

Recent Developments in Israeli Law

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In this update we report on the Israeli Supreme Court's recent decision in HCJ 5658/23 *Movement for Quality Government v. Knesset*, concerning challenges to Amendment No. 3 to Basic Law: The Judiciary (the "reasonableness amendment"). In view of the controversy surrounding the amendment and the fundamental constitutional question it raised in regard to the Supreme Court's jurisdiction to review Basic Laws, the Court took the unprecedented step of sitting *en banc*.

On January 1, 2024, a majority of the Court (12 of 15 justices) held that the Court held the authority to conduct judicial review of Basic Laws and to intervene in exceptional, extreme cases in which the Knesset deviated from its constituent authority.

A majority of the Court (8 of 15 justices) further held that Amendment No. 3 to Basic Law: The Judiciary represented an extreme deviation from the Knesset's constituent authority that left no alternative but to declare the amendment void.

A translation of the official abstract issued by the Court appears below.

Abstract

HCJ 5658/23 *Movement for Quality Government v. Knesset*

Date of judgment: 20 Tevet 5784 (Jan. 1, 2024)

Before: President E. Hayut, Deputy President U. Vogelman, Justices I. Amit, N. Sohlberg, D. Barak-Erez, A. Baron (emer.), D. Mintz, Y. Elron, Y. Wilner, O. Grosskopf, A. Stein, G. Canfy-Steinitz, K. Kabub, Y. Kasher, and R. Ronen.

A majority of the Supreme Court (12 of 15 justices) held that the Court held jurisdiction to conduct judicial review of Basic Laws and to intervene in exceptional, extreme cases in which the Knesset deviated from its constituent authority.

A majority of the Court (8 of 15 justices) further held that Amendment No. 3 to Basic Law: The Judiciary, which comprehensively eliminated judicial review of the reasonableness of decisions of the government, the prime minister, and government ministers, should be declared void. This, in view of the serious, unprecedented harm to the core character of the State of Israel as a democratic state.

In view of the importance of the issues raised by the petitions against Amendment No. 3, the Court held an *en banc* hearing on Sept. 9, 2023. The events of October 7, 2023, unrecognizably transformed Israeli reality, and the country has since been at war with murderous terrorist organizations. But inasmuch as Amendment No. 3 remains in force, and given the final date upon which President (emer.) Hayut and Justice (emer.) Baron could render judgment in accordance with the Courts Law [Consolidated Version], 5744-1984, the decision on the petitions was handed down.

The Court majority (*per* President Justice E. Hayut, Deputy President U. Vogelman, Justice I. Amit, Justice D. Barak-Erez, Justice (emer.) A. Baron, Justice Y. Wilner, Justice O. Groskopf, Justice A. Stein, Justice G. Canfy-Steinitz, Justice K. Kabub, Justice Y. Kasher, and Justice R. Ronen concurring) held that in exceptional, extreme cases, the Supreme Court – sitting as High Court of Justice – holds the authority to void a Basic Law that constitutes a deviation from the constituent authority of the Knesset. In this regard, the Court already held in H CJ 5555/18 *Hasson v. Knesset* (2021) (the “*Nation State*” case) that the Knesset, as a constituent authority, is not “all powerful”, and that it does not hold the authority – even by means of a Basic Law – to deny or facially contradict the core character of the State of Israel as a Jewish and democratic state. Given these limitations, and in order that it be possible to enforce them, a majority of the Court was of the opinion that the Supreme Court’s authority to conduct judicial review over Basic Laws must be recognized. Some of the justices based this conclusion upon Israel’s unusual constitutional structure, which is, *inter alia*, characterized by a lack of any designated, separate process for adopting constitutional norms; the problematic practice of enacting and amending Basic Laws that testifies to a contempt for the Basic Laws and to their being turned into pawns of the political majority; and upon the role of the Court in protecting the constitutional enterprise. In this regard, some of the justices emphasized Israel’s Declaration of Independence as a basis for the judicial review of Basic Laws, while others grounded that authority in Basic Law: The Judiciary, which

grants the High Court of Justice authority to grant relief for the sake of justice and to issue orders to all state authorities.

A majority of the Court (*per* President E. Hayut, Deputy President U. Vogelman, Justice I. Amit, Justice D. Barak-Erez, Justice (emer.) A. Baron, Justice O. Groskopf, Justice K. Kabub, and Justice R. Ronen concurring) held that the amendment that was the subject of the petitions – Amendment No. 3 to Basic Law: The Judiciary – was an extreme case in which the Knesset deviated from its constituent authority and therefore, there was no alternative but to declare the amendment void. The Court emphasized that the exceptional, sweeping language of the amendment prevented all courts from adjudicating and hearing arguments upon the reasonableness of decisions of the government, the prime minister and government ministers in regard to every decision, including a decision to refrain from exercising authority. The majority was further of the opinion that interpretation of the amendment left no room for doubt that it applies to capricious decisions and to decisions that are unreasonable in the extreme. The result is an unprecedented infringement of two of the core characteristics of the State of Israel as a democratic state – the separation of powers and the rule of law. In this regard, it was noted that the amendment significantly increases the substantial power already concentrated in the hands of the government and its ministers, while blocking the possibility for an individual to obtain relief in a wide range of situations in which grave harm may be inflicted to his important interests as a result of governmental actions. It was further emphasized that the amendment leads to a situation in which the most significant elements of the executive are effectively exempted from their duty to act reasonably, it leaves whole areas without effective judicial review, it prevents the protection of such public interests as ethical conduct and administrative regularity, and may lead to a fundamental change of the state's civil service, severe harm to the independence of the law enforcement authorities, and exploitation of government resources for political gain in the electoral process.

Justice Y. Wilner was of the opinion that the amendment could be upheld by means of narrow construction and therefore, the Court should not consider voiding it. Justices Stein and Canfy-Steinitz were of the opinion that it is possible and would be appropriate to construe the amendment narrowly, and that there is, therefore, no need to intervene inasmuch as it is far cry from those instances in which it might be said that the Knesset deviated from its constituent authority. Accordingly, Justices Wilner, Stein and Canfy-Steinitz were of the opinion that the amendment

should be construed such that it would prevent judicial review only on the basis of reasonableness as it has developed since the Court's decision in HCJ 389/80 *Dapei Zahav v. Broadcasting Authority* (1980), which focuses upon examining the balance of the various considerations for the governmental decision ("reasonableness balancing"). In accordance with their approach, the amendment, as so construed, would still allow for intervention in the case of capricious decisions in which the Court could have intervened even prior to *Dapei Zahav*. Justice Kasher refrained from deciding upon the question whether the amendment could be narrowly construed, holding that despite the amendment's infringement of the separation of powers and the rule of law, it did not rise to the level that would justify the High Court's intervention in a Basic Law.

Justices Sohlberg and Mintz dissented from the majority view in all that concerned the Court's jurisdiction in principle to conduct judicial review of Basic Laws, as well as in regard to its authority to decide upon the question itself, noting that there is no legal source that would permit such review. According to their approach, even were one to ignore the problem of the Court's jurisdiction, the amendment stood far from the narrow limits established by the majority, and they noted that even were it proper to adopt a narrow exception that would allow intervention in Basic Laws in extreme cases of infringement of the basic rights of the individual, the arguments in regard to Amendment No. 3 were not ripe for decision in that the amendment had yet to be interpreted and its boundaries had yet to be set. Therefore, it could not be assumed that its consequences would be as severe as suggested.

Following are summaries of the opinions of each of the justices (in the order of their appearance in the judgment):

President (emer.) E. Hayut:

In her opinion, President (emer.) Hayut reiterated the Court's holding in HCJ 5555/18 *Hasson v. Knesset* (2021), according to which the Knesset's power as a constituent authority is not unlimited, and that it is not authorized to enact a Basic Law that denies or directly contradicts the core character of the State of Israel as a Jewish and democratic state. According to the President (emer.), this conclusion derives from the "elements of the constitution" developed since the earliest days of the state – the Declaration of Independence, the Basic Laws, the laws enacted by the Knesset,

and the case law of the Supreme Court. The President (emer.) further held that given the unique character of Israel's constitutional regime – the enacting of a constitution “chapter by chapter”, the absence of a rigid process for its enactment and amendment, and the political majority's control over the exercise of constituent authority – the limitations upon the Knesset's power cannot be left unenforced and exempt from judicial review through which the Court can intervene in those extreme, exceptional cases in which the Knesset deviates from the bounds of its constituent authority in enacting a Basic Law.

According to the President (emer.), Amendment No. 3 to Basic Law: The Judiciary is an extreme case in which the Knesset deviated from its constituent authority. In this regard, it should be emphasized that given the existing Israeli situation, judicial review is the *only* effective check upon the substantial power concentrated in the government and its ministers. Therefore, the amendment that is the subject of the petitions – which *comprehensively* denies the Court's authority to conduct judicial review of the reasonableness of all decisions of the government, the prime minister, and government ministers, and even blocks any possibility of addressing such questions – strikes an extremely severe blow to the principle of the separation of powers and the principle of the rule of law. This extreme harm to two of the quintessential characteristics of the State of Israel as a democratic state (the significance of which the President (emer.) addressed at length in her opinion) can significantly affect the individual and the public in general in an unprecedented way. Therefore, the President (emer.) held that there is no alternative to holding that in enacting Amendment No. 3, the Knesset deviated from its constituent authority and the amendment must be declared void.

Justice Y. Wilner: Justice Y. Wilner concurred with the opinion that the Court holds jurisdiction to review Basic Laws. In her opinion, this is also the case by virtue of sec. 15(c) of Basic Law: The Judiciary, which authorizes the Court to “grant relief for the sake of justice”. She further held that in view of the ambiguity of the term “reasonableness” adopted by the constituent authority in the framework of the amendment, a question arises as to its meaning. Justice Wilner resolved this question by means of an affirming construction according to which the repeal of reasonableness refers only to “reasonableness balancing”, i.e., the sense it was given in *Dapei Zahav*. In her opinion, this conclusion is required by the firmly established rules of the Court according to which a construction that affirms the law is to be preferred to one that may lead to its avoidance. In her

opinion, such an affirming construction is linguistically possible, it is grounded in the subjective purpose, and it best realizes the objective purpose. Given the said construction, the amendment does not strike a mortal blow to the democratic identity of the State of Israel. This is so, inter alia, in view of the fact that the amendment does not detract from the duty of the government and its ministers to act lawfully and does not prevent effective judicial review in accordance with the other grounds for such review. And note that while cases may arise in which it will not be possible to grant relief as in the past, nevertheless, while that may be regrettable, we will be concerned with decisions made with authority, following a proper administrative process, in good faith, in the absence of irrelevant considerations, that are proportionate, not arbitrary, non-discriminatory, and not fundamentally unfounded. Justice Wilner further noted that the approaches that, over the years, called for restoring reasonableness to its original meaning were never deemed anti-democratic. She further explained that in examining the constitutionality of the amendment, the Court must take account only of the existing legal situation, and not give heed to arguments concerning future legislative bills. Therefore, Justice Wilner held that the petitions should be dismissed while interpreting the amendment in accordance with an affirming construction.

Justice Y. Elron:

Justice Elron was of the opinion that the petitions should be dismissed. He reiterated his principled view that the mandate granted to the High Court of Justice to examine the justification for decisions by the members of the Knesset is limited, and that in the absence of an express norm that limits the authority of the Knesset to enact Basic Laws or that establishes the manner for the exercise of that authority, the continued development of doctrines that grant the Court authority to set the limits for adopting the constitution constitutes a role reversal. Justice Elron further noted his position in regard to the possible existence of a narrow exception in the case of exceptional, extreme cases of harm to fundamental individual rights as a last resort. As for the “cause of reasonableness”, Justice Elron emphasized that if the limitation imposed by Amendment No. 3 meets the test for intervention in a Basic Law, the door that is opened for the Court’s intervention is not narrow at all. In addition to his position in principle, Justice Elron was of the opinion that the petitions could also be dismissed on the grounds that the arguments against Amendment No. 3

were not ripe. He explained that where the Court is of the opinion that it would be proper to consider intervening in the content of a Basic Law, this should be carried out only after examining the law's application and the definition of its scope as interpreted by the Court. In the instant case, the courts might establish that the import of the amendment is the abolition of the *Dapei Zahav* rule, and nothing more. If that be the case, then the magnitude of the amendment's harm to the various democratic principles is far from justifying voiding a provision of a Basic Law. In conclusion, he wrote: "*I am firm in my conviction that this is not the time to shake the constitutional foundations of our state. It would be better that we defer the matter to the appropriate time, if and when a decision will be required on the basis of the facts of the case. I fear that at the present time, the harm that will be caused by undermining the foundations of Israeli constitutional law due to the voiding of Amendment No. 3 may be many times greater than the harm in leaving it in place.*"

Justice A. Stein:

Justice A. Stein held that the enactment of laws and of Basic Laws by the Knesset is subject to the boundaries delineated in the Declaration of Independence. This is the case inasmuch as the Proclamation [of the Provisional Council of State] and the Law and Administration Ordinance – which were enacted and promulgated upon the establishment of the state – expressly established that the legislative authority of the Provisional Council of State, which transferred that authority to the Knessets that would succeed it, is grounded in the Declaration of Independence. In addition, Justice Stein held that the amendment to the Basic Law that is the subject of the petitions does not contradict the principles of the Declaration of Independence, inasmuch as it only repeals the Supreme Court's authority to void government decisions on the basis of unreasonableness as an independent and exclusive cause, while preserving its authority to void government decisions that are found to be facially capricious due to irrelevant considerations, arbitrariness, lack of good faith, and other causes for invalidation. In the opinion of Justice Stein, this narrowing of judicial review returns administrative law to its status prior to the *Dapei Zahav* case – which recognized unreasonableness of a governmental decision as an independent cause for invalidation – as was expressly stated in the explanatory notes of the amendment's bill. For this reason, Justice Stein held that the amendment that is the subject of the proceedings does not uproot judicial review and

therefore does not breach the requirement of basic justice in the Declaration of Independence. This led Justice Stein to the conclusion that the amendment under review is constitutional.

Justice I. Amit:

In his opinion, Justice Amit addressed the Israeli legal system's lack of checks and balances for restraining the government, which grants it unusual power. This situation leads to the conclusion that what is needed is *additional* mechanisms for strengthening the democratic regime, whereas the amendment that is the subject of the proceedings moves in the opposite direction. It further empowers the executive branch and harms the fundamental principles of the legal system.

Justice Amit addressed the sweeping language of the law, which appeared to apply to reasonableness in all its forms in the case law, without distinguishing among different types of decisions. He explained that the reasonableness doctrine treats of the day-to-day life of the citizen, and its main power and effect are not in the *post-facto* examination of an administrative decision in court, but rather *ab initio*, at the stage of arriving at and framing the decision. In the absence of the reasonableness cause, the duty of reasonableness will wither and die, which may leave the public with no defense, and reshape the civil service. The other tools offered by administrative law cannot fill the gap that would result, and the possibility for examining a decision by means of parliamentary oversight or public pressure cannot provide a real alternative to judicial review.

The amendment to the Basic Law inflicts harm upon the democratic core of the state: the right to access to the courts, the principle of the separation of powers and the principle of distribution of power upon which that rests, and upon fundamental constitutional rights. The amendment also undermines several aspects of the rule of law – placing the government and its ministers above the law; facilitating improper appointments and dismissals, including of the “gatekeepers”; immunity in regard to refraining to exercise administrative power and ignoring professional considerations; a lack of supervision over an interim government; and a fear of elections tampering.

Justice G. Canfy-Steinitz:

Justice G. Canfy-Steinitz agreed that the Supreme Court has the authority to conduct judicial review of Basic Laws, but in her view, an examination of the amendment in accordance with its proper interpretation leads to the conclusion that it does not meet the very narrow criteria that would justify voiding a Basic Law.

The issue of the judicial review of Basic Laws raises complex questions that would be better resolved in the public arena. When the Court is required to address this question, Justice Canfy-Steinitz is of the view that the Basic Laws provide a textual foundation for a limitation that the Knesset assumed upon itself, subjecting its constituent power to preserving the character of the State of Israel as a Jewish and democratic state. This limitation is grounded in the existing Basic Laws, including sec. 17A(a)(1) of Basic Law: The Knesset, the purpose of which is to protect the core constitutional identity of the state and prevent a change of the system “from within”. The Court’s authority to review Basic Laws derives from the said limitation in cases where the Knesset deviates from its constitutional limits – but this is as narrow as “the eye of a needle” and should be exercised only in the most rare cases of mortal harm to the core identity of the state.

The amendment was adopted against the background of years of debate on the scope of reasonableness. While the broad, sweeping language of the amendment raises problems, it is a *far cry* from threatening to undermine the foundations of Israeli democracy. On the interpretive level, the amendment should be narrowly construed, such that it would prevent judicial review on the basis of reasonableness “balancing” but not on the basis of the “narrow” cause of reasonableness. Under this construction, the practical ramifications of the amendment are very limited, inasmuch as recourse to reasonableness balancing can be replaced by other grounds for review in administrative law. The few decisions that cannot be reviewed under the amendment are decisions that by their nature and by the normative position of the legislature – which must be respected – cannot be examined in terms of reasonableness balancing. This would not strike a mortal blow to the rule of law and the principle of the separation of powers.

Justice R. Ronen:

Justice Ronen concurred in the opinion of President (emer.) Hayut. She held that the power of the Knesset, as a constituent authority, is limited, such that it cannot enact Basic Laws that significantly

infringe the two core characteristics of the State of Israel – its being a Jewish and democratic state. She further held that the Supreme Court holds jurisdiction to conduct judicial review of Basic Laws.

Justice Ronen also held that the possibility of a narrow construction of the amendment must be rejected inasmuch as it has no basis in the language of the amendment, clearly contradicts the subjective purpose of the amendment, and provides the Court no clear operative instruction as to how to examine government and ministerial decisions in the future. This is the case, inter alia, in view of an examination of the legal situation before and after the *Dapei Zahav* case, and rejecting the assumption according to which an instruction to return to the “pre-*Dapei Zahav*” situation is significant. It was therefore held that the amendment, properly construed, denies the Court the possibility of examining *any claim whatsoever* that touches upon reasonableness.

Justice Ronen addressed the standard of review applicable to the amendment and held that since the amendment undermines the judiciary’s ability to review the executive, while materially changing the existing system of balances among the branches, it raises a suspicion concerning Knesset’s inherent conflict of interests. This fear is intensified by the fact that the amendment was adopted without the consent of any of the members of the opposition and its immediate entry into force. That being the case, she held that a somewhat more rigorous standard of review should be applied to the question of whether the harm to democratic characteristics constitutes a deviation from constituent authority.

In view of the interpretation of the amendment and the denial of judicial review in regard to all aspects of reasonableness, Justice Ronen’s conclusion was that the amendment inflicts significant harm to the core values of the democratic system. In this regard, inter alia, the subject of appointments and dismissals of gatekeepers was emphasized. Therefore, in view of the standard of review noted above, Justice Ronen held that the Knesset deviated from its authority in adopting the amendment, and it should be declared void.

Justice Y. Kasher:

Justice Kasher concurred with the opinion of the President (emer.) according to which the constituent authority of the Knesset is limited in that it is subject to the definition of the State of

Israel as a Jewish and democratic state. In addition, the High Court of Justice holds the authority to decide that the Knesset has deviated from its constituent authority and order the voiding of a Basic Law. The test for a deviation from the Knesset's constituent authority was established in the *Hasson* case – a narrow test expressed in the question whether the amendment denies the core democratic identity of the state or inflicts mortal harm upon the minimal core characteristics of its identity as a Jewish and democratic state.

In the opinion of Justice Kasher, the amendment under review weakens judicial review of the government and its ministers and thereby harms the separation of powers and the rule of law. However, not every shift in the balance point between the judiciary and the executive by means of narrowing judicial review of the executive constitutes a denial of the core democratic identity of the state. In his opinion, the amendment will lead to a certain weakening of judicial review over the executive. However, it is not expected to lead to a situation in which the said review will be ineffective, and thus there is no justification for voiding the amendment.

Justice Kasher concluded in stating that the question that he was called upon to decide is not to what extent he agrees with it and whether, in his view, it were better had it not been enacted, but rather whether the amendment that is the subject of the petitions rises to the level of the extreme circumstances – a mortal blow to the minimal core characteristics of the State of Israel's identity as a Jewish and democratic state – that alone would justify the Court's exercise of its very far-reaching authority to declare an amendment to a Basic Law void. Justice Kasher stated that in his opinion, the answer was no, and thus his conclusion.

Deputy President U. Vogelman:

The Deputy President held that the constituent authority cannot undermine the Jewish and democratic character of the state, and that the characteristics of the Israeli constitutional enterprise and the actual use of the constituent authority lead to the conclusion that the Court is the institution that holds the authority to decide whether the Knesset has deviated from its constituent authority. The Deputy President held that Israel's unique situation, in which the control of executive, legislative and constituent powers are all effectively held by the government, as well as the

shortcomings of the system for establishing constitutional provisions, have bearing on the threshold for the Court's intervention.

As for Amendment No. 3, the Deputy President held that barring any possibility of the Court addressing a claim of unreasonableness in regard to the ministerial level constitutes a mortal blow to the principle of the rule of law and the principle of the separation of powers. This harm is expressed in three spheres: first, for the individual who is harmed by an unreasonable decision and whose access to the Court is barred by the amendment; second, at the ministerial level, regarding which the amendment removes a significant limitation and erodes the already shaky system of checks and balances of the Israeli legal system; third, regarding the legal system as a whole, by intentionally creating a system in which "there is law but no judge".

The amendment's harm in these three spheres is particularly severe because it is comprehensive and absolute: it prevents every court from addressing the cause of reasonableness in regard to decisions at the ministerial level; it extends to every decision at that level; it lacks mechanisms for oversight or other balances; the other causes of action in administrative law cannot provide an effective alternative.

The Deputy President added that a narrow construction of the amendment is not possible in this case. This is so, *inter alia*, because the suggested interpretive theories have no foothold in the language of the amendment and do not provide a coherent alternative. In any case, he held that even under such interpretation, the severe harm to the rule of law and the separation of powers would remain.

Justice D. Mintz:

Justice D. Mintz emphasized that every agency and every judicial instance can act only within the boundaries of the authority granted to it by law. The Court must take care to act strictly within the bounds of its authority, with the same strictness that it applies when the question of authority arises in regard to other authorities. In this regard, jurisdiction to review laws does not rest upon strong foundations, and there is certainly no source of authority that would permit the Court to address the validity of a Basic Law or void it. The development of doctrines that examine the content and substance of Basic Laws *ex nihilo* undermines fundamental principles of democracy, among them

the separation of powers, the legality principle, and the rule of law. Voiding a Basic Law on the basis of a vague doctrine and an undefined formula comprises a heavy price from a democratic perspective, particularly when it involves an issue in regard to which the Court itself has an “institutional conflict of interests”.

From this perspective, there is no need to address the amendment on the merits. In any case, the discussion of its construction is premature inasmuch as its boundaries have yet to be shaped and put into practice. In regard to the position of the majority, Justice Mintz emphasized that a constitutional provision should be interpreted from a “broad perspective” and not “technically”, in a manner that reflects the “fundamental concepts” that it is intended to realize as a constitutional document; it is difficult to establish that the language of the amendment is “sweeping”, unbounded, and leaves “no room for doubt” as to its scope; and there is no flaw in the very fact that it concerns a general concept that requires interpretation. In addition, the amendment does not entirely preclude judicial review of government and ministerial decisions, does not grant them absolute, comprehensive discretion, and does not grant immunity to their decisions. The State of Israel is a strong democracy, and it remains so even after the amendment. The fact that there is a narrow majority among the opinions of the judges for the conclusion that we are concerned with a mortal blow to the principles of democracy also speaks for itself.

Justice K. Kabub:

Justice Kabub noted that recognition of the limitations upon the legislature in a democratic state does not necessarily come at the expense of the people’s sovereignty. Someone can protect them if their representatives in the legislature undermine the democratic regime. He explained that the best illustration of such restrictions is the fact that the people did not authorize the Knesset to do whatever it pleases. Thus, the Knesset is not authorized to extend its term beyond four years in the absence of special circumstances, even if all one-hundred-and-twenty members vote in favor of such a law in three readings and call it a Basic Law. Thus, he held that in view of the structure of the Israeli regime, a result according to which there would be no judicial review of Basic Laws constituted through a deviation from authority is unacceptable. However, such review must be undertaken with special care and only in an extreme case.

After surveying the development of reasonableness in Israeli law, Justice Kabub concluded that at root stands the view that the legislature cannot grant the administration authority to make arbitrary and capricious decisions. Over time, the reasonableness doctrine expanded, and the interest-balancing test was devised in the *Dapei Zahav* case, which has come under criticism primarily because of its ambiguous boundaries. Nevertheless, the proper construction of Amendment No. 3 shows that the Knesset did not merely annul the interest-balancing test, but also comprehensively eliminated judicial review of the reasonableness of the decisions at the ministerial level.

Justice Kabub emphasized that exempting the ministerial level from accountability when it deviates from its authority means that the nation would be governed by people, contrary to the purest description of sovereignty as governance by laws. Therefore, there is no alternative to judicial intervention. However, he explained that attention should be paid to the criticism of the interest-balancing test that has been expressed over the years, which went as far as the Knesset and led to amending a Basic Law, and it would be appropriate to give that expression in the case law.

Justice (emer.) A. Baron:

Justice Anat Baron noted that 75 years after that historic moment of the Declaration of Independence, Israeli democracy is under a threat from within – as illustrated by the amendment to Basic Law: The Judiciary. The amendment was intended to bring about a fundamental regime change. It frees the government and its ministers from the bonds of judicial review *on the grounds of reasonableness* and grants the executive the power to rule without effective checks and balances. The import of the amendment is the granting of a comprehensive exemption to the government and its ministers from the duty to act reasonably in their decisions, in a manner that grants the government unprecedented power and the status of a “super” executive-legislative-constituent authority. This strikes a mortal blow to the principle of the separation of powers, the rule of law, and the democratic character of the state.

Justice Baron explained that there is no appropriate alternative to the reasonableness doctrine for maintaining good governance and for protecting individual rights. At the same time, the amendment opens the door to political cronyism in the public administration and undermines the independence of those who hold professional appointments, particularly the “gatekeepers”,

inasmuch as their appointment and dismissal would be subject to the grace of the ministers and the government. In Justice Baron's opinion, the Supreme Court is granted the authority to establish that a constitutional norm is void in extreme cases in which the Knesset deviates from its constituent authority. In the instant case, adopting an affirming construction of the amendment is not possible as it would constitute *drafting a new Basic Law*, which is neither within the authority nor the role of the Supreme Court. There are those who seek to understate the dimensions of the matter, and make it appear as if the amendment is an inconsequential triviality of minor or marginal importance. But this is an acute moment in which one cannot stand aside, and the amendment must be declared void. In the words of the poet: "Therefore, send not to know for whom the bell tolls, it tolls for thee."

Justice O. Grosskopf:

Justice Ofer Grosskopf concurred in the opinion of President (emer.) Hayut that the petitions should be granted, and that the amendment should be voided. In his opinion, the Supreme Court, sitting as High Court of Justice, holds jurisdiction to review whether the Knesset has acted in accordance with the limitations under which it operates as a constituent authority by virtue of Basic Law: The Judiciary and by virtue of substantive justifications deriving from the unique character of the Israeli constitutional enterprise. Those limitations are three: *Regularity* (the requirement that it enact or amend a Basic Law by the required legal procedure); *Good faith* (the prohibition upon exploiting the constituent authority for foreign purposes); *Authority* (the limitations upon the power of the sitting Knesset to deviate from the constitutional enterprise designed by its predecessors).

In the area of authority, which is the focus of the proceedings, given the nature of a sitting Knesset to shape the "constitution in the making" (continuation of the constitutional project, and not its creation *ab initio*), and in view of the primary purpose of the constitution (limiting the power of a transitory majority in the Knesset in its role as constituent authority), the sitting Knesset is subject (in the absence of Basic Law: Legislation) to two restrictions: *First*, the sitting Knesset is not authorized to undermine the fundamental principles already laid down in the "constitution in the making", foremost among them the identity of the state as Jewish and democratic (the "constitutional givens") in manner that would bring down the constitutional structure created by

its predecessors; *second*, the authority of the sitting Knesset to introduce changes that constitute a significant deviation from the “constitutional givens” is contingent upon broad consensus. A transitory majority that the constitution is intended to limit is insufficient.

As for Amendment No. 3 to Basic Law: The Judiciary, Justice Grosskopf accepted the interpretive approach according to which it prevents any judicial review of the reasonableness of a governmental decision. Given that, the amendment constitutes a severe infringement of the “constitution in the making” as designed by the previous Knessets, primarily because it places the government above the law. As a result, the amendment bears severe negative consequences, and above and beyond that, it inflicts mortal harm to the principle of the rule of law, inasmuch as it comprehensively exempts those at the head of the executive branch from judicial review on the basis of reasonableness. Therefore, the amendment should be voided under the first limitation (undermining the “constitution in the making”), and alternatively, under the second limitation (significantly deviating from the “constitutional givens” without broad consensus).

Justice D. Barak-Erez:

Justice Barak-Erez was of the opinion that constituent authority is limited in accordance with the fundamental definition of Israel as a Jewish and democratic state. She explained that this limitation is grounded in the Declaration of Independence (which is not a constitution but establishes the limits of the constituent authority). Accordingly, the Court’s jurisdiction to conduct judicial review in cases of deviation from the constituent authority derives from this limitation and cannot be contingent upon the wording of the Basic Laws themselves.

Justice Barak-Erez reiterated her position that the Court will intervene in the content of a Basic Law only in extreme cases of overstepping the bounds, which is the situation in the present case. The amendment to the Basic Law strikes a mortal blow to the foundations of democracy by granting the government broad immunity from effective oversight. In practice, it leads to harm on three levels: barring the path to judicial relief in regard to decisions that harm individual interests; a lack of effective oversight of interim governments to the point of potentially influencing the transfer of power (for example, by advancing a “popular” policy on the eve of elections); as well as inflicting grave harm to oversight of the regime by those holding office as “gatekeepers” and

independent regulators as a result of significantly weakening judicial review over their appointment and dismissal (a subject for which adequate safeguards have not been established in the law). Justice Barak-Erez added that the suggestion of returning to the reasonableness approach of “the good old days” ignores the broad legal and constitutional context and the balances among the branches of government in which judicial review was rooted in the past, in the sense of the adage: “No man ever steps in the same river twice”.

Justice N. Sohlberg:

Justice Sohlberg was of the opinion that it would be better to deny the petitions *in limine* by reason of a lack of jurisdiction.

According to his approach, a holding that there is some limit upon the authority of the constituent authority *de facto* annuls the fundamental democratic principle of the sovereignty of the people through its elected representatives. Justice Sohlberg added that this is not his view alone. The first seven Presidents of the Court, the eighth President, Aharon Barak at the outset of his judicial tenure, and a significant part of the justices who served on the Court for decades all stated, as it were: “Keep your hands off the state’s Basic Laws.

Justice Sohlberg noted that the Court majority points to various sources of authority, while there is no single source that is acceptable to them all. He was of the opinion that even according to the majority’s approach, one cannot derive from those sources that it is possible to void Basic Laws where the justices themselves are not in agreement, let alone on the basis of one vote.

Justice Sohlberg further noted that the majority opinion represents the opinion of the judiciary. As opposed to that, the constituent authority is of the opinion that not only does the Court lack the authority to void Basic Laws, but also that it lacks jurisdiction to decide the preliminary question: Is it the Court that holds the power to decide whether it has the authority to invalidate Basic Laws? Such a “conflict” between the branches of government is not played out in the legal arena, and it cannot be resolved by legal means.

As for the reasonableness doctrine, Justice Sohlberg was of the opinion that even were we to ignore the question of jurisdiction, then even according to the President (emer.), there is only one question:

Does the Basic Law deny “the very existence of Israel as a Jewish and democratic state?”. Since that is the question, the answer is near at hand: the Basic Law is a very, very far cry from falling within the compass of that narrow restriction, and more so. In any case, even if there were authority, there would be no grounds for voiding the law.