

Canceling Israel's "Reasonableness" Clause and its Implications on Palestinians

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On 24 July 2023, the Israeli Knesset (Parliament) approved Amendment No. 3 to the "Basic Law: The Judiciary", which abolishes the authority of the courts, including the Supreme Court, to exercise judicial review over government decisions and ministerial actions based on the "reasonableness" clause. In practice, this amendment limits the power of the judiciary to intervene in various and broad government decisions, thereby restricting the judicial oversight of the authority's actions and the examination of the legality of the government and its ministers' actions. Abolishing the reasonableness standard has significant implications, including limiting the judicial scrutiny by the courts over government decisions that infringe upon human rights. This position paper aims to highlight the impact, essence, and scope of this amendment on the rights of Palestinians in the Occupied Territories.

The “Reasonableness” Clause in Israeli Law

The “Reasonableness” clause is a doctrine within public and administrative law in Israel within which the court, including the Supreme Court, examines the degree of reasonableness of a decision made by government branches. This clause was introduced by the Israeli courts following its adoption from British jurisprudence. As part of assessing the “reasonableness” of a decision, the court evaluates the executive authority’s process of decision-making, as well as the outcomes of that decision. Among other criteria, the court examines whether the authority’s decision was rational, whether all relevant considerations were weighed in making the decision, whether extraneous and irrelevant considerations were taken into account, whether the decision was made arbitrarily, and ultimately whether the reached decision is logical and justified. In essence, the court assesses whether the executing authority acted within the scope of the authority granted to it by law or exceeded it. If the court finds that the process of decision-making and its outcomes are extremely unreasonable, it will have the authority to order its annulment.

Canceling the “Reasonableness” Clause

A few days after the 37th Israeli government was sworn on 29 December 2022, the Minister of Justice, Yariv Levin, announced a plan for constitutional changes. Supporters of the plan refer to it as a “judicial reform,” whereas its opponents see it as a “regime or constitutional coup.” Primarily, it encompasses several key stages, including: A) Eliminating the Supreme Court’s judicial review of new Basic Laws or amendments to the existing Basic Law. B) Canceling or restricting the Supreme Court’s judicial review of regular legislation and establishing the “Override” clause, thereby allowing the Knesset to re-enact laws that have been invalidated by the Supreme Court. (C) Canceling the “Reasonableness” clause which enables the court to review decisions issued by the executive authority. (D) Weakening the State Attorney’s role and status as well as the legal advisers for ministries. (E) Altering the composition of the Judges Selection Committee while granting political power coalition and granting it majority of votes in appointing judges. (F) Revoking the Basic Law: Human Dignity and Freedom.

Minister of Justice Yariv Levin and other coalition members presented the plan as one aimed at “strengthening the principle of separation of powers.” Meanwhile, the actual goal was to limit the Supreme Court’s power to intervene in decisions made by the government and the Knesset – which are controlled by the coalition.

It is worth noting that following the announcement of the plan by Minister Levin, a petition was simultaneously brought before the Supreme Court against the appointment of Aryeh Deri as Minister of Interior and Minister of Health. The petition argued that Deri’s appointment was extremely unreasonable due to his previous conviction for tax offenses just one year prior, in January 2022. The petition further claimed that the appointment was made without receiving the necessary approval by chairman of the Central Elections Committee – as demanded by law. On 18 January 2023, the Supreme Court issued its decision in favor of the petition and instructed the revocation of Deri’s appointment as minister in the 37th government, as the appointment was extremely unreasonable. The coalition members’ response to the Supreme Court’s verdict was one of reinforcement and acceleration of the plan declared by Levin.

In parallel to Levin’s plan’s announcement and the cancellation of the “Reasonableness” clause, further attempts were made to advance legislative amendments towards enacting some other major components of the plan. For example, a Bill to the Basic Law: The Judiciary, proposing to cancel judicial review over Basic Laws, was approved in the second and third reading by the Knesset Committee, and needs only one final vote for its final confirmation. Another Bill to amend the Basic Law: The Judiciary, proposing to revoke the Court’s power to review regular legislation, passed the first reading in the Knesset. In addition, an amendment to the BASIC Law concerning the changes in the composition of the Judicial Selection Committee also passed the first reading vote and was presented for discussion before the Knesset Committee for the second and third reading. It should be noted that while this last bill regarding the change in the Judicial Selection Committee has not been confirmed yet, the Minister of Justice Yariv Levin, in exercising his authority, did not convene the existing committee; as a political act of protest against as long as the bill to change the composition of the Committee is not confirmed in the Knesset and as long as the coalition does not hold a majority vote in the current composition of the committee.

The Knesset approved the cancellation of the “Reasonableness” clause on 24 July 2023, as part of the amendment

to the Basic Law: The Judiciary (Amendment No. 3). The wording of the amendment states that:

“Despite what is stated in this Basic Law, a person vested with judicial authority according to the law, including the Supreme Court when serving as a High Court of Justice, shall not adjudicate the matter of the reasonableness of a decision made by the government, the Prime Minister, or another minister, and shall not issue an order in this regard. In this clause, ‘decision’ means any decision, including on matters of appointments or decisions to refrain from exercising any authority.”

In this text, it becomes clear that canceling the “Reasonableness” clause would prevent the Supreme Court from adjudicating matters related to decisions made by the government, the Prime Minister, or ministers. Such decisions include ministerial appointments to various public positions, as well as refraining from exercising authority granted to the government, the Prime Minister, or ministers. As a result, if a law obligates the government to exercise its authority to fulfill a certain law, and the authority is not exercised, judicial intervention by the court cannot be requested, and the government is thereby not compelled to implement the law. There is no doubt that this formulation of the amendment is designed to prevent the Supreme Court’s intervention, especially if Aryeh Deri is appointed as minister again. Furthermore, the amendment ensures non-interference of the court in the petitions submitted against Minister Levin due to his refusal to exercise his authority to convene the Judicial Selection Committee, as mandated by law.

Essentially, the cancellation of the “Reasonableness” clause is just one component of a larger and more comprehensive plan to change the constitutional regime in Israel, and it is a critical first step in that direction. Moreover, it paves the way for the approval of additional components of the Levin plan during the current Knesset session.

By and large, limiting the Supreme Court’s power to intervene in decisions made by the government or its ministers will ultimately affect democratic values. This includes diminishing the principle of separation of powers between the three branches; restricting judicial review over decisions made by the executive and legislative branches; and undermining the rule of law. Additionally, limiting judicial review over decisions made by the executive authority entails granting absolute discretion to the government in the decision-making process in various domains, not just appointments. This will have significant implications in the violation of human rights, his situation has particular relevance in terms of its impact on the rights of Palestinians as a whole, and Palestinians in the Occupied Territories in particular. This is especially relevant as the current Israeli government is aggressively pursuing an immediate implementation of a racially-driven political vision, based on the reinforcement of the principle of Jewish supremacy across all aspects of life, and throughout the entirety of “Greater Land of Israel” extending from the sea to the Jordan River. These concepts are echoed in the Founding Principles of the 37th Government as published by the government in December 2022. The first guiding principle states:

“The Jewish people have an exclusive and non-revocable right to all the territories of Israel. The government will promote and develop settlement in all parts of the Land of Israel, in the Galilee, Golan, Judea, and Samaria.”

General Implications of the Supreme Court’s Rulings on Palestinians in the OPT

The Israeli Supreme Court is the only authorized judicial body to exercise judicial review over actions and decisions of the Israeli authorities as an occupying power in the Palestinian Territories. As such, its rulings directly impact the rights and lives of Palestinians in the OPT.

Since the Occupation in 1967, the Israeli Supreme Court allowed the submission of thousands of petitions by Palestinian residents and human rights organizations. However, the majority of these petitions were rejected for various reasons. Already during the first petitions submitted in the early 1970s following the Occupation, the Israeli Supreme Court adopted a legal approach stating that Israeli authorities, including the Israeli military, are not bound by all provisions of international law – but only by provisions deemed customary, mainly the Hague Conventions of 1907. Treaty laws, however, such as the Fourth Geneva Convention regarding the protection of civilians during times of war from 1949, were taken out of the legal framework that obligates Israel’s authorities as it was not

perceived as customary law. According to the Court's decisions, only provisions of customary law that have been incorporated into Israeli law through local enactment bind the different Israeli authorities. Nevertheless, most arguments raised in the various petitions regarding Israel's alleged violations of international humanitarian law have been dismissed by the Court. Particularly, petitions concerning the legality of the establishment of settlements in the Occupied Territories were rejected.

Furthermore, one of the key approaches adopted by the Israeli Supreme Court was the application of Israeli administrative law to the actions of the military and decisions of the military commander in the Occupied Territories. The Supreme Court viewed the military's actions and decisions as those of a regular administrative authority that should act based on the criteria of "reasonableness." In this way, it was possible to order the cancellation of military actions only if they were deemed extremely unreasonable. Meanwhile, the interpretation and examination of the "reasonableness" criteria remained within the realm of the Court's interpretation on the likelihood or extremeness of the military action or decision. This allowed for the validation of most of the Israeli military's actions on the grounds that they did not exceed the bounds of reasonableness. Additionally, the application of Israeli administrative law enabled the Court to reject many petitions based on an assessment of the specific facts of each petition, separate from the legality of the action or policy in principle according to international humanitarian law provisions.

The frequent dismissal of petitions, as indicated by the Court's rulings, has provided a legal shield over the years not only to reinforce and sustain the Occupation but also to carry out various actions that amount to blatant violations of international humanitarian law. These actions include breaches that fall within the definitions of "war crimes" and "crimes against humanity" as outlined in the Rome Statute.

With all this in mind, canceling of the "Reasonableness" clause, as mentioned, will most likely exacerbate the infringement of the rights of Palestinians in the Occupied Territories even further. The following are some of the most prominent examples of the potential ramifications of this impact:

Examples of how the revocation of the "Reasonableness" clause could exacerbate the infringement upon the rights of Palestinians in the OPT:

1. The scope of governmental and ministerial decisions that will not be under judicial review due to the cancelation of the doctrine:

The revocation of the "Reasonableness" Clause applies on the decisions the government, PM, and ministers make. Nevertheless, the government and its ministers possess exclusive and extensive authorities and power, so a wide range of decisions will be affected by the new amendment. For instance, Section 31 of the "Basic Law: The Government" stipulates that the government is authorized to alter the distribution of roles among ministers in the government. It also addresses the authority to transfer authorities and areas of responsibilities prescribed by law from one minister to another as well as to determine the spheres of activity of a governmental ministry. Similarly, Section 32 of that Basic Law grants the government "discretionary power" to take, on behalf of the state, "any action not imposed by law on another authority." In addition, Section 34 of the Basic Law bestows the most expansive authority, as it allows each minister to assume any power prescribed by law upon a civil servant for acting in a particular matter or a specified period that they shall establish. Furthermore, Section 39 of the "Basic Law: The Government" grants the government exclusive authority to issue Emergency Regulations, which have the power to cancel or suspend the effect of a specific law during the declaration of a state of emergency.

2. Decisions regarding appointments to public positions:

The court shall refrain from intervening in any decision concerning the appointment to any public position, starting from the appointment of ministers in the government to the appointment to a minor public role. This is irrespective of the criminal or security background of the minister or the appointed position holder. In this context, it should be noted that in the case of Bezael Smotrich, the leader of the "Religious Zionism" party, who was appointed as an additional minister in the Ministry of Defense, is known for his extreme and discriminatory positions towards Palestinians as a whole. Similar appointments in the future to any government position or ministry will be immune from judicial review.

3. Absolute discretion handed to Minister Bezael Smotrich:

One of the significant changes implemented by the current Israeli government with far-reaching implications for the rights of Palestinians in the Occupied Territories is the appointment of Bezalel Smotrich as an additional minister in the Ministry of Defense. The coalition agreement reached between the “Likud” Party and the “Religious Zionism” Party included the transfer of extensive powers to Minister Smotrich following his appointment. These powers were previously under the responsibility of the “Coordination of Government Activities in the Territories” and the “Civil Administration Department.” Some of the authorities transferred to Minister Smotrich as an additional minister in the Ministry of Defense, include:

- The appointment of the coordinator of government activities and the appointment of the head of the civil administration.
- Authority to approve the state’s responses submitted to the Supreme Court on behalf of the state.
- Acceleration of proceedings for the regulation of land in the West Bank and their transfer to the ownership of the State of Israel.
- Streamlining, improvement, and development of the range of public services provided to settlers in the Occupied Territories.

Any decision made by Minister Smotrich in matters under his direct responsibility is immune from any legal challenge due to the revocation of the “Reasonableness” clause. The outcome is the acceleration of all procedures and the decision to expand settlements, establish new settlements, and de facto annexation of the West Bank to Israel.

On the other hand, Smotrich’s discretion is also substantial as the Minister of Finance, granting him exclusive authority to approve the annual state budget for all government ministries, including governmental funding to strengthen and expand settlements in the West Bank.

4. Decisions made by the Minister of the Interior regarding the revocation of the legal status of East Jerusalem residents:

A. Following the occupation of East Jerusalem in 1967 and its annexation to the State of Israel, the status granted to the Palestinian residents who remained in the city was that of “permanent residency”. This status subjected them to the Entry into Israel Law of 1952, which applies to foreigners seeking to enter Israel without status or those seeking to upgrade their status. The status of permanent residency does grant Palestinians in Jerusalem the right to continue residing there and provides them with entitlement to all social rights. However, this status is conditional in nature, as transferring one’s place of residence to another country or territory, including to the West Bank, could result in the revocation of the residency due to the absence of a “center of life” in Jerusalem. Revoking permanent residency on these grounds falls under the jurisdiction of the Minister of the Interior, who is, based on the new amendment, immune from judicial review.

B. The “Entry into Israel Law” of 1952 grants the Minister of the Interior the authority, according to Section 11A, to revoke permanent residency if the minister believes that the individual has committed an act that involves “breach of allegiance to the State of Israel”, where this term has been defined as an “act of terror” according to the Counter-Terrorism Law of 2016. To this day, this provision has been directed and applied solely towards Palestinian residents of Jerusalem who have been suspected or convicted of committing “terrorist acts” and even towards their family members. Since the decision under this law lies with the Minister of the Interior, it is immune from judicial review.

C. On 15 February 2023, the Knesset approved “The Law for Revoking Citizenship or Residency of a Terrorist Activist Receiving Compensation for Carrying Out a Terrorist Act (Amendments - 2023)”, which grants the Minister of Interior the authority, among other things, to revoke the permanent residency of Palestinian prisoners from Jerusalem and of their family members who received funds from the Palestinian Authority during their period of imprisonment. Additionally, the law stipulates that after the revocation of residency, the released prisoner will be deported to the West Bank and barred from re-entering Jerusalem. Decisions made by the Minister of Interior under this law will also be immune from judicial review.

5. Entry of Palestinians from the Occupied Territories into Israel:

A. The Minister of Interior is also responsible for implementing the “Citizenship and Entry into Israel Law” from 2022, which prohibits the entry of Palestinians, residents of the Occupied Territories, into Israel for the purpose of family unification with their Israeli citizen spouses, children, and parents. This law views every Palestinian as an enemy and a security threat to the State of Israel and its citizens solely due to their national identity. This is in spite of the law’s true motives being demographic control and the reduction of the number of Palestinians entering Israel and settling there with their families. This law is a continuation of a similar law enacted in 2003 for a temporary period of one year, but it has been extended annually since then. It grants the Minister of Interior exclusive authority to decide on the requests of Palestinians for family reunification in Israel, and decisions made by the minister according to this law will be immune from judicial review.

B. The same law – the “Citizenship and Entry into Israel Law” of 2022 – also grants the Minister of Interior the authority to decide on all matters related to granting entry permits to Palestinians into Israel for purposes of employment, medical treatment in Israel, or humanitarian matters.

6. Freedom of Movement for Palestinians within the Occupied Territories:

As a general principle, the restricted freedom of movement for Palestinians between the West Bank and the Gaza Strip falls under the jurisdiction of the military commander. However, in many cases, decisions regarding entry and exit between the Gaza Strip and the West Bank, or between them and the State of Israel, are made by the Minister of Defense. These decisions often lead to further constraints on the Palestinians’ freedom of movement.

For example, during the year 2018, the Minister of Defense refused to grant an exit permit to residents of the Gaza Strip to the West Bank for the purpose of receiving life-saving medical treatment. One case related to the prevention of 19-year-old journalist, Youssef Kronz, from receiving medical treatment to save his legs from being amputated after being shot by Israeli military snipers during the Great Return March demonstration along the border between the Gaza Strip and Israel, while suitable treatment could not be found for him within Gaza. The primary justification provided by the Minister of Defense was that the young man’s mere participation in the return protests justified denying his entry into the West Bank to receive the necessary treatment. A petition to the Supreme Court against the decision of the Minister of Defense led to Kronz being allowed to exit to Ramallah in order to save one of his legs.

In a second case, the Minister of Defense imposed a ban on women residents of the Gaza Strip who suffered from cancer from exiting Gaza to Jerusalem for life-saving medical treatment. The reason given was that they had close family ties to Hamas officials. Again, in this case, a petition filed to the Supreme Court led to the decision being overturned and the women being granted permission to exit the Gaza Strip to receive medical treatment.

Summary and Conclusion

Following the approval of the amendment to the “Basic Law: Judiciary” and the cancellation of the “Reasonableness” clause, several petitions were filed with the High Court of Justice. These petitions highlighted the damage to the Supreme Court’s ability to oversee the government’s actions for examining the legality of its actions and decisions, as well as harm that will result to human rights. Additionally, a request to join the proceedings as an “amicus curiae” was submitted to support the petition and it aimed to highlight the potential harm for human rights. This request is unique, as for the first time, such a request was filed jointly by 38 human rights organizations in Israel.

In response to the petitions, the Supreme Court decided to hold a hearing on 12 September 2023. The hearing will be heard by a full panel of judges comprised of all 15 judges serving currently at the Supreme Court. This marks the first time that the Supreme Court will hear a constitutional petition with its full complement of judges.

As the hearing approached, the attorney general of the government and the government separately submitted their positions. This occurred after the government attorney general, Gali Baharav-Miara, announced her opposition to the amendment and her support for its annulment by the Supreme Court. According to her position, the amendment to the Basic Law creates a “constitutional black hole” in the principle of the separation of powers by limiting the Supreme Court’s authority to exercise judicial review over government decisions and those of its ministers. In contrast, the government informed the Supreme Court that it supports the amendment to the Basic Law and opposes its annulment. The government argued that the Supreme Court does not have the authority to intervene in the Basic Law as it is situated at the highest normative level of laws. Additionally, the government’s stance is grounded in principles such as “the sovereignty of the people,” “the rule of law,” and “the separation of powers.” According to the government, if the Supreme Court were to intervene and annul the amendment to the Basic Law without the proper authority, it would lead to “anarchy.”

Indeed, due to the position of the attorney general, who supports the annulment of the amendment to the law, there is some possibility that the Supreme Court may indeed annul the amendment. If this were to happen, it would be the first time in Israel’s history that the Supreme Court has annulled a basic law, which holds the highest legal status in the country and equates that of a constitution. This would be a significant and historic development, as it would demonstrate the judiciary’s authority to review and potentially overturn constitutional amendments in Israel. Such a decision would have far-reaching implications for the balance of power and the legal framework in Israel.

In any case, regardless of the outcome of the judgment that will be issued, it is still unclear how and to what extent the annulment of the “reasonable grounds” will affect human rights, especially the rights of the Palestinians in the Occupied Territories. This is because, as mentioned above, the court has generally dismissed petitions submitted against military actions in the Occupied Territories. Thus, whether or not the Supreme Court will intervene, it will not affect the status of rights of Palestinian in the OPT and the Supreme Court will most probably continue to form a legal shield for enabling the continuation of the Israeli occupation in the OPT.

Attorney Sawzan Zaher, is a Palestinian human rights lawyer based in Haifa and specializes in constitutional human rights litigation on behalf of Palestinians from both sides of the Green Line, before the Israeli Supreme Court. She litigated several landmark constitutional cases before the Israeli courts; until August 2021 she served as the deputy general director and senior lawyer of Adalah Legal Center, where she worked for 16 years.

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