



פורום המרצות והמרצים למשפטים למען הדמוקרטיה

The Israeli Law Professors' Forum For Democracy

Summary of Position Paper No 54: Basic Principles Regarding any Statutory Arrangement of Judicial Review on grounds of Non-Reasonableness and Response to the "Amitai - Bar-David" Outline of July 23, 2023

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These are difficult days for the State of Israel. The risks to social cohesion, the economy, security, and stability at this time are tremendous. In case of an agreement on cessation of the unilateral legislation and transition to dialogue, and in order to help facilitate such initiatives, we seek to emphasize the vital importance of preserving basic principles in any statutory

* The Israeli Law Professors' Forum for Democracy is an ad hoc and voluntary group of experts on Israeli law working to protect and promote liberal democracy in Israel. The forum engages in research and analysis of legislative bills, writes policy papers, and provides information and explanation for the public as well as for professional audiences. The forum actively opposes initiatives and actions aimed at abolishing the independence of the judiciary and subordinating it to the government and to partisan political considerations of the executive branch, as well as initiatives aimed at harming democratic institutions, equal and free elections, the right to equality, free speech, freedom of religion and other human rights.

The members of the Israeli Law Professors' Forum for Democracy hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. Therefore the position papers and other professional materials produced by us reflect the prevailing position of the members, even if it is not held unanimously. We are, however, united in the opinion that the host of the government's proposals - which are an unprecedented and severe attack on the independence of the judiciary, the Attorney General and other government legal advisors, the police, the military, and public broadcasting - will seriously damage the rule of law and undermine Israel's democratic character. Accordingly, we joined this forum to make our professional opinion available to the public at this fateful time.

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arrangement regarding judicial review on grounds of non-reasonableness. In this paper, we also respond to the proposal put forward by Arnon Bar-David, Chairman of the Histadrut (Israel's general federation of labour), and Dubi Amitai, Chairman of the Israeli Business Sector Presidium (as of July 23, 2023). Though we appreciate their efforts, we will explain why we oppose their proposal and believe it does not uphold the abovementioned essential basic principles.

The Basic Principles

1. **Absolute cessation of the Regime Overhaul. Changes will be made only by broad consensus**

Every legislation regarding the Non-Reasonableness Doctrine will be accompanied by a commitment, established in a basic law, according to which no changes will be made without broad consensus. This will be under a constitutional freeze provision, according to which, during the term of the 25th Knesset, no changes will be made to provisions in basic laws as well as to other arrangements that concern governmental authorities, the relationships between the branches of government, the powers of the Attorney General and its subordinated bodies (such as the State Attorney and the ministerial legal advisors) and other gatekeepers, arrangements that may affect pending legal proceedings against ministers and, in particular, the Prime Minister, and arrangements that may infringe upon the Elections Rules and the independence of the media and academia, unless they are made by broad consensus; also, the changes will be made in a Basic Law which will determine a transitional period that will allow for designing proper constitutive procedures and will not permit constitutional changes until the process is completed.

A proposal for such a basic law will be published separately.

2. **Appointments and Terminations**

The Non-Reasonableness Doctrine will continue to apply to all decisions regarding appointments and the termination of office holders (except for appointments of ministers and deputy ministers), including decisions to convene or refrain from convening a committee for appointments or election to a public office.

3. Decisions of Ministers and the Government

The Non-Reasonableness Doctrine will continue to apply to ministerial decisions made according to Section 34 of the Basic Law: The Government. In addition, the Extreme Non-Reasonableness Doctrine will apply to ministerial decisions, as well as to government decisions in matters that do not constitute general policy.

4. Transitional Government

The abovementioned arrangements imposing limits on the Reasonableness Doctrine will be invalid from the moment the Knesset decides to dissolve itself until a new government is sworn in.

It is essential to emphasize that the Government's refusal to adhere to these basic principles will reveal its true intentions regarding the Reasonableness Doctrine and the Regime Overhaul. For example:

- Dismissal of the Attorney General and the other gatekeepers.
- Not convening the Judicial Appointment Committee in order to disrupt the judicial system and harm it.
- Continuing the legislation of the "Regime Overhaul" in incremental stages in order to accumulate unrestricted governmental power that fundamentally changes the nature of Israel as a democratic state.

We oppose the Bar-David and Amitai proposal of July 23, 2023, due to the following issues:

1. The proposal does not commit to an absolute cessation of the Regime Overhaul, and to the requirement that changes will only be made by broad consensus. The Professor's Forum puts forward a bill proposal for Basic Law: Design of the Constitutional Procedure that will facilitate the design of a proper procedure and will prevent statutory changes until that process is completed. The Government's statement that it will not pass laws on matters related to the Reform without the consent of 75 MKs during the next 18 months is not enough – **first, since it is a mere a statement and the Government can reverse it at any time; and secondly, an 18-month period provides the Government ample time to promote the reform during the current Knesset and provides no incentive to compromise.** Lastly, the requirement of 75 MKs is not satisfactory.
2. Decisions regarding appointments and terminations of office holders (excluding the appointment of ministers or deputy ministers) cannot not be immune to judicial review based on the Reasonableness Doctrine. The condition 'unless approved by the Knesset' is too broad, since it allows the coalition majority in the Knesset to set a list of office holders that will be approved by the Knesset. As long as there are no restrictions on the possibility to change basic principles and customs enshrined in a basic law, including regarding appointment and termination of office holders, this presents a real danger.
3. The current proposal enables the Government to claim that the Reasonableness Doctrine does not apply to its decision not to convene the Judicial Appointment Committee. The exemption from reasonableness should explicitly exclude decisions to convene or refrain

from convening a committee for appointments or elections to public positions, even if the Knesset approved them at the plenum.

4. Exempting from reasonableness government decisions that do not constitute general policy, including approval of ministerial decisions, grants broad immunity, through the backdoor, to decisions that should be subject to effective judicial review, including under the Reasonableness Doctrine, and is therefore unacceptable. Ministerial decisions that are not made under Section 34 of the Basic Law: The Government, and government decisions that do not involve general policy matters should, at the very least, be subject to the Extreme Non-Reasonableness Doctrine.
5. In any case, such a complex and intricate amendment must be made through an open discussion, allowing participation of the Ministry of Justice and all relevant professional bodies.