An Unreasonable Amendment

The Constitutional Capture in Israel

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Amidst massive protests taking place in Jerusalem and throughout the country, on July 24th the Knesset (Israeli parliament) passed Amendment Number 3 to Basic Law: The Judiciary, curtailing the power of Israel's Supreme Court. Basic Laws are chapters in Israel's fragmented constitution with supreme status over regular legislation.

The amendment determines that no court, including the Supreme Court seating as the High Court of Justice, may engage with and/or pass judgment on the reasonableness of any "decision" of the government, the prime minister, or any minister; nor may a court give an order on the said matter. The amendment continues to define "decision" as "any decision – including in matters relating to appointments, or a decision to avoid exercising any authority." This amendment was proposed as part of a package of legislation whose overall aim is to create a government that is not limited by law, by restricting the possibility of judicial review of legislation and governmental action, while also curtailing the independence and the power of the legal advisors to the government.

This amendment is the first of the six prongs of the "reform" proposed in January 2023 by Minister of Justice Yariv Levin (as detailed in my post on The Populist Constitutional Revolution in Israel) to become actual law. As explained in the follow-up post I published here in March, after massive public protests, as well as domestic and international pressures, on March 27th, Prime Minister Netanyahu declared a suspension of the legislation, pending negotiations between the coalition and opposition aiming at reaching a "compromise" on the proposed "reform." Building on these two previous posts, this post explains how the passing of this amendment demonstrates the erosion of the initial success at blocking the legislative blitz, thus illustrating the limits of the strong opposition to the constitutional coup initiated by the Netanyahu government. It further argues that after the failure (to date) to complete the legislation taking over the Judicial Appointments Committee, the curtailment of the reasonableness doctrine is a crucial step in the government's constitutional capture plan.

As detailed in my previous post, the suspension of the legislation in March came after a night of dramatic protests following Netanyahu's attempts to fire Minister of Defense Yoav Galant, after Galant had spoken out against the proposed legislation. These protests were the culmination of weekly protests taking place ever since the government's plans were announced in January. These protests were joined by numerous letters and petitions from Israel and from all over the world, pressure from the financial sector and especially from Israel's tech industry, and pressure from reservists within elite units of the Israel Defense Forces (IDF).

However, the negotiations between the coalition and the opposition under the auspices of President Isaac Herzog, which commenced following the suspension of the legislation, proved futile. A major bone of contention was the issue of the composition of the Judicial Appointments Committee: the coalition insisted on controlling its composition, and the opposition refused any such change. After this failed dialogue, the coalition re-instigated the legislation process, this time prioritizing the legislation abolishing the reasonableness doctrine.

Losses for the Coalition and the Battle over the Judicial Appointments Committee

While the talks were taking place, the coalition suffered two significant losses. The first was the elec-

tion of an opposition member to the Judicial Appointments Committee, which is still comprised of three Supreme Court Justices, two cabinet ministers, two Members of the Knesset and two representatives of the Israel Bar Association. The coalition had attempted to have no Member of the Knesset elected, so it could delay the convening of the committee in its current structure; therefore, it sought to have its members vote against all candidates. However, on June 14th, opposition Member of Knesset (MK) Karin Elharar was nonetheless elected to the committee, as four unknown members of the coalition joined the opposition in supporting her candidacy. Eventually, on July 12th, a second MK was elected to the committee on behalf of the coalition.

Even more dramatic were the results of the Bar elections held on June 20th, when Amit Bachar, the acting head of the Israel Bar Association and a fierce opponent of the government's plans, won a landslide victory against the pro-government candidate, attaining 73 percent of the vote. This was not only a no-confidence vote by the Bar for the government's "reform," but also a significant victory, given the two seats the Bar holds in the Judicial Appointments Committee. The government's reaction has been to support a bill that, if passed, will disband the Bar as it exists today and replace it with another body controlled by the government.

The elections of Elharar and Bachar clarified to the coalition that it cannot achieve its goal of capturing the courts simply by packing them with conservative anti-activist judges within the existing structure of the appointments committee. Thus, the coalition is now more motivated than ever to pass legislation that will alter the composition of the committee. The proposal to change the composition of the committee in a way that will give the coalition government control of it has already passed all of the required preliminary stages of legislation before the suspension of the legislative process. At any moment, this proposal can be brought to the Knesset plenary for the required second and third votes that will entrench it into law. Until this happens, Minister of Justice Yariv Levin, who serves as the Chair of the Judicial Appointments Committee, is not convening the committee, in order to prevent the appointment of judges by a committee he cannot control. This is especially notable given the upcoming mandatory retirement of Supreme Court President Esther Hayut – a staunch opponent of the government's "reform" plans – in October, when she turns 70.

Thus, the definition of a "decision" over which there will be no review under the amendment to the reasonableness doctrine (the "Reasonableness Amendment") must now be understood within this context: the language regarding "a decision to avoid exercising any authority" is there to attempt preventing petitions challenging continued avoidance by Levin to exercise his authority by not convening the committee until he has managed to take over it. Conversely, the language regarding "matters relating to appointments" is there to allow the government to fire Attorney General Gali Baharav Miara, also a staunch opponent of the constitutional coup, who alongside Hayut serves as one of the major guardians of the rule of law. Indeed, the coalition would be very eager to get rid of her and to appoint an Attorney General who supports its authoritarian moves. Thus, the "Reasonableness" Amendment is critical for the coalition's plans to capture the major rule of law institutions in Israel in ways that would facilitate its plan of governing with no limits.

The End of Reasonableness: What is at Stake?

The legislation prohibiting judicial intervention based on reasonableness is skewed. Rather than offering legislation defining the duties of the administrative state, including the norms according to which it should act (reasonableness, fairness, good faith, etc.), the legislation presents an unprecedented (at least in Israel) attempt to curtail a major criterion under which judicial review of administrative action takes place, by signaling out one common law doctrine and saying the Court cannot strike down governmental decisions on its basis. Other writers explored in detail the status of the reasonableness doctrine in Israeli law. Rivka Weill explicated in this blog the risks entailed in curtailing this doctrine. I will not rehash that discussion within this post. However, I do note that while the courts can

address some issues potentially covered by the reasonableness doctrine through other doctrines (e.g., proportionality, particularly in assessing violations of specific human rights), there are important issues beyond those already discussed above where reasonableness plays a major role.

Concretely, it is no secret that the government vehemently dislikes judicial decisions restricting the possibility of appointing as cabinet ministers politicians who are under serious indictment, or who were recently convicted of serious criminal offences. The fact that the major precedents making these determinations were both made (in 1993 and 2023) regarding the same person – Shas Party leader and major Netanyahu partner MK Aryeh Deri – reveals that this legislation has a name on it. So while legal scholars in Israel engage in ongoing debate regarding to how dramatic the curtailing of the reasonableness doctrine will be given the variety of other administrative law doctrines allowing for judicial review, it is quite clear the doctrine plays a major role in judgments concerning political as well as other appointments. Moreover, the legislation cannot be understood outside the broader context of the government's constitutional capture plans. In fact, if passed, it may give the coalition the signal that it can go ahead and use the same majority to pass the other prongs of its program.

The Crisis

The days leading to the legislation of the Reasonableness (or rather, un-reasonableness) Amendment were fraught with crisis. The protests gathered momentum, while simultaneously facing escalating incidents of unjustified police violence against protesters and their arrest. This is a worrying development, indicating that the police are following the spirit of Minister of National Security Itamar Ben-Gvir, who has been demanding that the police act more harshly against the protests. On July 5th, the Chief of the Tel Aviv Police Department quit the force after Ben-Gvir succeeded to strip him of his position. In his resignation speech, Eshed said that Ben-Gvir expected him to use unreasonable force against the protesters. "We could have fulfilled the expectations," he said, by breaking bones and filling the Tel Aviv hospital emergency room at the end of every demonstration. Sadly, police violence in recent weeks seems to indicate that others within the force do attempt to fulfil Ben-Gvir's expectations.

Another frontier or crisis is the military one. On July 1st, over 1,000 reservists, including hundreds of pilots, signed a letter saying they would stop serving in the IDF if the Reasonableness Amendment passes. While this continues previous similar threats voiced since January, this concrete threat sent shockwaves through the Israeli military and in fact Israeli society, with commentators noting that the Israeli air force – a central component in Israel's security mechanism – would lose its capacity to act in wars. The constitutional crisis is now understood as a major security crisis. However, it is also understood as a major societal crisis, creating unprecedented chasms within Israeli society. Continued pressure by US President Joe Biden on Netanyahu not to proceed with the legislation without broad consent may also indicate a crisis in Israel's relations with the US.

What Lies Ahead

In the days before the legislation passed, there were various attempts to reach a "compromise" legislation that would include a more limited restriction on the use of the reasonableness doctrine, alongside a commitment from the coalition to put the rest of the legislative "reform" on hold for a few months. President Herzog, head of the Histradut (the federation of trade unions) Arnon Ben-David, and some academics were all involved in these negotiations. The failure of these attempts and the passing of the legislation may exacerbate the ongoing political, societal, military, and economic crises. Petitions being launched to the Supreme Court against the amendment argue that it amounts to an unconstitutional constitutional amendment and to abuse of constitutive power by the Knesset. While in my view, the Supreme Court should strike down the legislation, to date it has never struck down a Basic Law (only regular legislation violating Basic Laws). So even if constitutional doctrine in Israel seems open to striking down Basic Laws if they violate

basic democratic principles or constitute an "abuse" of the constitutional process, it is unknown whether the Court will choose to take this path. If it does, and the government refuses to honor the judgment, this may lead to an all-out constitutional crisis. However, it is not unlikely that the Court will refuse to intervene, at least at this stage, possibly holding (based on the "ripeness" doctrine) that it would only intervene in the issue when facing a concrete case where the amendment prevents judicial review.

Meanwhile, the government continues to pursue its extremist policies in other ways, which should remind us that the constitutional takeover is only one component in the story of how this government is reshaping Israel and its relationship with the Palestinians. Especially regarding the Occupied Palestinian Territory, the government's annexational policies continue with hardly any interference, illustrating that the coalition's ultimate agenda of increasing Jewish settlements and maintaining Jewish supremacy does not pause pending the constitutional discussions. While the occupation, the settlements, and their detrimental effects on Palestinians are hardly new, the policies advocated by this government aim at entrenching and deepening Israeli control and Palestinian dispossession even further.

The huge opposition to the government's plan of constitutional capture announced in January has largely been considered a success. The popular narrative was that within two months, the government had to disband its legislative plan and sit down with the coalition. However, as we have now seen, the government has merely transitioned to the so-called "Salami technique," supporting piecemeal changes, starting with one that may seem technical, and which the government perhaps thought most of the population may seem oblivious to. Fortunately, the liberal public did not buy this, as the massive protests against the amendments have shown. However, these protests and pressures were not enough to stop the legislative process in the Knesset. The coalition government's choice to go ahead with the legislation notwithstanding the internal and external pressures may now only deepen the multi-layered crisis the country has been in since January.

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