



Adalah Position Paper

**The unconstitutionality of the new Basic Law:
The Judiciary (Amendment No. 3)**

August 2023

This paper details Adalah's arguments as to why the new Basic Law: The Judiciary (Amendment No. 3) – also known as “the reasonableness law” – is unconstitutional. Adalah sent its position to the Attorney General and to the Knesset's Legal Advisor on 1 August 2023.

On 23 July 2023, the Knesset enacted amendment No. 3 to the Basic Law: The Judiciary (hereinafter referred to as “the Amendment” or “the Amendment regarding the annulment of the reasonableness standard”), with a majority of 64 Knesset members voting in favour and “0” members opposed. The Amendment adds to Article 15 to the Basic Law: The Judiciary a subsection (d1) that removes authority of the courts, including the Supreme Court sitting as a High Court of Justice, to examine ministerial and governmental decisions against the reasonableness standard that has been developed and utilized as a doctrine in Administrative Law to assess the legality of acts, decisions and policies of the executive authorities. The article reads as follows:

“Notwithstanding the provisions of this Basic Law, any body vested with the authority to adjudicate according to the law, including the Supreme Court sitting as a High Court of Justice, shall not consider the reasonableness of the decisions of the government, the Prime Minister, or any other minister, and shall not issue an order in this regard; in this subsection, “decision” is any decision, including on matters of appointments or decisions to refrain from exercising any authority.”

The amendment to the Basic Law: The Judiciary has severe flaws that, individually and collectively, justify its annulment. These weaknesses pertain to both its legislative process and to the rationale behind the amendment itself.

Misuse of legislative authority: The bill began as a “private member's bill” proposed by Member of Knesset Simha Rotman (Religious Zionist Party). Its adoption, subsequently, by the Knesset's Constitution, Law, and Justice Committee as “a committee bill” was done by exploiting the political power of the committee's chairman; he circumvented the requirement for a preliminary reading of private member bills. Converting private member bills put forward by members affiliated with the Knesset's coalition majority into bills put forward by Knesset

committees, authorised under Article 80 of the Knesset Rules of Procedure (the Knesset's regulations) regarding the proposal of laws in matters specified therein, amounts to contemptuously undermining the legislative mechanisms, which rises to a misuse of the procedural rules governing these processes.

This subversion of the process is not a purely technical matter. It involves a significant deviation from the balances of legislative processes adopted in the Knesset Rules of Procedure concerning various categories of bills presented to and by the legislature. The fundamental presumption is that institutional bills (governmental and committee-initiated) undergo a much more meticulous process in their formulation, in contrast to private member bills. The preparation of a committee bill, including its wording, is treated as a collective effort of the relevant committee members, with a blend of professional input, and on the assumption that the final product will be substantially similar to government-sponsored bills (see for comparison the Attorney General's Directive No. 2.3005 – Handling Government Bills). As clarified by the Knesset's Legal Advisor, Attorney Sagit Afik, the preparation of a committee bill for its first reading should be done "after hearing and considering all positions, so as to hold meaningful deliberations on all the issues and their implications raised by all participants in the discussions, all in a manner that will enable the Knesset members to seriously weigh the proposal's subjects, to clarify its wording and content, and to grasp its factual and legal context. This is to ensure that the final product placed on the Knesset's table for its first reading will be similar to the product of a government bill that has not yet been placed on the Knesset's table and has undergone an extended process within the government."¹

A review of the minutes of the Knesset's Constitution, Law, and Justice Committee and an examination of documents presented to the committee members during the preparation stages of the bill for its first reading, shows that the initiation process did not rely on adequate groundwork and it lacked a comprehensive factual basis concerning the fundamental issues arising therein, on more than one occasion. The preparation process was limited to the adoption of the Committee Chairman's private proposal verbatim, which was then transformed into a committee bill.

Indeed, this matter involves a step intended to circumvent the need for placing the proposed bill on the Knesset's table in accordance with the rules established regarding private member bills, including the requirement for a preliminary reading (preliminary call) as mandated by the Knesset Rules of Procedure (see Chapter 2, Section B of the Knesset Rules of Procedure). The process of legislating this bill constitutes a misuse of the Chairman's authority, which is not a matter to be taken lightly. This flaw strikes at the heart of the parliamentary process and constitutes an improper use of the Chairman's powers, whose approval not only allows for

¹ The opinion of the Knesset's Legal Adviser was not published on the Knesset's official website, but its contents were published the media. Available (in Hebrew) via the following link: <https://www.makorrishon.co.il/news/571097/>.

deviation from the usual legislative procedures but also undermines the fundamental equality between Knesset members affiliated with the coalition and those in the opposition.

Therefore, the Knesset adopted this amendment in violation of the Knesset Rules of Procedure and through a misuse of the legislative process. The bill was supposed to undergo four readings, and since this was not done, the amendment should be voided due this substantial flaw in its enactment.

The legislation is defective as it violates the principle of the rule of law: The amendment nullifies the applicability of the “reasonableness standard” to certain categories of administrative decisions, without defining the term. As is known, the reasonableness clause is a multifaceted criterion that encompasses various aspects related to both final decisions and the processes that led to them. However, its different components have developed historically as separate criterions with independent existence, eventually falling under the broader umbrella of the reasonableness clause (See: Yitzhak Zamir, *Administrative Authority*, Volume V - Criteria of Judicial Review 3850-3854 (Second Edition, 2020)). The vague reference to such a broad criterion without clear definitions or criteria, creates ambiguity in a way that renders the amendment ineffective, as it fails to meet the fundamental standards of the rule of law (See: Aharon Barak, *Interpretation in Law*, Volume III - Constitutional Interpretation 505-507 (1994)).

Gross violation of fundamental principles: The amendment inflicts severe harm to democratic foundational principles and undermines the core essence of the system's fundamentals, including "separation of powers, the rule of law, and independent judicial authority" (Supreme Court AB11280/02 *Central Elections Committee for the Sixteenth Knesset v. Tibi*, 54(1) PD 1, 24). It seeks to immunize certain types of administrative decisions from scrutiny and oversight, therefore violating the structure of checks and balances, which is characterized by weakness in the Israeli constitutional order to begin with.

Severe violation of fundamental rights: The significance of the reasonableness standard is known not only for its purpose of safeguarding general interests and ensuring the integrity of administrative authorities, but also for protecting individual rights (See: Daphne Barak-Erez, *Administrative Law*, Volume II 748-749 (2010)). By characterizing human rights impacted by specific administrative policies as a relevant consideration which must be given its proper weight in the exercise of administrative discretion, the court has established an additional arena for safeguarding individual rights in administrative law independent of the degree of infringement examined under the proportionality standard. The elimination of the requirement that certain decisions meet the standards of the administrative reasonableness principle allows authorities to make decisions and formulate policies while disregarding fundamental rights. This amendment constitutes a drastic change in the system of governance concerning the status and legal impact of fundamental rights within the system, substantially limiting the scope of protection granted to fundamental rights.

Limiting the amendment's applicability to decisions of the government, the Prime Minister, and the ministers does not diminish the expected impact on fundamental principles and rights. This is particularly so considering the authority granted under Section 34 of the Basic Law: The Government, which empowers ministers to assume certain powers (excluding powers with judicial nature) held by officials under the law. Consequently, the amendment creates a dangerous incentive for the transfer of powers from officials to the political echelon in order to shield the exercise of authority from judicial scrutiny. Therefore, it appears that the scope of the amendment's application is much broader than it may initially seem, and its practical implications could also be far-reaching.

Similarly, the amendment also impinges on the right of access to remedies and the right of the individual to seek relief when his/her rights are violated by the administrative authority. The existence of other grounds for reviewing administrative decisions does not diminish the severity of the amendment's harm. Limiting the court's discretion is tantamount to limiting the individual's ability to seek recourse from it.

Therefore, the in-depth changes that the amendment introduces to the legal system and to administrative law, and the anticipated negative effects on basic interests, principles and rights, leads to the conclusion that this is an extreme and unconstitutional amendment.

Abuse of Authority – Constitutionalization of Partisan Politics and Coalition Interests: This amendment exemplifies an abuse of the Knesset's authority as a constituent assembly. It promotes, through a basic law, partisan and factional interests while blatantly disregarding the interests of minority groups who are excluded from the ruling power and therefore, from the decision-making process. While judicial review may not always fully protect individual rights, it provides a mechanism that centers the legitimate and worthwhile interests of those without access to the decision-making process (including their representatives) when these interests are overlooked or neglected by these decisions. The abolition of the judicial review, without providing alternative oversight mechanisms, completely eliminates the incentive of the political majority to use its authority with restraint. A constitutional amendment, the sole purpose of which is to allow the majority coalition to impose its exclusive will in shaping administrative policy, relying entirely on the majority principle, constitutes an abuse of the constitution-making authority (vested in the Knesset) for the aim of advancing partisan and coalitional interests.

Based on the above, we argue that the amendment is a result of an abuse of the Knesset's constitution-making authority for several reasons. First, the Knesset enacted the amendment to promote the illegitimate objective of creating immunity for the coalition, allowing it to make unlawful decisions. Second, it was passed based on partisan motives rather than seeking broad, cross-party consensus that takes into account the interests of all groups in society, thus indicating a flawed constitution-making process. Third, the manner in which the Knesset adopted the amendment suggests a lack of consideration for its broad implications on constitutional principles and individual rights, without prior establishment of a proper

framework that examines the wide-ranging consequences of such a significant change in the balance of powers. The private proposal adopted by the Constitution, Law, and Justice Committee was passed within less than a month, without substantial deliberations on fundamental issues. This is not how constitutions ought to be made.

The exercise of the Knesset's constitution-making powers must be done behind a "veil of ignorance", and not motivated by narrow political considerations or for the purpose of targeting a specific public or representatives of a certain population. For instance, Justice Dorner noted that "it is not desirable for basic laws – which are chapters of the Constitution – to be adopted or amended to satisfy immediate coalition needs." (HCJ 5160/99 *The Movement for Quality of Government in Israel v. The Knesset's Constitution, Law and Justice Committee* (1999)). Similarly, *In the matter of the Academic Center for Law and Business*, Justice Rubinstein, who was the Vice President of the Supreme Court at the time, argued that "where an abuse of the majority's power in the constitutional text is identified, the political need should give way to the 'constitutional core' and its 'sanctity,' its legal and ethical significance." (HCJ 8260/16 *Academic Center for Law and Business v. The Knesset* (2017)).

Based on all of the above, the conclusion that must be reached is that this amendment is unconstitutional.