court has determined a transitional government's 'obligation of restraint'. In the past, the Court had ruled, for example, that because a transitional government has less leeway regarding reasonableness than do regular governments, it cannot make permanent public appointments. The Court has explained that a transitional government no longer holds the trust of the Knesset, and it suffers from a democratic legitimacy deficit.[11] Without such 'obligation of restraint', a transitional government could award financial favours to certain sectors, decide on appointments without appropriate oversight, and could make long-term decisions without public legitimacy, and even in contradiction with the interests of the public.

5. The appointment and dismissal of officials

There is an intimate link between appointments to public positions and policy decisions. Without the standard of reasonableness, the government and ministers have a free hand to appoint and dismiss officials as they please. First, this could lead to a massive influx of unqualified appointments, including convicted felons and others who, given their shady background, would never be hired for a job in the private sector or a junior post in a properly managed civil service. Second, it would guarantee that suitable candidates from groups that the government views with a jaundiced eye – Arabs, women, LGTBQ, single parents, Ashkenazim, the secular – would never even get their foot in the door. The principle of equal opportunity would be breached, and the criterion of merit would be replaced by sectoral affiliation. The only relevant factor would be loyalty to the person making the appointment – the more an individual is ill-suited to the job, the more he or she would feel indebtedness towards

[11] HCJ 5403/22 *Lavi – Civil Rights, Proper Administration and Encouragement of Settlements v Prime Minister* (22 September 2022) opinion of Justice Sohlberg, para 1.

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the person who appointed them – and this would create an incentive for appointing the least qualified! Unfortunately, Israel has a tradition of political appointments of candidates whose chief qualification is precisely their unsuitability. We cannot expect that such persons would be committed to the defence of human rights. What is more, unreasonable appointments are liable to transmit a negative message about the importance of human rights: for example, when someone implicated in murder is appointed to a senior civil service post.[12] Even worse, such appointments are a sure-fire recipe for eliminating gatekeepers from the public service. Instead of persons devoted to public welfare, ethical conduct and proper administration, jobs would go to persons expected to shield government corruption. Such 'bodyguards' are a recipe for unprofessional, self-serving, damaging and arbitrary decisions. Extreme unreasonableness would have a field day and there would be no way to rein it in. Finally, the long knives would be drawn; officials who perform their jobs faithfully, such as ministry legal advisers, would be liquidated.[13] Israel would turn into a backward country, the survival of which is imperilled.

The issue of appointments must be assessed against the backdrop of the moral decline in the state over the last three decades. A president, a prime minister and several ministers have been convicted of crimes and sent to jail. Politicians have managed to persuade most of the public that there are no standards of public morality other than those of the criminal law (and, even there, those whose crimes were not labelled as tainted by 'moral turpitude' should be seen as 'innocent', and that a criminal conviction has no meaning unless it was upheld on appeal).

Ethical conduct in public life has gradually lost all meaning, to the point that some moral blemish has almost become a precondition for admission to public life. Shame has been banished, replaced by boundless audacity. This is the only way to explain the stubborn insistence on returning the repeat offender Deri to the government table.[14] The elimination of all restraints on

[12] HCJ 4668/01 *MK Yossi Sarid, Leader of the Opposition v Prime Minister Ariel Sharon* (27 December 2001).

[13] The State Comptroller could be seen as a role that has already been captured in Israel. The current Comptroller has been publicly criticised for acting more as an internal auditor to the government than as a separate branch of government, and of conceding his role as gatekeeper. Similarly, the current Civil Service Commissioner is considered to be very weak, and politicians have recently been able to appoint their cronies. More recently, Netanyahu reportedly sought to appoint his political confidante as the acting chief statistician of the Central Bureau of Statistics, but backed away after this plan became public.

[14] Shas Chairman, Aryeh Deri, was indicted in 1993 of serious crimes (including fraud) while serving as Minister of the Interior. In a groundbreaking ruling in 1993, the High Court of Justice held that it is 'unreasonable in the extreme' for Deri to continue to act as a minister after he was indicted, and he ultimately resigned from office [HCJ 3094/93 *The Movement for Quality in Government v State of Israel* (8 September 1993)]. In 1999 Deri was convicted and sentenced to three years in prison. In 2022 he was convicted of tax offences as part of a plea deal in which he also stated that he would resign from the Knesset and pay a fine. The verdict stated that Deri is 'willingly excluding himself from dealing with public affairs' [CrimC (Jerusalem) 56231-12-21 *State of Israel v Deri* (1 February 2022)]. However, in the 2022 general elections, Deri ran again as chairman of the Shas Party and was later appointed as Minister of both the

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appointments would accelerate the collapse of ethical norms and the crushing of public and institutional checks and gatekeepers.

6. Should the government be immune from reasonableness check?

It is misleading to describe the category of those now granted immunity from the standard of reasonableness as 'elected officials' because this creates the impression that they were chosen for their position by the people (all citizens); and this is not the case. In the coalition system of government the voters do not choose the members of the government or assign ministerial portfolios. The person tapped to form a government almost always has multiple options for doing so, often in opposite political directions. The decision about who sits around the government table is theirs, provided they receive parliamentary approval, and is not the direct result of the people's choice.[15]

Even a candidate's undoubted electoral victory does not imply unlimited trust in the reasonableness of every action that candidate takes. The public trust in the winners of an election is not a blank check on which they can inscribe clearly unreasonable statements. That is incompatible with the principle of limited government bound by law, with its system of checks and balances. It is also clear that a grant of immunity for unreasonable decisions by elected officials would undermine trust in them, which is already weak. It is not true that most decisions made by elected officials involve particular value judgments (which might be seen as a cause for shielding them from deep judicial review). On the other hand, it is precisely decisions based on highly problematic values like Jewish supremacy that are liable to be extremely unreasonable, because they subvert the basic values of our system of government.

As the government and the Knesset are run by the coalition, one cannot expect an effective and unbiased control of the Knesset over government decisions. Similarly, such control over thousands of decisions cannot be expected from the public.

The election (as opposed to the appointment) of an individual to a public position, especially for the first time, is rarely based on demonstrated decision-making skills. The process by which government and ministerial decisions are reached, and even their content, are not transparent to the public. All too often they are the product of pressures exerted by interested parties, which are not conducive to a balanced decision that furthers the public welfare. The need for strong judicial review is paramount precisely in such cases. Nor is there any

Interior and Health Offices. In January 2023 the High Court of Justice ruled that these appointments are once again 'unreasonable in the extreme' and that the Prime Minister ought to fire him [HCJ 8948/22 *Sheinfeld v The Knesset* (18 January 2023)]. Since then, the Netanyahu government has been searching for ways to bring Deri back to the government table and the amendment to eliminate the reasonableness clause has been seen as the route to make this appointment possible; see, eg, Eliav Breuer, 'Reasonableness Bill Passes 64-0 after Compromise Falls at Last Minute', *The Jerusalem Post*, 24 July 2023, https://www.jpost.com/breaking-news/article-752225.

[15] Sohlberg (n 6).

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substance to the blanket response that when the public next goes to the polls it can punish representatives who behaved unreasonably. Elections are based on various issues; the choice of which slip to drop into the ballot box is determined by what is most important to each voter. Furthermore, the reasonableness of an elected official's decisions cannot be a factor in the Israeli system, where we vote for a party and not an individual. Nor is it reasonable to expect the public to keep intelligent track of the reasonableness or unreasonableness of decisions by its representatives. Moreover, without the standard of reasonableness, the public would not have trustworthy information about whether a candidate for re-election has been making reasonable decisions.

In practice, the new law totally eradicates the standard of reasonableness, because one can simply shift every matter in the purview of professional officials to a formal decision by their elected superiors (the ministers and government).[16] Moreover, nothing will prevent the coalition from expanding the freedom from reasonableness to other categories of public office, such as mayors of towns. This is true also in respect of other grounds for judicial review. If reasonableness can be abandoned, why should honesty, fairness and equality remain?

The elimination of the standard of reasonableness provides new ammunition for the enemies of the Court. An unwelcome judicial ruling would be examined under a magnifying glass to determine whether it has some link to reasonableness. The enemies of the Court would argue that it is ignoring the new law – bypassing or outsmarting it.

7. Arguments against reasonableness

It is argued that the standard of reasonableness is vague, and consequently grants the Court unlimited discretion, which makes it improper.[17] This argument rests on the expectation that the law must always be crystal clear and unequivocal. This is an exaggerated expectation, which cannot be satisfied. The law does indeed aspire to certainty and stability, but these attributes can be attained only within a certain limit. A legal text consists of words the open sense of which requires complex interpretation, which cannot anticipate all possible situations. No system of laws can function without broad normative concepts – including bedrock notions such as justice – which give room for legal interpretation. Many laws require civil servants to act reasonably.[18] Should we expect that at some point down the road there will be an assault

[16] Basic Law: The Government (Israel), art 34 states: 'A Minister, who is in charge of implementing a law, is entitled to assume any power, with the exception of powers of a judicial nature, which is conferred by that law upon a civil servant, unless another intention is implied in the law. The Minister is entitled to act as stated with regard to a particular matter, or a specific period'.

[17] Michal Shaked, 'Notes on the Reasonableness Standard in Administrative Law' (1982) 12 *Mishpatim* 102, 127–28.

[18] eg, Police Ordinance (New Version), 1971, art 4A; Physicians' Ordinance (New Version), 1976, art 20; Entry into Israel Law, 1952, art 12B8.

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on reasonableness wherever it is called for? Will the demand for reasonableness be replaced by the 'right' of authorities to take arbitrary action?

It is precisely the conservative approach that encourages courts to be creative in sustaining legislation which at first sight contradicts a Basic Law. Is this not an acknowledgement that creative interpretation is necessary and essential? Is it possible to avoid creative interpretation of legislation left over from the British Mandate, which posited an undemocratic regime? Judicial discretion is essential in avoiding absurd outcomes. Judges' discretion is like a fresh breeze in a closed room. It is impossible to deal with the complex, rich, and multifaceted relations between the authorities and citizens exclusively by means of closed and defined rules. We are not talking about allowing the Court unlimited discretion. The category of extreme unreasonableness – a clear conflict with common sense – applies to extreme situations only. It may be assumed, then, that in general it will produce decisions on which there is a broad consensus. There are incentives for the Court to handle reasonableness with restraint. Declaring a decision as patently unreasonable is offensive to the decision maker. Fairness towards public officials imposes a restrictive approach by the judiciary. Judicial decisions are accessible to the public (both the professional and lay public). They carry the onus of convincing the public of being right and just. Judges also know that it is not their role to run the country and that, if they try, they will be flooded with endless petitions.

Another argument rejects the compatibility of judges to assess the reasonableness of the actions by the authorities, and states that judges do not hold better knowledge about the reasonableness of decisions and actions.[19]

This is an unconvincing claim. Judges make constant and extensive use of the concepts of reasonableness and unreasonableness. A basic principle of legal interpretation is that if an interpretation leads to an illogical outcome the judge must look for some other interpretation that does not produce an absurdity. Reasonableness is intrinsic to the concept of negligence – the hard core of torts law and an essential element of criminal responsibility. In these contexts, rather than a single notion of negligence there are gradations, up to gross negligence. A basic distinction, essential for delineating the domain of freedom of action, is that between a reasonable and justified risk and one that is not.

It is hard to imagine the law without the mythical creature known as the 'rational human being'. One of its key functions is to help courts in assessing the credibility of witnesses' conflicting versions; another key function is to formulate normative expectations whenever it is necessary, in diverse contexts, to set a threshold or limit for such expectations. Criminal justice is based on the distinction between reasonable doubt, which should lead to acquittal, and unreasonable doubt, which leads to a conviction. If judges are not equipped for this task, who is?

[19] Sohlberg (n 6).

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8. The amendment is included in a Basic Law: Is it immunised therefore from judicial review?

The answer is 'no'. As Basic Laws are characterised only by their name (not by content, proceedings or special majority), there is no reason for granting them absolute and unchecked power. Such power remains in the hands of the sovereign – the people.[20]

The amendment enacted by the Knesset as a constituent assembly is beyond its powers, for three reasons: it undermines basic features of democracy – the rule of law, checks and balances, and limited government. These are cornerstones of the state – protected against any coincidental majority.

Secondly, it relieves the government from an essential part of its duty of allegiance to the citizens and thus undermines the social covenant between the citizens and the government. By this, it assumes power that it does not have.

Thirdly, the amendment is serving no reasonable purpose, no legitimate interest, no legitimate value. It serves only the seeking of absolute power for the government to be used to destroy democracy. At the same time, it causes different kinds of harm. It is a clear case of the constituent assembly acting upon improper motives and abusing its power.[21]

9. Conclusion

It is hard not to be horrified by the farce of the coalition's race to free itself from the yoke of the duty of government (which is supposed to act as a public trustee) to conduct itself reasonably, and by the contempt for the public welfare this implies. When evaluating the damage, one must also take account of the untoward motives that are pushing the coalition and the potential for wreaking havoc in the future by means of other amendments in the same destructive direction.

It is the current government's zeal to shake itself loose of every restraint and to concentrate unlimited power in its hands that spurred this law, which is so clearly detrimental to sound government and the public welfare. It harms the government itself – its legitimacy, its credibility, and public trust in it. It is bizarre that the coalition so blatantly announces its intention to behave unreasonably. Its testimony that it has discarded common sense can itself be seen as a display of extreme unreasonableness. This underscores the imperative need for this standard of judicial review. The amendment is declaring itself as irrational and therefore as invalid.

[20] The President of the High Court of Justice, Esther Hayut, has stated that the authority of the Knesset as a constituent assembly is not unlimited, and it is derived from the sovereign – the people: HCJ 5555/18 *Hasson v The Knesset* (8 July 2021), para 24.

[21] See literature on the unconstitutional constitutional amendment doctrine and the Knesset's institutional conflict of interest as both the constituent assembly and the legislator: Suzie Navot and Yaniv Roznai, 'From Supra-Constitutional Principles to the Misuse of Constituent Power in Israel' (2018) 21 *European Review of Law Reform* 403. See also *Hasson* (n 20); HCJ 8260/16 *Ramat Gan Academic Center of Law and Business v Knesset* (6 September 2017), para 35.

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