Translated from the Hebrew
Legaltrans

Signed this day, July 25, 2023.

Before the Supreme Court **High Court of Justice _____/23**
Sitting as a High Court of Justice

In the Matter of: **1. Israel Bar Association**

2. Adv. Amit Becher, Head of the Israel Bar Association

Both represented by counsel, Adv. Nadav Weisman (License No. 17039) and/or Adv. Dr. Issar Birger (License No. 45748) and/or Adv. Edan Laron (License No. 46892) and/or Adv. Adi Koppel-Aviv (License No. 71054) *et al.*
of Meitar | Law Offices
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Tel.: 03-6103100; Fax: 03-6103111

The Petitioners

v.

1. The Knesset

Represented by the Legal Advisor to the Knesset
Knesset Building, Jerusalem
Tel.: 02-6408636; Fax: 02-6753495

2. The Government of Israel

Represented by the Office of the State Attorney – High Court of Justice Department
29 Salah a-Din Street, Jerusalem
Tel.: 073-3925590; Fax: 02-6467011

3. The Constitution, Law and Justice Committee

Represented by the Legal Advisor to the Knesset
Knesset Building, Jerusalem
Tel.: 02-6408636; Fax: 02-6753495

The Respondents

Petition for the Issuance of an Order *Nisi*

The Honorable Court is hereby requested to issue an order *nisi* directed against the Respondents, ordering them to come before the Court and to cite grounds for the following:

a. Why Section 15(D1) of the Basic Law: The Judiciary, in its wording as amended in Amendment No. 4 to the Basic Law, should not be canceled.

b. **In the alternative**, why the above-referenced provisions of law should not take effect only upon the election of the 26th Knesset.

c. **In the alternative to the alternative**, why any other remedy that is considered fitting and proper by the Honorable Court should not be granted.

As we will show below, the referenced amendment has been declared to be part of a plan, the purpose of which is to fundamentally change the system of the regime in Israel, and there is a well-founded concern that its implementation will cause irreversible damage – grave harm to the rule of law; acute harm to the principle of separation of branches; exempting ministers from their obligation to uphold the laws; granting to the executive branch immunity from judicial review on a broad range of subjects; and weakening the gatekeepers in charge of maintaining the rule of law.

The effect of the law should also be understood against the background of the fact that an additional amendment to the Basic Law: The Judiciary, which is intended to completely change the method of selecting judges in Israel and to confer upon the political coalition absolute control of the Judicial Selection Committee, has already passed on first reading.

In addition, the Honorable Court is hereby requested to schedule an **urgent hearing** of the Petition, as if an order *nisi* had already been issued with respect thereto, in order to efficiently decide the significant issue that is pending in this Petition.

The Honorable Court is further requested to charge the Respondents with the Petitioners' costs in this Petition, plus attorneys' fees and VAT with respect thereto.

All of the emphases in this Petition below have been added, unless expressly stated otherwise.

A copy of the Petition has been served on the Respondents simultaneously with its filing with the Honorable Court.

Adv. Nadav Weisman License No. 17039	Adv. Dr. Issar Birger License No. 45748	Adv. Edan Laron License No. 46892	Adv. Adi Koppel-Aviv License No. 71054

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A. Introduction

> **In former times, the legislature sought to block ways to the judicial review of administrative activity, and, to this end, made use of various and sundry formulas, including "absolute" discretion […]. The courts won that battle – they won and they succeeded. Those days are over and gone, and it is hard to believe that they will return to us. Nonetheless, we will always remember and keep in mind that absolutism, enlightened though it may be, is the enemy of freedom. We are free people, and anyone who was born free or who experienced freedom will not become enslaved to any person – either to a person or to absolute discretion. And as Justice Douglas said…: "Absolute discretion, like corruption, marks the beginning of the end of liberty."**
>
> (The Honorable Justice M. Cheshin, High Court of Justice 758/88, **Kendall v. Minister of the Interior**, PD 46 (4) 505, 528 (1992) (hereinafter: the **"Kendall Case"**))

1. This logical statement was written by Justice Cheshin in the **Kendall Case** in 1992. Unfortunately, however, three decades later, the coalitionary majority that controls the Knesset and the government is again attempting to block the way to the judicial review of administrative activity – to overturn the order of the regime, to confer absolute discretion upon the government, and to enable it to operate in extreme unreasonableness. The Honorable Court is hereby requested to stop this move – a move that contradicts the core values of the State of Israel as a Jewish and democratic state; a state founded, *inter alia*, on the rule of law, the principle of legality and the separation of branches; a state that is guided by individual liberty and individual rights; a state in which the government and its ministers act as public servants on behalf of the people and are not "elected public officials" above the people.

2. On July 24, 2023, 6 Av 5783, the Knesset passed Basic Law: The Judiciary (Amendment No. 4) (Reasonableness Standard) (hereinafter: the **"Abolition of Reasonableness Law"** or **"Amendment No. 4"**), which deletes the reasonableness standard from Israeli law and not only prohibits anyone holding a judicial position under law from issuing an order against decisions by the government and its ministers that pertain to extreme and material unreasonableness, but also closes the doors of the Honorable Court in the faces of petitioners and prohibits it from hearing an argument of unreasonableness, even extreme unreasonableness.

3. The Abolition of Reasonableness Law was not enacted in a vacuum. It is part of a declared plan, only part of which has been disclosed to the public to date. It was passed with a clear and radical purpose – to nullify the judicial review of acts by the administration in many areas and to fortify the power of the executive branch against judicial review, even with respect to the most untenable decisions. It is part of the "legal plan" that was announced in the nighttime speech by the Minister of Justice, Member of Knesset Yariv Levin on January 4, 2023, only five days after the establishment of Israel's 37th Government, in which he declared, with no basis, that **"there is no**

such thing as the reasonableness standard" and drafted a roadmap for smashing the court system as it had been built up over the 75 years of Israel's existence.

4. As was appositely stated by the Honorable Justice (ret.) Menachem Mazuz: **"The reasonableness standard is the opening gambit in a move to take over all of the foci of power in the State."**[1] This is why it is not right to examine the constitutionality of the Abolition of Reasonableness Law separately, because it does not stand alone. Once the fabric of changes has been completely woven, it will be very difficult, even impossible, to contend with all of its parts in a legal framework that characterizes a democratic state. It is therefore right to examine it in context – as part of a complete plan, which contains, according to the declaration of the Minister of Justice, as only a first stage: the absolute abolition of judicial review of Basic Laws, irrespective of their content and irrespective of their definition; the *de facto* abolition of judicial review of the constitutionality of laws, by requiring a special majority of justices for the abolition of laws along with an override clause with a minimal majority; the abolition of the principal standard of review of the legality of administrative acts; the abolition of the independent status of legal advisors and the absolute political takeover of the Judicial Selection Committee. This is a plan for conferring absolute power upon the government; a plan for the abolition of judicial independence and the separation of branches; a plan for smashing the independence of the gatekeepers and the professional echelon in the public system; and a plan for the abolition of the binding constitutional status of basic individual rights, while drawing up a "blank check" for corruption. This is a plan over which a black flag flies, a plan with the clear stamp of illegality on its forehead.

5. After months of national rift and unprecedented civil uprising; profound harm to Israel's military reserves as the people's army; economic collapse with emphasis on the high-tech sector; and severe harm to Israel's foreign relations and strategic status worldwide, the government has decided to implement the first move in its destructive plan – the Abolition of Reasonableness Law.

6. These matters should appropriately be simply stated:

   - The Abolition of Reasonableness Law is intended to enable the government to appoint ministers as it pleases, even if they are tainted with corruption, because the government is legislating for itself, through the coalitionary majority under its control, and exemption from review according to the limitations of reasonableness.

   - The Abolition of Reasonableness Law is intended to enable the unreasonably appointed ministers to make any decision, even the most unreasonable and far-fetched decision, because the limitations of reasonableness will not apply to the ministers.

   - The Law is intended to enable the government and the unreasonably appointed ministers to dismiss the gatekeepers as they please – and, first and foremost, the attorney general, the

[1] In an interview given to the Israel Defense Forces radio station on July 20, 2023 (available at https://twitter.com/ReshetBet/status/1681969516757106688?s=08), and see also a statement by the Minister of Justice following the passing of the amendment on July 24, 2023: "A historic – and a first – step" (Moran Azoulay: "Levin" 'A historic – and a first – step.' Smotrich: 'Not worried about the security situation'" (**Ynet**, July 24, 2023)).

deputy attorneys general and the state attorney – and thereby to subjugate them, to enslave them, and to detract from the independence of their professional discretion, because the limitations of reasonableness will not apply.

- The Law is intended to enable the government to trample the professional echelon in the governmental ministries and the heads of the statutory authorities, to cancel out their professional integrity, and to subject them to ministerial whims, with respect to important appointments ("jobs") and on important professional subjects, because the limitations of reasonableness will not apply.

- The Law is intended to enable the ministers to violate any law that they do not like by refraining from exercising their powers – for example, with respect to the failure to convene the Judicial Selection Committee, or the failure to make necessary appointments (such as the Police Commissioner, the State Attorney, and more), because the limitations of reasonableness will not apply.

- The Law is intended to shut the mouth of the court, to bind its hands, to block its doors and to subject it to the whims of the administration, which, starting now, will consider itself exempt from the burden of Israeli administrative law, because the limitations of reasonableness will not apply.

- And primarily, the Law is intended to pave the way for the next laws in the plan, which will be enacted as soon as possible, because the law for the coalition's takeover of the Judicial Selection Committee has already been passed on first reading.

7. The reasonableness standard is a foundation stone of Israeli administrative law, which is not written in any codex of laws. As will be set forth in this Petition, the reasonableness standard is the mirror image of the duty of reasonableness. What it means is that the authority operates in accordance with the law by virtue of which it operates, and does not deviate from the powers conferred upon it for the promotion of the purposes earmarked for it by the law. The duty of reasonableness results from the basic principle, according to which the executive branch, as a trustee for the public, owes the duty that is incumbent upon every trustee – to act faithfully, diligently and reasonably, for the good of the beneficiary (see Section 10(B) of the Trusteeship Law, 5739-1979). This is the duty that is discussed in this Petition – a duty that the Government of Israel is *de facto* seeking to dismantle and to nullify.

8. The reasonableness standard has been enshrined in Supreme Court case law since its first days. It was drawn from English common law. It remained in effect even after the establishment of a special commission by the English Parliament in order to examine it (Appendix 35 below). It has been invoked by generations of judges, including some of Israel's judiciary giants, from the first days of the State of Israel, in landmark judgments such as High Court of Justice 73/53, **Kol Ha'am Company v. Minister of the Interior**, PD 7 871 (hereinafter: the **"Kol Ha'am Case"**), in order

to protect human rights, to safeguard citizens against administrative arbitrariness, to accomplish the principle of the rule of law, and to guard against the corruption of the public sector.

9. The great need for the reasonableness standard cannot be disputed. The Supreme Court has pointed out, more than once, that it is a principal and central stratum of the system of checks and balances that underlies the principle of separation of branches. This was discussed by the Honorable Chief Justice M. Naor in High Court of Justice 3997/14, **Movement for a Quality Government in Israel v. Foreign Minister** (published in the Nevo database, February 12, 2015) (hereinafter: the **"Hanegbi Case"**), and the Honorable Justice (as her title was then) E. Hayut added the following, in Section 3 of her opinion:

> **The rules pertaining to the reasonableness standard that have been shaped in the case law of this court over decades have served, and still serve, as a major and important tool for the review of acts by the administration. A place of honor is reserved for the reasonableness standard in preserving the fairness and equity of public administration; in addition, it contributes to the safeguarding and protection of human rights, lest they be harmed by administrative acts to a greater degree than that which is appropriate and necessary.**

10. This was discussed by the Supreme Court in High Court of Justice 5853/07, **Emunah National Religious Women's Movement v. Prime Minister**, PD 62 (3) 445 (2007) (hereinafter: the **"Haim Ramon Case"**), and words that were repeated by the Honorable Chief Justice E. Hayut in High Court of Justice 8948/22, **Sheinfeld v. Knesset**, Section 76 (published in the Nevo database, January 18, 2023) (hereinafter: the **"Fourth Deri Case"**):

> **The appointment to public office of officials who are tainted by a moral flaw, or leaving them in their positions after they have gone astray, may damage the foundation of values on which the State and governmental institutions in Israel are built. It may do grave harm to the basic principles of values on which the foundations of Israel's society and regime are built. It may undermine the public's trust in the administrative systems, which are meant to reflect, in their status and standards, the basic ethical principles on which Israel's social life is founded.**

11. The evisceration of reasonableness, then, may lead us to appointments that are tainted by a moral flaw; it may damage the foundation of values on which the State and governmental institutions in Israel are built; and it may do grave harm to the basic principles of values on which the foundations of Israel's society and regime are built. This is unacceptable.

12. The reasonableness standard is one of the foundations of judicial review, which is intended to ensure that the executive branch does not exceed its authority, as was stated by Justice Baron in the **Fourth Deri Case**, in Section 4 of her opinion:

> **Administrative discretion is subject to judicial supervision according to several delimited and defined standards of review – including the reasonableness standard. Judicial review of administrative acts is intended to protect human rights and the basic values against the abuse of power, and to ensure governance that is good, clean-handed and fair. The court is the entity in charge of maintaining the boundaries of the administrative authority's powers and the legality of the exercise of those powers… This is the essence of the doctrine of checks and balances, which underlies the principle of separation of branches; <u>this is the nature of democracy</u>.**

13. Even those who support the narrow approach to the use of the reasonableness standard recognize its fundamental importance, as was stated by Justice A. Stein in the **Fourth Deri Case**, in Section 35 of his opinion:

> **Similarly, the reasonableness doctrine determines that an administrative decision that *prima facie* appears to be extremely unreasonable "is a decision that is surely tainted with one of the basic flaws, such as arbitrariness, extraneous considerations and discrimination, even though the existence of such a flaw is not manifest" … In this residual format, the effect of the reasonableness doctrine gives rise to considerable social benefit: it provides the courts with an efficient and necessary tool for judicial review under uncertainty, and does not allow the administrative authorities to conceal their wrongdoing by exploiting the vagueness of the factual foundation. We will therefore do well to keep it in this format.**

14. The abolition of reasonableness was not implemented by critics of the standard, who desire to soften it. It was implemented in the form of a constitutional amendment, which is directed entirely against the judicial branch, and it has a single purpose – to nullify the standard entirely. To get it out of the way of the executive branch. To allow the government and its ministers to act wantonly, with no reasonableness whatsoever, and to make any decision – no matter how scandalous, absurd and far-fetched – without being subject to any judicial review, or even to a court hearing.

15. This, then, is not the abolition of the reasonableness standard, as the latter was phrased in High Court of Justice 389/80, **Golden Pages Ltd. v. Israel Broadcasting Authority**, PD 35 (1) 421, 437 (1980) (hereinafter: the **"Golden Pages Case"**), by the Honorable Justice (as his title was then) A. Barak. Rather, it is an extreme act involving the abolition of the authority to examine the reasonableness standard, which has been implemented and established (albeit not always under that name) in a long series of judgments dating back to the earliest days of the State, by Chief Justices Zmora, Olshan, Landau, Agranat, and many other judges.

16. The abolition of the reasonableness standard creates a "vacuum" in Israeli administrative law. The determination that no court will hear a case (not to mention issue an order) based on an argument of unreasonableness vis-à-vis the government and its ministers means, in practical terms, the *de*

facto nullification, abolition and disappearance of the standard. It means, in practical terms, the abolition of the basic duty of "elected public officials" (who are nothing other than public servants) to act reasonably and for the public benefit, which is a basic part of the executive branch's nature as a trustee for the public, whose duty is to act exclusively on its behalf. After all, we have already learned that **"when the way to the court is blocked, the judge will disappear and be no more, and when there is no judge, even the law will disappear with him"** (Civil Appeal 733/95, **Arpal Aluminum Ltd. v. Klil Industries Ltd.**, PD 51 (3) 577, 629 (1997) (hereinafter: the **"Arpal Case"**)).

17. The Abolition of Reasonableness Law is unparalleled in the fabric of Israeli legislation, as it purports to create a lack of justiciability under law for administrative acts. This is a fundamental change in the basic structure of Israeli democracy, because the Law deals a mortal blow to the principle of the rule of law, to which elected public officials are subject. In the words of the Honorable Justice A. Stein, in Section 40 of the **Fourth Deri Case**:

> **The election of a person to a seat in the Knesset, and his assent to the lofty height of the government, does not confer privileges upon that person, does not exempt him from his legal duties, and does not give him an exemption from the outcome of legal proceedings, either criminal or civil, in which he was involved as a defendant – as if he were a king who is not liable for his misdeeds ("the King can do no wrong"). In our legal regime, which has adopted as its motto the principle of the rule of law, all are equal before the law. Persons of high esteem are not above the law, and ordinary citizens are not below it… <u>All of us bow our heads before the law, and the law does not bow its head to anyone</u>.**

18. In a constitutional speech that he made in 1952, the late Prime Minister Moshe Sharett spoke of the principles that underlay the establishment of the State of Israel, in these words:

> **The State of Israel was established, and will only continue to exist, grow and thrive if it continues to rest on two pillars: the pillar of Zionism and the pillar of democracy… And just as these were the foundations on which we build its underpinnings, these should be the foundations on which the entire building, up to the rafters, rests.**
>
> **Preserving democracy, preserving Zionism: these two things mean, first and foremost, upholding these two values in a positive way, being loyal to them, walking in their light, resolving, on the basis of these two principles, all of the problems that we encounter on our way. And second, it refers to a negative precept: withstanding the destroyers and annihilators, from without and from within**.[2]

[2] Moshe Sharett, "The State of Israel Was Established on Zionism and Democracy" [Hebrew], ***Statements*** (1952).

19. Seventy-five years after its establishment, the State of Israel is facing a constitutional moment. The Abolition of Reasonableness Law, and certainly the Change in the Judicial Selection Committee Law, are threatening to make a fundamental change in long-standing practices, and to confer upon the executive branch power that is not subject to judicial review. The question that underlies the Petition is not "What are the boundaries of exercising the reasonableness standard?" It pertains to an executive branch that is seeking to rule with no restraints or limitations, at the expense of individual rights and the foundations of Israeli democracy, as the latter was determined in the Declaration of Independence, and that is using the coalitionary majority from which it benefits in order to prevent the enforcement of the law over it. It is possible that no petitions on questions of greater significance to the vitality and continued progress of Israeli democracy and Israeli society have ever been brought before the Honorable Court. And there have certainly not been many such petitions.

20. To date, the constitutional moments of the State of Israel pertained to independence and elevation, building the land and the State, and the advancement of human rights. Such was the constitutional moment of the signing of the Declaration of Independence and of Proclamation No. 1, which was read out by the first Prime Minister of Israel, David Ben Gurion, shortly thereafter. Subsequently, Israel was privileged to experience additional constitutional moments, different in both meaning and content, with the enactment of the Law of Return, 5710-1950; the Equal Rights for Women Law, 5711-1951; the establishment of the Supreme Court and the enactment of the Judges Law, 5713-1953; the Doing Justice regarding the Nazis and their Collaborators Law, 5710-1950, and the Eichmann trial in 1961; the enactment of Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation; the judgment in the **Kol Ha'am Case**; the judgment in High Court of Justice 1/49, **Solomon Shlomo Bejerano v. Minister of Police**, PD 2 80 (1949); and the judgment in Civil Appeal 6821/93, **United Mizrahi Bank v. Migdal Cooperative Village**, PD 49 (4) 221 (1995) (hereinafter: the **"Mizrahi Bank Case"**). These moments were characterized by the advancement of the national structure, the growing development of Israeli democracy and the protection of human rights within it. The present moment is not one of those. This Petition pertains to **a retreat of democracy** - an attempt by a relatively small parliamentary majority to change a basic component of Israel's public law, and to create an area with no laws and no judges, without a proper hearing and without a consensus.

21. This Petition asks the Honorable Court to fulfill a rare and exceptional role, for which it is responsible – to preserve the structure of the democratic regime and the emerging Constitution against constitutional amendments that are unconstitutional and an abuse of constituent power, with a view to damaging the fragile core of the democratic identity of the State of Israel – in accordance with the tests outlined in High Court of Justice 5555/18, **Hasson v. Knesset** (published in the Nevo database, July 8, 2021) (hereinafter: the **"Hasson Case"**), High Court of Justice 5969/20, **Shaffir v. Knesset** (published in the Nevo database, May 23, 2021) (hereinafter: the **"Shaffir Case"**), and subsequent cases. This is no easy remedy; nonetheless, as the Petitioners see it, it is obviously indispensable, in light of the extreme nature of the Law.

22. The Petition is being filed at a time when the Israeli public is torn by the disputes regarding the regime coup. Efforts to reach a consensus and to prevent the need for a court decision did not succeed. In this state of affairs, there is no other choice than a clear court decision regarding the unconstitutional nature of the legislation that constitutes the object of the Petition, a decision that can restore order. This is the constitutional role of the court. This is necessitated by the rule of law. Even though the Honorable Court is being requested to grant an exceptional remedy, these are also exceptional times and this is an exceptional situation, which calls for the intervention of the Honorable Court as sought at the beginning of the Petition.

B. The parties to the Petition

23. Petitioner No. 1 is the **Israel Bar Association**, which was founded under the Bar Association Law, 5721-1961. The section describing its objectives determined that the Association "will strive to preserve the standard and purity of the legal profession, and, in addition, **will act toward the protection of the rule of law, human rights and the basic values of the State of Israel**." The Association perceives itself as obligated to take action against the Abolition of Reasonableness Law and against the judicial coup, in the framework of which it was enacted, both of which entail a great and tangible danger to the rule of law, to the separation of branches, to the independence of the court system, to the integrity of the executive branch, to human rights, and to the basic values of the State of Israel as a Jewish and democratic state. This Petition is being filed with the approval of an overwhelming majority of the Israel Bar Association's National Council.

24. Petitioner No. 2 is the Head of the Israel Bar Association. He was elected to that position on June 20, 2023, in egalitarian and secret general elections, from among five candidates, after he received 73% of the votes, representing tens of thousands of attorneys.

25. Respondent No. 1 is the **Knesset**, the legislative entity of the State of Israel.

26. Respondent No. 2 is the **Government of Israel**, which, according to the legislation that constitutes the object of the Petition, will be *de facto* exempt from exercising its discretion in a reasonable way.

27. Respondent No. 3 is the **Knesset Constitution, Law and Justice Committee**, in which Amendment No. 4 was discussed and prepared for the voting sessions in the Knesset plenum.

C. The regime coup

> **I think that democracy is part of our national existence and the court is a foundation stone of our democracy. These statements are not mere lip service. They are things in which I, and those who assist me, and the opposition as well, believe. I think that democracy is not examined according to the radical proposals that arise from within it. It is examined according to the response of the leadership, of the critical mass of the electorate and the political leadership, how it conducts itself vis-à-vis radical phenomena. In our case, I think that the**

> **State of Israel is a responsible state with a responsible heritage, and it will remain so. <u>There are judges in Jerusalem, there will be judges in Jerusalem, and I am happy that there are more judges in Jerusalem today, and that will remain</u>** (from a statement by the Prime Minister, Mr. Benjamin Netanyahu, in a meeting with the Chief Justice of the Israel Supreme Court, February 12, 2012).

28. On January 4, 2023, only a few days after Israel's 37th Government was sworn in, the incoming Minister of Justice and Deputy Prime Minister, Member of Knesset Yariv Levin, presented the plan for a total change in the court system, and, in practical terms, in the foundations and the structure of Israel's regime - a real revolution in the regime. In the months that have elapsed since then, Israel's Knesset – led by the coalition headed by Prime Minister Benjamin Netanyahu – has promoted a series of super-fast legislative moves for the amendment of the Basic Law: The Judiciary, which are known by the blatantly deceptive name: **"Amendment – Strengthening the Separation of Branches."**

- A copy of an announcement by the Minister of Justice, Mr. Yariv Levin, dated January 4, 2023, and the initial memoranda of legislation that were published, are attached hereto and marked as **Appendix 1**.

29. This is a super-fast plan for unfathomable and far-ranging changes in the court system, the standing of the courts and individual rights, which originates in a private draft law. According to a declaration by the Minister of Justice, the plan, "in the initial stage," includes four strata, the principal components of which are as follows:

    a. **A significant reduction of the judicial review of administrative decisions**, through the abolition of the reasonableness standard.

    b. **A fundamental change in the composition of the Judicial Selection Committee**, which is in charge of selecting judges for all of Israel's courts, while conferring absolute, permanent and intrinsic control upon the representatives of the coalition, in all matters pertaining to the appointment and promotion of judges in all courts, and a considerable effect on their dismissal from office.

    c. **The extremely significant reduction, to the point of total nullification, of the judicial review of the legislative branch**, including by way of the following:

        (1) The prevention of any judicial review of the <u>Basic Laws</u>, irrespective of their content or subject, and with no binding definition in legislation for the term "Basic Law."

        (2) The dramatic reduction (to the point of nullification) of the judicial review of <u>laws</u>, so that the power to cancel them will only rest with <u>a full panel</u> of the Supreme Court, in a <u>unanimous or nearly unanimous decision</u>.

        (3) The establishment of an <u>override mechanism</u>, according to which 61 Members of Knesset will be able to determine – *a priori* and even before the law has been brought before the

court for examination – that <u>any law</u> will be immune to judicial review, even if its provisions contradict the Basic Laws.

d. **The weakening of the legal advisors to the executive branch and a fundamental change in their role, from gatekeepers to "advisors on behalf of."** This includes the following:

(1) A change in the status of the legal advisors to the governmental ministries, so that they will be appointed as "positions of trust" under the ministers, and, as such, the ministers will be able to dismiss them at any time.

(2) The abolition of the binding status of an opinion issued by the attorney general.

(3) A determination that the government and its ministers will be able to determine their legal position, and to reject the attorney general's position.

(4) A determination that the Treasury of the State will fund representation by attorneys from the private sector, according to the ministers' choice, for the purpose of representing their legal positions.

30. The plan confers **unlimited power** upon the executive and legislative branches. As the formulators of the plan see it, **a majority decision can serve as the sole and exclusive tool for decision**. In their eyes, **there is no importance to the legal protection of individual rights, there is no individual right that the majority does not have the power to suppress and to abolish, and there is no legal institution that will have the power to recognize a private individual's right or to protect it against the majority decision**.

31. **There are no mild words to describe this – this is rule <u>with no restraints and without the rule of law</u>. These are laws that, as soon as they take effect, will give the government, and only the government, unlimited power, with no checks and balances**.

32. The plan ignores the fact **that unlimited administrative power is a sure recipe for the violation of human rights, private sector rights and civil rights, and for harm to good governance**. It ignores the fact that a foundation stone of a democratic regime is **the rule of law and individual rights**. It ignores the fact **that the principle of separation of branches requires a judicial system that has the effective ability to protect the individual's basic rights, when that individual is in a dispute with the administrative authorities, and to review the other branches**. The plan seals the fate of any ability (and certainly of any effective ability) to perform this type of review.

33. A "reform," according to the dictionary definition, is "an initiated and planned change, the purpose of which is to repair and improve a system" ("reform," ***Ravmilim: The Complete Dictionary – A New Hebrew Dictionary*** (Uzi Friedkin, editor in chief, 5758-1998)). The proposed plan is not a reform. It is not intended to repair and improve the system. The plan is nothing less than a regime coup: a fundamental, immediate and radical change - the crushing, and not the improvement, of the judicial branch. Implementing the proposed plan will confer unlimited and unrestrained power upon the executive branch, will cancel the autonomy and independence of the gatekeepers, and will

crush the separation of branches in the State of Israel, which already rests on shaky foundations, in light of the government's absolute control of the Knesset, especially through the tool of coalitional discipline. **The proposed amendments overturn Israeli democracy**.

34. This was stated, in no uncertain terms, by the Honorable President of the State of Israel, Mr. Isaac Herzog, in a special speech on March 9, 2023:

> **The entirety of the legislation now being discussed in the [Constitution, Law and Justice] Committee <u>should be eliminated, and quickly</u>. It is erroneous. It is predatory. <u>It undermines our democratic foundations</u>…**
>
> **Our democracy is a supreme value. An independent, sound court system is a supreme value. The preservation of human rights, for men and women alike, with emphasis on minorities, and of the uniquely rich Israeli mosaic, is a supreme value.**

35. The following was stated by a former Head of the Israel Security Agency, Mr. Nadav Argaman, in an interview with the Israeli television program ***Uvda*** ["Fact"] on March 16, 2023:

> **It's not a good idea to underplay this. This is a change in the regime. This is a coup. A judicial coup transforming the State of Israel into a dictatorship. Let's not confuse ourselves and let's not underestimate this. This is what it is. It's not like anything we've seen. It's not like anything we've known. It's all new. And anyone who tries to underplay it is doing so in order to try and reassure us.**

36. The foregoing statements apply both to the entire situation – that is, a situation in which all of the "reform" laws will be passed – and to each of the laws that the government intends to enact in their own right, and especially to the legislation that constitutes the sole object of this Petition.

37. This was clearly stated by the former Attorney General, Prof. Avichai Mandelblit, quite recently, at an Israel Bar Association conference on the subject of the reasonableness standard, on July 20, 2023:

> **There is a legend – a naïve one in the best case, one that trips up even the advocates of goodness – that the mere abolition of the reasonableness standard is ostensibly not all that bad. As long as they stop there. So, aside from the fact that it's really clear to everyone here that they really won't stop there, but, rather, will go further, I would like to refute that legend as well… I want to show that, in the extreme way that people are talking about, this is actually spin, camouflage, the purpose of which is to crush the independence of the entire court system, including our last line of defense, which is the Supreme Court. <u>This, as stated, is meant to lead to the tyranny of the ruler, with no balance and no protection, and, therefore, this is a regime coup</u>.**

38. This was also stated by a former Head of the Mossad, Mr. Tamir Pardo, in an interview on Channel 12 News on July 20, 2023: **"If the Reasonableness Standard Draft Law is passed on second and third reading, the State of Israel will cease to be a democracy."**

39. This was also stated by a former head of the Israel Security Agency, Mr. Yuval Diskin, in a speech that he made at the protest rally in Tel Aviv, on Saturday night, July 22, 2023, a few days before the legislation that constitutes the object of this Petition was enacted:

> **I feel as if an incessant earthquake is shaking everything we knew, and especially the ethos of the State, on which we grew up until recently. An ethos that , for us, was the justification of our way of life. […] <u>If the Reasonableness Standard Amendment passes, if the institution of the attorney general is weakened, and if the judicial branch, and the Supreme Court at its head, lose their ability to perform judicial review of the executive branch – we will become a hollow democracy, plunging down without a parachute into the depths of autocracy!</u> […] And we must not forget for one second who the people who stand behind this legislation are: a prime minister who is a defendant in a criminal trial, supporters of Jewish supremacy, racist Kahanists, homophobes, misogynists, former convicted criminals, and non-Zionist ultra-Orthodox Jews dodging military service. Such a government has no moral basis for leading such a profound change in the image of our State, in our democracy, and in our values. To anyone who thinks this is only about the reasonableness standard, I will state that there are already 213 Draft laws that pertain to the judicial coup, violations of rights, harm to the public media, harm to the gatekeepers and changes in the election laws. These Draft laws are waiting for the weakening of the High Court of Justice, the weakening of the attorney general, the weakening of the gatekeepers, and the granting of unrestrained power to the nightmare government… <u>The danger is clear and immediate: the end of the rule of law in Israel is only a few days away. Two Knesset readings – and it's all over!</u>**

40. The fears that the regime coup will be exploited for the purpose of predatory legislation and the implementation of blatantly unreasonable decisions are not theoretical. If the dam breaks and judicial review is nullified – there will be no other barrier blocking the way to severe violations of human rights and harm to the democratic systems. As Dr. Ilana Dayan pointed out in a disturbing speech at the beginning of the above-referenced TV program ***Uvda*** ["Fact"]:

> **So when this legislation is rushing forward, don't believe anyone who tells you that it will be alright. That no one here is going to violate the rights of gays, women, Arabs, journalists, lecturers, poor people, and, at a later stage, ultra-Orthodox Jews and others as well… Because an administration that insists on making sure it gets advisors that it doesn't have to listen to; while also appointing judges "on behalf of," and neutering them just in case; and while**

> **also passing laws that can't be reviewed and outlawing freedoms that can be done without – such an administration is taking us to a place from which no democracy ever came back alive. Because an administration doesn't grab such quantities of power for itself just to make it look nice… [The reform] is drawing vast power, absolute power, to only one place. And now, when there is no compromise on the horizon – ask yourselves just one question: <u>Will there even be one thing, only one thing, that the majority won't be able to do to the minority, once this move is complete</u>?**

41. In the guise of "reform," in a rapid and inappropriate blitz of legislation, which is inversely proportional to the extreme nature of the meanings that it purports to institute,[3] the Government of Israel is taking measures to turn the image of the State upside down. The initiators of the "reform" did not listen to the many voices that warned them of its implications and hid behind the principle of majority rule. This was discussed by the Attorney General, Adv. Gali Baharav-Miara, in her opinion with respect to the Draft Memorandum of the Basic Law: The Judiciary, dated February 2, 2023 (hereinafter: the **"Attorney General's Opinion"**):

> The proposed memorandum is founded on a purpose that seeks to accomplish the principle of majority rule. Indeed, the principle of majority rule and the principle of the separation of branches dictate that key decisions and evaluations with respect to legislation and policy should be made by elected public officials in the Knesset and in the government. At the same time, a foundation stone of a democratic regime is the protection of human and individual rights, the rule of law and good governance, and the understanding that it is impossible to give the administrative authorities unlimited power and to accept majority decision as the only decision-making tool. **Unlimited administrative power is a sure recipe for the violation of human rights and for harm to good governance. The principle of separation of branches requires an independent and autonomous judicial system, which has the effective ability to review the other two branches**, while preserving the principal of mutual respect among the authorities. **The memorandum provides no response to this** (Appendix 2, page 1) [emphases in original – the undersigned].

- Copies of all of the relevant opinions and position papers are attached hereto and marked as **Appendices 2-35**.

42. The leaders and disciples of the "reform" are not attempting to conceal its true significance. They are openly calling for the total abolition of judicial review. They are belittling and wrangling with the decisions of this Honorable Court, while showing contempt for the principles of separation of branches, the rule of law and good governance – the very soul of every democratic state. They do not conceal their aim to establish an autocracy in the guise of "reform." The following statement,

[3] In this context, see the position paper of the Forum of Law Lecturers for Democracy, "Position Paper No. 3: The Appropriate Process for the Legislation of the Constitutional Reform" [Hebrew] (Appendix 9 below).

for example, was made by the Chair of the Constitution, Law and Justice Committee, who formulated the Draft laws himself with the assistance of a private entity:

> **I think the parliament is a much more effective balancing mechanism for the government than the court.** COVID was a fascinating example of this. The court, other than on specific, sexy subjects among the political support group of the High Court of Justice Party, did not intervene. On the prohibition against demonstrations, it was very aggressive, because those are its buddies. But the prohibition against going out for prayers? Nope. Those petitions were dismissed on the grounds of public health. As if the virus distinguishes between demonstrations and prayers. Why? Because **the ones who pray aren't members of the High Court of Justice Party Headquarters, so screw them. The High Court of Justice doesn't protect human rights, it protects members of its headquarters**. […]
>
> The Basic Law: Equality isn't a balance and it isn't a check. It's a stupid thing. **Equality is a meaningless word. It's a tautology** (Hilo Glazer, "Simcha Rothman: 'The Justices of the High Court of Justice Are Uneducated Ignoramuses. It's a Mechanism That Screws Minorities. I'm Eliminating It'" [Hebrew], ***Haaretz***, February 23, 2023).

43. The accelerated legislative process of the plan, and specifically of the legislation that constitutes the object of the Petition, aroused broad public protest. Hundreds of thousands of people have been demonstrating against it each week, for approximately 30 weeks (!). This is the "mother of all protests" that the State has ever known. Senior figures in academia, law, economics, business and the high-tech industry, former heads of the defense and security establishment, reserve combat troops, Israel Prize and Nobel Prizewinners, have signed petitions, letters and manifestoes opposing the plan. The objectors cry out the obvious: The implementation of the plan will nullify the court system, will eliminate its power to protect individual rights, and will severely harm the economy and security of the State of Israel. Among the objectors are retired Supreme Court justices, former attorneys general and state attorneys, presidents of universities and lecturers, former chiefs of staff, former heads of the Israel Security Agency, former heads of the Mossad, former heads of the National Security Council, the Israel Medical Association, former directors general of governmental ministries, senior figures from the business sector, ministers and Members of Knesset, senior legal advisors, and many others.[4]

[4] See *e.g.*: Letter written by retired judges regarding the judicial reform (February 17, 2022); Yuval Erel and Li Naim, "77 Retired Judges Against the Reforms Planned by the Government: 'Profound Harm to the Basic Values of the State'" [Hebrew], ***N12*** (February 17, 2022); Bini Ashkenazi, "Aharon Barak Joins the Battle Against the Reduction of the Reasonableness Standard: This is Harm to Democracy, Netanyahu Is Using My Name"[Hebrew], ***Walla*** (July 23, 2023); Tuvia Tzimuki, Itamar Eichner and Gilad Morag, "18 Retired Supreme Court Justices: The Plan May Cause a Disaster. 12 Former Heads of the National Security Council, Including Yossi Cohen: The Confrontation Is Threatening Israel's Strength"[Hebrew], ***Ynet*** (February 12, 2023); Attorney General's Opinion; "Attorney General's Comments on the Draft Memorandum of Basic Law: The Judiciary"(Attorney General's Opinion, February 2, 2023) (Appendix 2 above); "General Preparatory Document Regarding Draft Basic Law: The Judiciary (Amendment – Strengthening the Separation of

44. The legal advisor to the Constitution, Law and Justice Committee, the attorney general and the Forum of Law Lecturers for Democracy published position papers criticizing the various components of the judicial coup and recommending their rejection (see *e.g.* Appendices 2-35 above). Experts in administrative law, such as Prof. Yoav Dotan and Prof. Meni Mautner, have severely criticized the proposal. But none of all this deterred the coalition from the race to acquire unlimited legal power for itself and to eliminate any balancing legal power, like a person picking himself up by his bootstraps.

45. This, for example, is a comment by the attorney general on the memorandum of the first law setting forth the "reform:"

> **The memorandum, and its present structure, does not pertain at all to the arrangement of the rules and limitations that will apply to the constituent power and the legislative and executive branches. Rather, it only compresses and reduces the role of the judiciary branch as a reviewer of those branches. Absent any broad arrangement for the relationship among the branches, the outcome of this matter is the absence of protective mechanisms that will ensure the safeguarding of the propriety of processes, the basic principles of control, individual rights, the rule of law and good governance** (**Attorney General's Opinion**, Appendix 2 above, page 2).

46. The foregoing applies to both the entire "reform" and the amendment on which this Petition is focused. The Honorable Chief Justice A. Barak spoke out explicitly against the possibility of abolishing or reducing the reasonableness standard, in an interview on KAN Channel 11 on July 23, 2023, in these words:

> **I am against the abolition, I am against the reduction, of the reasonableness standard. The reasonableness standard is a very important standard, <u>which protects the rule of law</u>. All my professional life, I've protected the rule of law, and now, <u>if the reasonableness standard is reduced or abolished, the rule of law</u>**

Branches)" [Hebrew] (Attorney General's Opinion to the Constitution Committee, January 27, 2023) (Appendix 3 above); Yaki Adamkar, "Deputy Attorney General Against the Reduction of the Reasonableness Standard: 'Grave Harm to the Values of Democracy'" [Hebrew], ***Walla*** (June 26, 2023; Noya Hasson, "The Former State Attorney Warns: 'We Are Facing a Change in the Regime'" [Hebrew], ***Maariv*** (January 15, 2023);Lior Dattal, "Presidents of the Universities: 'The Judicial Reform Will Cause a Mortal Blow to Academia and a Brain Drain'" [Hebrew], ***TheMarker*** (January 23, 2023); Adam Kotev, "Chiefs of Staff, Heads of the ISAM Former Senior Officials to Herzog: 'Stop the Legislation – Or We'll Object to Any Outline'" [Hebrew], ***Ynet*** (March 1, 2023); Itai Schickman, "The Security Personnel Protest Against the Reform Is Coming Back"[Hebrew], ***Kan*** (June 26, 2023); Gad Lior, "Dozens of Former Directors General of Economic Ministries Join the Warnings: 'The Judicial Coup Will Harm the Economy'" [Hebrew], ***Ynet*** (January 30, 2023); Itamar Minmar and Li Naim, "Senior Figures in the Business Sector Against the Judicial Coup: The High-Tech Companies Will Allow Employees to Strike" [Hebrew], ***N12*** (January 22, 2023); Adir Yanko, "Israel Medical Association Will Shut Down the Health System for Two Hours" [Hebrew], ***Ynet*** (July 18, 2023); Liat Levi, "The Attorneys' Protest: 'We Are All Aharon Barak'" [Hebrew], ***TheMarker*** (January 12, 2023); and the former [sic] Minister of Defense, Mr. Yoav Gallant, who made a public speech on March 26, 2023 against the "reform" and stated that **"I will not lend a hand to it"** – "Gallant Comes Out Against the Judicial Coup: 'I Will Not Lend a Hand to It, Stop the Legislative Process'" [Hebrew], ***Haaretz*** (March 25, 2023).

will be harmed, because the administration will not be subject to the possibility of the court examining whether the decision was reasonable.

47. Prof. Yoav Dotan, who was represented by the promoters of the Abolition of Reasonableness Law as being in favor of it, also explained as follows: **"I never proposed to abolish it [the reasonableness standard] entirely… This proposal, in practical terms, eliminates the court's review of the reasonableness of many kinds of decisions, regarding which the review of reasonableness should not be stopped"** (interview with the ***Ynet*** website, July 5, 2023).

48. The plan aroused consternation in the international arena as well – states and other international entities expressed their reservations (to put it mildly) regarding the plan and its proposed format. Thus, the annual report of the Organization for Economic Cooperation and Development (OECD) dated April 2023 stated as follows: **"There is an essential need for 'judicial independence and legal balances' in order to enable the system to fight corruption and to create norms of public integrity."**[5] The German Minister of Justice expressed concern to Minister of Justice Levin regarding the judicial coup, and commented as follows: **"A democratic majority can't do everything it wants to."** Canadian, British and Swiss jurists warned against the changes in the regime.[6] The International Bar Association (IBA) expressed "profound concern" regarding the rule of law in Israel and the independence of the court system, if the plan were to be adopted.[7]

49. Even the president of the United States recently commented on the importance of checks and balances and an independent court in a democracy, and on the importance of consensus for changes of the kind proposed in the plan. In a message that he passed on to Thomas Friedman, he stated: **"Stop now. Don't pass anything of such great importance without a broad consensus, or you are going to break something within Israel's democracy and with your relationship with the United States, and you may never be able to get it back… If Israel and the United States do not share the same democratic values, it will be difficult to sustain the special relationship between the two countries."**[8] The night before the legislation, President Biden again addressed Israel's leaders, in an interview with journalist Barak Ravid: **"It makes no sense to rush forward with the judicial legislation."**[9]

50. Nor did the rift pass over the Israel Defense Forces reserves. Thousands of reserve officers and soldiers informed their commanders that they had stopped volunteering for reserve service, or warned that they would not be able to continue to volunteer for reserve service in a reality in which

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5 Shlomo Teitelbaum, "The OECD Report on Israel: The Independence of the Court System Is Essential to the Struggle Against Corruption"[Hebrew], ***Calcalist*** (April 3, 2023).

6 Appendices 16, 24 and 34 above, respectively.

7 "Israel: the IBA is profoundly concerned with the proposed reform to the legal system that would jeopardize the Rule of Law," International Bar Association (March 24, 2023).

8 Shahar Berdichevsky, "Biden's Dramatic Message to Prime Minister Netanyahu: 'Don't Legislate Without Consensus'" [Hebrew], ***Maariv*** (July 19, 2023); see also, *e.g.*: "OECD Warns Israel: 'The Independence of the Court System is Essential to the Economy'" [Hebrew], ***Yisrael Hayom*** (February 16, 2023); "German Minister of Justice Expressed Concern to Levin Regarding the Judicial Reform"[Hebrew], ***Walla*** (February 21, 2023); "Biden on the Reform in the Court System: Changes Like These Require a Consensus'" [Hebrew], ***Maariv*** (February 12, 2023).

9 "Biden: 'It Makes No Sense to Rush Forward with the Judicial Legislation'" [Hebrew], ***Haaretz*** (July 24, 2023).

the basic contract between the citizens and the State had been breached through the fundamental change in the nature of the State of Israel as a Jewish and democratic state. Thus, on July 13, 2023, approximately 1,700 male and female combatants belonging to Israel's reserve and retired aircrews (including a lieutenant general and six majors general) stated that they would support acts of protest including the suspension of volunteering for reserve service; on July 18, 2023, 161 senior members and officers of the Israel Air Force's operational core announced that they were immediately terminating their reserve service; the same day, approximately 300 reservists in the IDF Medical Core, including doctors, paramedics and mental health officers, announced that they would terminate their service in protest against the judicial coup and the progression of the legislative process that constitutes the object of the Petition. On July 21, 2023, 1,142 reserve pilots and Israel Air Force personnel notified the O/C IAF that they would stop serving if the legislation that constitutes the object of the Petition were to pass. The Brothers and Sisters in Arms organization stated that approximately 10,000 reserve officers and soldiers had given notice that they would not volunteer for service if the legislation were to be completed. Letters and notices in this vein were sent by hundreds and thousands of reserve officers and soldiers from intelligence, cyber-attack, special operations and various spearhead units.

51. The reform also has serious economic aspects. The Chief Economist at the Ministry of Finance wrote as follows, in the numerator document that was filed with the government in preparation for the approval of the budget, dated February 23, 2023:

> **If the judicial reform is perceived by the market as detrimental to the strength and independence of the State institutions, and as increasing the uncertainty, this might detract from the economic activity in Israel's economy and in private investments… In research studies in the economic literature, a connection has been found between the strength and independence of the State institutions and economic growth, the scope of private investments, and the scope of foreign investments. In addition, the credit rating companies may pay attention to these developments.**

And, in fact, this March, the credit rating company Moody's published an unusual notice, in which it warned against harm to Israel's economy if the judicial reform were to be enacted as planned, and warned against the adverse effects of the reform on Israel's credit rating. Although, to date, no change has yet been made in Israel's credit rating (in light of clarifications by the State that negotiations were being conducted toward a settlement and toward the passage of the reform with a broad consensus only), the international credit rating companies have recently contacted senior figures in Israel's economic and political system and demanded to receive clarifications in light of the unilateral continuation of the legislation and the increasing wave of protest.[10]

[10] Liel Kaiser, "Credit Rating Companies to Senior Figures in Israel: 'We Demand Clarifications in Light of the Continued Legislation'" [Hebrew], ***Kan*** (July 22, 2023).

52. It can be seen that, one after another, the reform is adversely affecting the prominent characteristics and achievements of the State of Israel, of which it prided itself for many years, including the strength of the Israel Defense Forces; Israel's status as a high-tech power; the economic soundness of the State; its international relations; its nature as "the only democracy in the Middle East;" and – most importantly – the cohesive nature of Israeli society.

53. Nonetheless, governmental ministers, and public interviews in the media, have repeatedly declared that the coup would go forward. Because they intend to legislate all of the components declared by Minister Levin, in order to "repair" the court system. Thus, Minister Eliyahu emphasized: **"The reasonableness standard is only the first drop. I don't know what the next parts to be passed will be – maybe the Judicial Selection Committee, and maybe the Attorneys General Law."**[11] Minister Amsalem also declared, in an interview on Channel 14 Now, on July 17, 2023: **"I stood at the Knesset podium two weeks ago and I said what the timetable was, gentlemen. Next week, despite the opposition of anyone who doesn't like it, the [Abolition of Reasonableness] Law will pass in the Knesset… In the next stage… with God's help, at the end of this session or at the beginning of the next session, we'll already start discussing the Judicial Selection Committee. We're following the outline."**[12] Minister of National Security Ben Gvir declared, in an interview on the "Sabbath Square" program, that the Reduction of the Reasonableness Standard Law was the "opening move" in the judicial reform, and, as he aptly described it, it was "**only the salad that gives people an appetite**."[13] The Minister of Justice, in a speech on July 18, 2023, emphasized that the plan is to promote the coup in its entirety, and the step back from the enactment of all of the "reform" laws at once was only a tactical retreat: "We're amending it, we're doing it responsibly, but we must make the great change in the court system."[14]

54. True to their word, on February 20, 2023, Respondent No. 1 passed on first reading: Draft Basic Law: The Judiciary (Amendment No. 3) (Strengthening the Separation of Branches), and Courts Draft Law (Amendment No. 105) (Provisions Regarding the Judicial Selection Committee), 5783-2023). The purpose of both amendments was to detract from the independence of the court and to take over its composition. The draft laws were subsequently approved by Respondent No. 3 for second and third reading, and now they are only a step away from being passed on second and third reading. As stated, the members of the coalition intend to ensure that this happens.

55. Subsequently, after a hasty and flawed legislative process, on July 24, 2023, Respondent No. 1 enacted Basic Law: The Judiciary (Amendment No. 4) (The Reasonableness Standard), and, in so

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[11] Tweet by the Israel Defense Forces radio station dated July 17, 2023: https://twitter.com/GLZRadio/status/1680953009369391106.

[12] "Minister Amsalem Declares: 'Even If They Don't Like It – the Abolition of Reasonableness [Law] Will Pass Next Week. If There's No Reform – There's No Government'" [Hebrew], ***YouTube*** (July 17, 2023).

[13] "Ben Gvir: 'The Reduction of the Reasonableness Standard [Law] Is the Salads That Give People an Appetite'" [Hebrew], ***N12*** (July 18, 2023).

[14] "'Expressing Our Voices Powerfully:' Minister Levin in an Emotional Appeal to Rightist Voters" [Hebrew], ***14 Now*** (July 18, 2023).

doing, implemented the first component of the "reform" – **the abolition of judicial review according to the reasonableness standard**.

56. According to the amendment to Basic Law: The Judiciary, from this time forth, the government, the prime minister and the governmental ministers, in practical terms, are released from the obligation to act in a reasonable manner. They will be able to make decisions based on extraneous motives (which it will be impossible to prove); they will be able to make political appointments (and to claim that they took relevant considerations into account); they will be able to dismiss gatekeepers based on "pertinent motives;" and, by canceling the reasonableness standard, they are rendering the government *de facto* immune to judicial review on issues covered by the reasonableness standard, both according to its original interpretation and according to its updated interpretation.

57. This Petition is being filed during the three weeks that commemorate the period between the breaching of Jerusalem's walls on the 17th of Tammuz and the destruction of the Temple on the 9th of Av. The Prophet Isaiah – one of the Jewish "gatekeepers" of ancient times, describes the destruction of the system of just law and its transformation into a system that only serves the administration:

> **Wash yourselves, make yourselves clean; put away the evil of your doings from before My eyes. Cease to do evil. Learn to do good. Seek justice; rebuke the oppressor; defend the fatherless; plead for the widow.**

The prophet goes on to predict that, if the People of Israel adopts justice – the vision will be fulfilled in that:

> **Afterward you shall be called the city of righteousness, the faithful city. Zion shall be redeemed with justice, and her penitents with righteousness.**

May it be so.

D. <u>The Abolition of Reasonableness Law and the severe defects from which it suffers (Section 15(D1) of Basic Law: The Judiciary)</u>

D(1) <u>Background</u>

58. On July 24, 2023, the Knesset passed the Basic Law: The Judiciary (Amendment No. 4) (The Reasonableness Standard) Draft Law propounded by the Knesset Constitution, Law and Justice Committee on its second and third readings by a majority of 64 of its members. The amendment reads as follows:

> **15(d1) Notwithstanding the provisions of this Basic Law, no person that possesses judicial power pursuant to the law, including the Supreme Court sitting as the High Court of Justice, may adjudicate the reasonableness of a decision of the government, the prime minister or other minister or issue an**

> **order regarding the same. In this section, "decision" means any decision, including regarding an appointment or a decision to refrain from exercising any power.**

59. The implication of the amendment can be gleaned, *inter alia*, from the brief explanatory notes that were appended to the draft law, which, due to their importance to what follows, we will cite *verbatim*:

> The Supreme Court sitting as the High Court of Justice is invested with the power to judicially review decisions of the state authorities pursuant to the provisions of Section 15 of the Basic Law: The Judiciary. Other courts and tribunals are also invested with the power to judicially review decisions of the state authorities in line with the grounds, powers and remedies based on which the Supreme Court sitting as the High Court of Justice adjudicates them… By virtue of this power, the court undertakes administrative review of the acts of the executive branch. The grounds of administrative review have been primarily created by the case law, and it is in this context that the standard of reasonableness has also developed. Today, this standard allows the court to quash an administrative decision that is unreasonable in the sense that it does not give "appropriate weight to the various interests that the administrative authority is required to consider in rendering its decision" (High Court of Justice File 389/80 **Golden Pages Ltd. v. Broadcasting Authority,** PD 35(1) 421, 437 (1980)), provided that the "unreasonableness is material or extreme" (*ibid.*, *ibid.*). Regarding the employment of the standard of reasonableness in this sense, and, in particular, the application of the standard of reasonableness to decisions of the elected officials, it is argued, *inter alia*, that the determination of the ethical balance between the various considerations relating to an administrative decision must lie with those elected by the public rather than with the court. Therefore, it is proposed to establish in the Basic Law: The Judiciary that the judiciary may not adjudicate the reasonableness of a decision of the cabinet, the prime minister or another minister or any other official as prescribed in the law, or issue an order against the elected official regarding the reasonableness of a decision made by him. It is noted that this does not restrict the power of the court to adjudicate matters or issue orders on other grounds of administrative review, including that of proportionality.

60. The Abolition of the Reasonableness Standard Law was enacted with lightning speed. Only around one month elapsed between the date of the Constitution, Law and Justice Committee's first hearing of the draft law (June 25, 2023) and the date on which the law was passed on its second and third readings. During this month, the committee held a small number of hearings in which it heard – ostensibly (given its demonstrative disregard for the submissions that were made) – the relevant parties, who expressed fierce opposition to the legislation, highlighted the need to exercise great caution given the harm to the constitutional rights and principles that it involved and dwelt upon

the problematic nature of its sweeping formulation. The chairman of the committee refused to hear other relevant parties despite their wish to be heard (for example, the legal advisor to the Ministry of Finance, Adv. Assi Messing, at the committee hearing on July 13, 2023, with the chairman of the committee stating that: "Clerks should not express a position"), did not enable members of the opposition to be fully heard, and hurried to determine that the "discussion had been exhausted." Those matters that the chairman of the committee did, in his kindness, agree to hear fell on deaf ears. The committee made almost no material amendments to the wording of the law, notwithstanding the problems that were asserted in that context, and did not undertake a thorough and comprehensive examination of its implications. The draft law was approved by the committee before its first hearing without the chairman of the committee allowing the deputy attorney general to have his say and while the members of the opposition were crying out in protest. After the first reading, the committee held a very short one-and-a-half day hearing before moving on to "hear" reservations, which it rejected in groups of 20 per vote without any discussion or awareness of the content of the reservations that were being rejected. Thus, there was a material defect in the legislative process that was inconsistent with the requirements of the legislative process, and certainly the legislative process as it applies to the Basic Laws.

61. Concomitantly, notwithstanding the requests of members of the Knesset, the security cabinet and the Foreign Affairs and Defense Committee were not convened to discuss the state of emergency that had arisen in the country in light of the protest of the reservists and the mass resignation of volunteers from the Israel Defense Forces.[15] The prime minister refused to meet the chief of staff before the vote.[16] The Knesset did everything to pass the law before the end of its current session – at any cost.

62. Moreover, the prime minister, Benjamin Netanyahu, who has a manifest conflict of interest against the background of his criminal trial, was involved in the legislative process and the compromise negotiations that were held on the matter, notwithstanding the opposition of the attorney general to this.[17] It was reported that the prime minister even threatened that any coalition member who opposes the law would be fired.[18]

63. This brief and non-exhaustive description demonstrates that the legislative process was blitzed through in a manner improper for ordinary legislation let alone a Basic Law. This is in particular given that the amendment purports to be constitutional, has far-reaching implications, has attracted exceptional and unprecedented public opposition, and lacks the most basic feature necessary for a constitutional amendment – a broad consensus.

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15 Efrat Avivi and Dror Gorni, "Neither the cabinet nor the Knesset: The coalition refuses to discuss the security situation" **Shakuf** (July 23, 2023).

16 Yaron Avraham and Nir Dvori, "Netanyahu refuses to meet Chief of Staff before the vote" **N12** (July 24, 2023).

17 Amir Kurtz, "Attorney General to Netanyahu: You cannot be involved in the changes to the legal system due to a concern of a conflict of interest" **Calcalist** (February 2, 2023).

18 Michael Hauser Tov, "Senior coalition member: Netanyahu has decided that the law will pass unchanged, anyone who opposes will be fired – even Gallant" Haaretz (July 22, 2023).

64. The defective legislative process is in line with the material defects in the amendment to the Basic Law. The wording adopted reflects a collection of conceptual errors regarding the structure of the democratic regime in Israel and the principles of administrative law and conflicts with its core democratic values. The wording of the new law evinces an erroneous and distorted worldview on the axioms of public law, including the separation of powers, the rule of law and the right of access to the courts. This is in a manner that also impinges on the interpretation of the amendment of the Basic Law and, hence, its constitutionality.

65. **First,** the wording of Section 15(d1) does not only rule out judicial review of the reasonableness of decisions of the executive branch – it rules out the very access to the court on matters of reasonableness, locks the doors of the Honorable Court and silences it on these matters. Section 15(d1) does not only provide that the Honorable Court **"may not issue an order"** with respect to the standard of reasonableness, but also provides that the Honorable Court **"may not adjudicate"** matters of reasonableness at all. In other words, the section prohibits the courts from even examining or hearing arguments on questions that come before it even if the judgment itself does not seek to intervene in the content of the decision, and it also prohibits the award of declarative relief that is not followed by an operative order.

66. This truncates the jurisdiction of the court – every court. This is the process known as jurisdiction stripping – a step that comes with a red flag since it leaves a "black hole" over acts for which there is absolutely no judicial review and hence no protection of the rule of law. The above formulation heavily impairs the right of access to the courts in the most fundamental and basic way, and also undermines the separation of powers and the rule of law as a corollary of the "silencing" of the courts and the prohibition against their hearing the above matters. The legislature has not only prohibited the issue of mandatory injunctions by the court– it has deprived potential petitioners of their right to make submissions to the court and the court itself of its duty to hear submissions and to have its say regarding the government, including with respect to the interpretation of the law applicable to the executive branch.

67. The right of access to the courts is the life source of the judiciary. It is a necessary and vital condition to the existence of the fundamental rights and the role of the court as an arena in which a person can air his grievances against the government. Negating the right of access to the courts undermines the role of the court as protector of human rights and the fundamental values of the constitution (Aharon Barak **"Unconstitutional Amendments to the Constitution"** Festschrift for **Gabriel Bach** 361, 377 (2011)). The remarks of the Honorable Justice M. Cheshin in the **Arpal Case,** page 629 are apposite in this regard:

> **The right of access to the courts is the lifeblood of the court, the foundation on which the judiciary and the rule of law stand. This distinguishes the judiciary from its two counterparts – the legislature and the executive – these latter initiate matters and act, whether in the realm of legislation or in the realm of action, while the judiciary sits back and waits for people to approach it for its**

> **opinions and decisions […] Blocking the path to the court – whether directly or indirectly – even if only partially, undermines the *raison d'être* of the judiciary, and undermining the judiciary means undermining the democratic basis of the state. Without a judiciary, without review of private and governmental acts, the people will be let loose and the kingdom will be destroyed. Without judicial review, the rule of law will be destroyed and fundamental rights will disappear.**

68. These comments have been made from every side. Even when the Honorable Court established broader restrictions on itself than those that apply today with respect to the standing of petitioners, this was done sparingly, with extreme gravity and out of an understanding of the profundity of the necessity of keeping the doors to the court open. In the words of the Honorable Justice Z. Berenson in High Court of Justice File 287/69 **Meron v. Minister of Labor,** PD 24(1) 337, 362 (1970):

> **Generally, I am in favor of opening the doors of this court widely to anyone who considers himself injured by an act or omission of a public authority or official. If an ordinary person knocks on the doors of the court and seeks entry, the door should not be shut in his face; […] When all is said and done, this court is the most secure and objective stronghold possible for a citizen who has a grievance with the government. As stated, the law has made this role as broad as possible. The role is not subject to any substantive, remedy-based or procedural qualification other than those qualifications that the court deems fit in accordance with its sense of proportionality and responsibility to place on itself […]**

69. **Second**, the amendment to the Basic Law uses the phrase **"person that possesses judicial power pursuant to the law"** in an unusual way. It does not provide that a particular court should or should not act in a particular way. It imposes a direct *in personam* prohibition against any **"person who possesses judicial power,"** namely against the judges themselves rather than the courts as an institution. In this way, Section 15(d1) of the Basic Law deviates from the wording used in other sections of Chapter C of the Basic Law: The Judiciary, regarding the powers of the courts. This is not a question of semantics. It involves a defect that touches upon judicial independence and the independence of the judicial system.

70. The phrase **"person who possesses judicial power"** is unique in Israeli law. It appears in only one other place in the Code of Laws, namely Section 2 of the Basic Law: The Judiciary, which is entitled **"Independence"** and provides: **"With respect to judicial matters, a person who possesses judicial power has no authority other than the authority of the law."**[19] This

[19] The phrases **"holder of judicial power"** (for example, Section 64(b)(3) of the Knesset Law, 5754-1994 and Section 2(5) of the Freedom of Information Law, 5758-1998), **"a person who has been invested with judicial power"** (Section 67A of the Israel Bar Association Law, 5721-1961) and **"an authority that exercises judicial power"** (Section 6 of the Copyrights Law, 5768-2007 and Section 1 of the Commission for Public Complaints against Representatives of the State before the Courts Law, 5771-2016) are used elsewhere in the law. Judicial independence is anchored in other pieces of legislation, such as Section 3 of the Administrative Courts Law, 5752-1992 and Section 184 of the Military Justice Law, 5715-1955. It is evident that the principle of judicial independence runs like a thread through the tapestry of Israeli law,

uniqueness is not by chance. It underpins the axiom of judicial independence and is personally directed at the judges. The only authority that applies to a person possessing judicial power is the authority of the law. Section 15(d1) deviates from this unique authority and adds an additional authority, namely, not to adjudicate "reasonableness." The use of this language therefore seeks to impose a personal authority – and perhaps fear – of another kind on the judges of Israel, in line with their duty to adjudicate matters in accordance with the law.

71. **Third,** the Law provides that a "decision" of the government, prime minister or other governmental minister includes a **"decision to refrain from exercising any power."** In other words, an abstention from exercising a power will now be immune from judicial review in accordance with the reasonableness standard. This amounts to no less than a complete dissolution by the government and its ministers of their duty to exercise administrative power. "A minister will not act if it is right in his own eyes." This is an unlimited license not to comply with the law. Henceforth, any minister may choose not to comply with the law and certainly not to comply with it in line with its purpose by deciding to refrain from exercising a power or deciding not to decide whether to exercise a power. This is a complete perversion of administrative law.

72. Even where a power that is vital to the public interest is at issue, any minister will be able to decide that he does not wish to comply with it. This is in particular if he desires to change or extend the power or to turn it on its head. Any minister will be able to treat the public interest as a slave to his whims since the limitations of the reasonableness standard will not be exercised.

73. Administrative power is given to be exercised. An administrative authority, including the government and its ministers, that refuses to exercise the power given to it, must base such a refusal on the law. It has a perpetual duty to consider the need to exercise its power, and it is prohibited from making a prior decision as to its future position on the exercise of the power (see, for example, High Court of Justice File 3872/93 **Meatreal Ltd. v. Prime Minister and Minister of Religious Affairs,** PD 47(5) 485 (1993) (hereinafter: the **"Meatreal Case"**); Daphne Barak-Erez, **Administrative Law** 201-203 (Vol. A, 2010). Where a mandatory power is at issue, the provisions of Section 15(d1) might connote a total dissolution of an express statutory duty that requires a minister to exercise the power. Even where a voluntary power is at issue, as we know, the authority has a duty to exercise it (High Court of Justice File 2344/98 **Maccabi Health Services v. Minister of Finance,** PD 54 (5) 729 (2000)), and it must do so in accordance with the binding rules of administrative law with respect to the exercise of discretion. Additionally, there are circumstances in which only one alternative for a decision is the reasonable alternative, and the authority is therefore required to choose it, such as, for example, in the Deri-Pinhasi Case (High Court of Justice File 3094/93 **Movement for Quality Government in Israel v. Government of Israel** (1993) (hereinafter: the **"Deri-Pinhasi Case"**); see also: High Court of Justice File 4287/93 **Amiti – Citizens for Proper Administration v. Prime Minister of Israel,** PD 47(5) 441, 469 (1993) (hereinafter: the **"Amiti Case"**): "The broad discretion afforded the prime minister and the

such as substantiates its importance both subjectively from the perspective of the Israeli legislature over the years and objectively as one of the pillars of the democratic system that jealously insists on the independence of the judiciary.

governmental ministers to dismiss a deputy minister becomes, in the circumstances of the present case, a duty"; **Barak-Erez,** pages 219-220)).

74. The law is meaningless if the person possessing the relevant power is allowed to ignore it by choosing not to exercise **"any power"** – even a mandatory power! The outcome whereby the legislature establishes an express provision of law, the executive ignores its duty to execute it, and the judiciary is precluded from reviewing this is unacceptable and unconstitutional. It infringes the principle of legality and the principle of the separation of powers.

75. **Fourth,** the original amendment of the Basic Law: The Judiciary was intended to not only apply to the "government, prime minister or other minister" but also to **"another publicly elected official as prescribed by law."** This addition was removed presumably so as to limit the constitutional damage of the Basic Law. However, it indicates something substantive about the legislature's view of the purpose of the amendment. In the view of the framers of the amendment, the government, prime minister and governmental ministers are **"publicly elected officials,"** and, because they have been elected by the public, it is incumbent on them to govern without restriction and to exercise discretion without judicial intervention.

76. In this context, it is necessary to dwell on a particular axiom. The government and its ministers are not **"publicly elected officials."** They are **public servants and public trustees.** The ministers and the government are not elected by the public in general elections (as opposed to members of the Knesset). The government is the executive branch of the state (Section 1 of the Basic Law: The Government). It holds office by virtue of the confidence of the Knesset and is responsible to it (*ibid.*, Sections 3-4 and 13). The prime minister and every governmental minister must declare: **"I undertake as a member of the government to faithfully safeguard the State of Israel and uphold its laws, to faithfully fulfil my role as a member of the government and to comply with decisions of the Knesset"** (*ibid.,* Section 14).

77. In Chapter D(4) below, we will dwell on the fact that the duty of the prime minister and governmental ministers is therefore a fiduciary duty that is wrapped up in the rule of law, and their powers are given to them by virtue of the law and in accordance therewith. The fundamental principles of administrative law lead to the corollary that a **"public figure is a public trustee"** (High Court of Justice File 1635/90 **Zerjevsky v. Prime Minister,** PD 45(1) 749, 776 (1991)). The public authority is only created to serve the public since everything it has is only entrusted to it as a trustee (High Court of Justice File 142/70 **Shapira v. Jerusalem District Committee of the Israel Bar Association,** PD 25(1) 325, 331 (1971) (hereinafter: the **"Shapira Case"**)).

78. A series of duties derives from this system of trust, including the duty to act reasonably, which is an independent expression of the fiduciary duty and is a derivative of the principle of legality in the sense of the duty to exercise the relevant power in accordance with the empowering law and the objectives that it is intended to realize. An unreasonable exercise of a power is, in this sense, also ***ultra vires*** and is an act that does not comply with the purpose underlying the granting of the power. Be that as it may, the idea that governmental ministers are "publicly elected officials" is

fundamentally erroneous. It is erroneous in its understanding of the subservience of the government to the law and the principle of the rule of law, it is erroneous in its understanding of the separation between the government and the Knesset and the principle of the separation of powers, and it is erroneous in its understanding of the role of the court as the entity empowered to interpret the law and hence of judicial review of the reasonableness of the exercise of the relevant power as an expression of the principle of the rule of law and the separation of powers.

D(2) <u>The standard of reasonableness and its development in Israeli law</u>

79. An extensive survey of the standard of reasonableness, its sources and application, was made in the opinion of the attorney general (Appendix 2 to this Petition, pages 52-58) and the opinion of the legal adviser to the Constitution, Law and Justice Committee dated June 23, 2023 (Appendix 5 to this Petition), and the Petitioners rely on the contents of those. For the sake of good order, a background of the standard of reasonableness as a fundamental standard in the democratic regime of the State of Israel will be briefly set forth below.

80. The standard of reasonableness is one of the cornerstones of administrative law and "as we know, has been one of the grounds of review under administrative law **<u>since the early days of Israeli law,</u>** starting from the 1950s, including with respect to ministerial discretion" (the Honorable Justice D. Barak-Erez in the **Fourth Deri Case,** paragraph 44).

81. The standard of reasonableness originates from English administrative law where, at its inception, it served as a ground of review against bylaws. According to the standard of reasonableness as formulated even then, where bylaws and secondary legislation are so unreasonable that it is inconceivable that a reasonable authority would have enacted them or would have been invested with the power to enact them, the court is justified to intervene. Hence, the standard of reasonableness is, at root, a ground that is substantively connected with one of the most basic grounds of review of the administrative authority – *ultra vires* (a famous judgment in this context is Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223])[20].

82. The standard of reasonableness was adopted in Israel from the English law by virtue of the Order in Council 1922 and was subsequently enshrined in Section 15(c) of the Basic Law: The Judiciary, which empowers the Supreme Court sitting as the High Court of Justice to adjudicate **"matters that it considers require an award of relief for the sake of justice."** In this framework, the High Court of Justice may quash a decision on grounds of unreasonableness if it considers that this is necessary "for the sake of justice" (Yitzhak Zamir, **Administrative Power** 3551 (Vol. E, 2020) (hereinafter: **"Zamir, Vol. E."**)).

83. It is important to note that the standard of reasonableness has always dealt with the question of the **power** of the authority. This was the ground under English law, this is how it was adopted and

[20] In *Wednesbury*, a municipal by-law that provided that anyone under the age of 15 was prohibited from attending a movie theater on Sundays was examined. In the judgment, it was held that relief could be awarded to a petitioner if the decision was "so unreasonable that no reasonable authority could ever have come to it" (*ibid.,* page 234).

developed in Israeli law, and this is how it has remained to this very day (see details in Chapter D(3) below). A decision that is extremely unreasonable is disqualified because the law (and the legislature) **did not empower** the authority to make it. It is a decision made *ultra vires*, i.e., unlawfully.

84. The duty of the administrative authority to act reasonably is also part of its duty as a public trustee (the **Shapira Case,** 331). A trustee has a duty to act reasonably for its principal (Section 10(b) of the Trust Law). As the Israel Democracy Institute stated in Section 93 of its opinion dated March 8, 2023 (Appendix 34 above) **"It is inconceivable that the fiduciary duty of the government to the citizenry should be more limited than the duties of a trustee under private law."** Therefore, the use of the standard of reasonableness is, primarily, a means of enforcing the principle of the separation of powers such that the court supervises the executive branch and ensures that it does not exceed the power allotted to it by law.

85. Some maintain that reasonableness is a vague term. However, therein lies its power since there are situations in which only reasonableness can be an effective or exclusive tool for resolving a problem (**Zamir Vol. E,** 3548; Additional Hearing Before the High Court of Justice 3660/17 **General Association of Merchants and Self-Employed Persons v. Minister of the Interior,** paragraph 57 (published in the Nevo database, October 26, 2017) (hereinafter: the **"Association of Merchants Case"**)). Chief Justice E. Hayut dwelt on this in the **Hanegbi Case,** paragraph 3 of her opinion:

> **The standard of reasonableness enjoys a place of honor in safeguarding fairness and integrity in public governance and also contributes to the rigorous regard for human rights and protection against their infringements by governmental acts that exceed what is proper and necessary… The fact that a legal norm is formulated in abstract terms and is not solidified in a sharp and precise way so that it applies to a defined situation that is known in advance is not alone sufficient to sully that norm. In fact, <u>this is the nature of fundamental norms that seek to cover a whole spectrum of situations that cannot all be precisely foreseen or described in advance</u>… If we wish to regard this as a feature that sullies the standard of reasonableness as a legal norm, we would have to add a long and significant series of legal norms that shares similar features as defective norms such as the principle of good faith and public policy, for example.**

Indeed, like negligence or good faith in private law, reasonableness is also a term that is deliberately left open to interpretation and is a tool for helping fundamental values such as equality of the various branches of law to emerge (High Court of Justice File 2911/05 **Elhanati v. Minister of Finance,** PD 62 (4) 406, 449-450 (2008)).

86. During the first decades of the existence of the State, the standard of reasonableness was used in the same way as prevailed in English law. In this context, secondary legislation – regulations

enacted by ministers and by-laws enacted by local authorities – were quashed on grounds of unreasonableness on the basis that the content of the secondary legislation was **"unacceptable,"** which was **"illogical and intolerable,"** or involved **"manifest injustice."** Unreasonableness, *per se*, led to a holding that the secondary legislation had been enacted *ultra vires* since the legislature had not intended to give the authorities the power to make such decisions (High Court of Justice File 21/51 **Binenbaum v. Municipality of Tel Aviv,** PD 6 357 (1952) (hereinafter: the **"Binenbaum Case"**); see also: Civil Appeal 311/57 **Attorney General v. M. Dizengoff & Co. (Shipping) Ltd.,** PD 13 1026 (1959) (hereinafter: the **"Dizengoff Case"**); Civil Appeal 6/66 **Kalous v. Municipality of Bat Yam,** PD 20(2) 327, 332 (1966); Civil Appeal 492/73 **Speiser v. Israel Sports Betting Board,** PD 29(1) 22 (1974) (hereinafter: the **"Speiser Case"**)).

87. It should be emphasized that, since the inception of the standard of reasonableness in Israeli law, it was only applied to secondary legislation, i.e., ministerial, governmental and local authority decisions. The Honorable Court even made it clear that it was actually more important to apply this standard to ministers and the government in Israel than in England given the **lack of adequate institutionalized parliamentary scrutiny of the government,** as per the remarks of the Honorable Justice M. Shamgar in High Court of Justice File 156/75 **Dakkah v. Minister of Transport,** PD 30(2) 94, 103 (1976) (hereinafter: the **"Dakkah Case"**):

> If this is the direction its development took in the United Kingdom, where there is statutory parliamentary scrutiny over a large portion of the secondary legislation promulgated by governmental ministries, **here, where there is still no such institutionalized parliamentary scrutiny, the application and exercise of such judicial review is all the more important.** According to the guidelines that have been set in the jurisprudence of this court, **the possibility of quashing secondary legislation of any sort on grounds of unreasonableness can be reviewed even if the regulation was enacted by an elected body or a governmental authority such as a minister or the government as a whole.**

88. As the Honorable Justice Z. Berenson made clear in the **Speiser Case:**

> **The jurisprudence of this court enables us to quash secondary legislation of any sort on grounds of unreasonableness even if it was enacted by an elected body or a senior governmental authority, such as a minister or the government as a whole even with the approval of a Knesset committee…** [References]. Nevertheless, it is self-evident that the court will not hurry to quash such secondary legislation on these grounds. The consideration that passes like a thread through these judgments is that, although it is possible to quash secondary legislation on grounds of unreasonableness, it should only be done as a last resort in extreme cases…

89. In additional judgments, the standard of reasonableness has been applied in respect of decisions not necessarily relating to secondary legislation, including ministerial and governmental decisions. *Inter alia*, the standard of reasonableness has been applied to decisions to file or not to file

indictments (see, for example: High Court of Justice File 935/89 **Ganor v. Attorney General,** PD 44(2) 485 (1990); High Court of Justice File 7150/16 **Israel Movement for Reform and Progressive Judaism v. Minister of Justice** (published in the Nevo database, September 21, 2020)); governmental decisions on appointments or the termination of appointments (for example: the **Deri-Pinhasi Case;** the **Fourth Deri Case;** High Court of Justice File 3884/16 **Jane Doe v. Minister of Public Security** (published in the Nevo database, November 20, 2017); administrative decisions that have involved the question of undermining the interests or rights of private individuals taking into account budgetary concerns or other conflicting interests (for example: Appeal from Administrative Petition 5634/09 **Jalal v. Municipality of Jerusalem** (2009), High Court of Justice File 4380/11 **Jane Doe v. Minister of the Interior** (published in the Nevo database, March 26, 2017), High Court of Justice File 8213/14 **Dror v. Minister of Religious Services** (published in the Nevo database, August 15, 2017); High Court of Justice File 3842/18 **Machluf v. Minister of Public Security** (published in the Nevo database, February 19, 2020); High Court of Justice File 3865/20 **Shukrun v. Kiryat Arba Local Council** (published in the Nevo database, October 7, 2020); promotion decisions of the Chief of Staff (for example: High Court of Justice File 1284/99 **Jane Doe v. Chief of Staff,** PD 53(2) 62 (1999)); extraordinary decisions of a transitional government (see, for example: High Court of Justice File 5403/22 **Lavi – Civil Rights, Proper Administration and Encouragement of Settlement v. Prime Minister** (published in the Nevo database, September 22, 2022)) and more.

90. Thus, the Supreme Court has utilized the standard of reasonableness since the establishment of the State to review acts of the executive branch and, in particular, the government and its ministers, to prevent improper appointment of ministers and officials and to protect human and civil rights. This non-exhaustive survey illustrates the potential harm to individual rights and the integrity of the governmental system that could result from the legislation that is the subject of this Petition and how profoundly the foundations of the democracy of the State will be harmed.

91. It is possible to distinguish between two categories of use of the standard of reasonableness in Israeli law. With one type of usage, the court reviews the reasonableness of the administrative decision itself (whether the decision itself leads to an absurd and unacceptable result); while with the other usage, the court reviews the reasonableness of the exercise of the administrative discretion – i.e., whether the legally required weight was given to the considerations relevant to the decision (**Zamir, Vol. E,** page 3547). As will be set forth below, when reviewing discretion, the court puts the principle of the rule of law into effect since, in practice, it reviews whether [the authority] complied with the law that empowered it and the purposes behind that law under the circumstances of the case at hand – the law that empowers [the authority], which is interpreted in accordance with its purpose, is what determines all of the permitted weights and balances that the authority is allowed to choose among at its discretion, and the court enforces this law against the authority and ensures that it has not acted *ultra vires* under the circumstances of the particular case (**Zamir, Vol. E,** page 3593).

92. The court employed both of the above-mentioned categories of use during the first years of the State in constituent judgments that shape and underlie Israeli administrative law. **Abolishing the standard of reasonableness will eradicate one of the foundations of Israeli administrative law and will leave a significant vacuum, which will not always be replaceable using other grounds.**

93. As stated, a prominent example of this can be found in the constituent judgment in the **Kol Ha'am Case.** In that judgment, the court adjudicated an order that had been issued by the minister of the interior by virtue of a section of the Press Ordinance that empowered him to stop the publication of a newspaper **"that may, in the view of the Minister of the Interior, endanger the public peace."** In the framework of this decision, the minister was required to balance between two key relevant considerations – the public peace and freedom of expression. The court reviewed the decision and held that the minister had not given appropriate weight to the consideration of freedom of speech and, as a result, the proper balance between the relevant considerations had not been met. As a result, the court deemed fit to intervene in the decision of the minister and to quash the order that he had issued. The court held that:

> […] The solution must arrive via a consideration of the interests of state security, on the one hand, and freedom of speech, on the other hand, since the elevated social value of the principle that protects the second interest is deserving of special attention and, only when the reality actually requires it, will it be justified to give priority to the first interest (page 881).

94. The **Kol Ha'am** judgment is a milestone in Israeli law. It delineated the appropriate legal method for protecting civil rights and freedom of expression when they conflict with other values. Although the word reasonableness was not expressly stated, in practice, it did implement considerations of reasonableness.

95. Indeed, in the judgment that those behind the legislation cite as the reason therefor – the **Golden Pages Case** – the Honorable Justice A. Barak stated that the Kol Ha'am ruling, like other cases from the early days of the State, was an example where an administrative decision had been quashed on grounds that the pertinent considerations had not been balanced properly and explained that:

> In these cases, the court examined whether the administrative authority had appropriately balanced between the various interests. In most of the judgments, the ground of unreasonableness was not expressly mentioned by name. However, in these cases, the administrative authority had acted in good faith and not arbitrarily, had weighed the relevant factors and refrained from weighing any irrelevant factors. The decision had been mainly defective due to the inappropriate manner in which the relevant factors had been balanced between each other. This is the defect of administrative unreasonableness.

In other words, the ground for intervention on the basis of extreme unreasonableness has always been with us, even if not everyone has always called it by its name.

96. In light of this, a theory was presented in the **Golden Pages Case** for the theoretical basis upon which the previously existent standard of reasonableness had relied, even if only some of the judgments had called it by its name until then (for example, the judgments that we mentioned above). Indeed, **"The court did not create or purport to create a new meaning for the standard of reasonableness or a new ground for review… The court only presented the theory underlying the practice that the court had been exercising since the 1950s"** (**Zamir, Vol. E,** 3359-3360). Incidentally to this, it was emphasized in the judgment that the authority had a "field of reasonableness" at hand, i.e., a whole range of lawful decisions in which the court would not intervene, and that an administrative act could only be quashed if material or extreme unreasonableness that rendered the act unlawful was at issue. It was also clarified that the examination whether a decision deviated from the field of reasonableness should be made on the basis of the law that created the power. In other words, the field of reasonableness is the field of decisions that the authority is empowered to make in accordance with the law as interpreted in accordance with its purpose. For the avoidance of doubt, it was clarified in this ruling that extreme unreasonableness did not only constitute incontrovertible evidence of the existence of other grounds for quashing the decision, such as extraneous considerations or discrimination, but stood on its own two feet as a ground for quashing the decision as unlawful.

97. Since the judgment in the **Golden Pages Case,** the ground has been utilized in dozens of Supreme Court decisions that have reviewed the reasonableness of the relevant administrative decision, including in cases in which no other ground was sufficiently effective to uphold the judicial review. In the words of Justice Procaccia:

> In accordance with the notion of administrative law in recent generations, the standard of reasonableness has been a central and vital tool of judicial review of the administrative authority and lies at the heart of protection of the individual and the public against the arbitrariness of the government.
>
> (**Chaim Rimon Case,** page 486).

98. Indeed, generations of Supreme Court justices have repeatedly made it clear in the case law that the space for the intervention of the courts in cases in which the authority has acted unreasonably is limited. It has been made clear that quashing an administrative decision on grounds of reasonableness or intervening therein may only be done in a measured and cautious manner, and that the court does not substitute the discretion of the authority with its own discretion (see, for example: High Court of Justice File 2324/91 **Movement for Quality Government v. National Planning and Construction Council,** PD 45(3) 678, 688 (1991)). In this context, it has been ruled that there will not be judicial intervention in administrative decisions when there has been a general deviation from the field of reasonableness but only when the decision is tainted by "material" or "extreme" unreasonableness (see, for example: High Court of Justice File 1985/90 **Fertilizers &**

Chemicals Ltd. v. Municipality of Kiryat Ata, PD 46(1) 793, 802-803 (1992)). Moreover, it has been held in the case law that the extent of the field of reasonableness is not uniform and varies depending on various factors such as the nature of the administrative authority making the decision and the nature of the decision. Thus, for example, it has been held that the field of reasonable decisions will be broad when they involve political considerations or are made by professional staff (see, for example: **Chaim Rimon Case,** Section 22 of the opinion of Justice Procaccia; High Court of Justice File 3017/05 **Hazera (1939) Ltd. v. National Planning and Construction Council,** Ministry of the Interior, paragraph 38 (published in the Nevo database, March 23, 2011)). Moreover, it has been held that the more senior the administrative authority that makes the decision, the more limited the scope of the judicial review of the decision will be. It should be noted further that, in many cases in which it has been found that there has been a deviation from the field of reasonableness resulting from a failure to weigh all of the relevant considerations, the court has remanded the issue for deliberation by the authority so that a new decision can be made and, as stated, it has refrained from stepping into the shoes of the authority and making a decision in its place (see, for example: Appeal from Administrative Petition 4821/21 **Jane Doe v. Minister of the Interior** (published in the Nevo database, November 29, 2022)).

99. These remarks are not made insincerely. Thus, for example, <u>in the last 10 years</u>, <u>only 19 judgments</u> have been entered in which a petition against acts by a member of the "elected branch" (including the head of a local authority or a local council) has been granted fully or partially by virtue of the standard of reasonableness (expressly or impliedly) (see the document served by the attorney general on the Constitution, Law and Justice Committee dated July 4, 2023, Appendix 6 to this Petition). It should be noted that this limited figure does not illustrate the number of unreasonable decisions that were not made in the first place solely by virtue of the existence of judicial review against them, i.e., by virtue of the existence of the standard of reasonableness in administrative law.

100. Recently, the Supreme Court heard petitions that were filed against the appointment of MK Aryeh Deri as a minister in the 37th Government of Israel a short time after he had received another criminal conviction (**Fourth Deri Case**). In the judgment, the Honorable Chief Justice held that **"There is no escaping the determination that the failure to remove Deri from his post deviates from the field of reasonableness to an extreme degree,"** with Deputy Chief Justice Vogelman and the Honorable Justices Amit, Baron, Grosskopf, Willner and Kabub concurring with her decision. It should be noted that the Honorable Justices Barak-Erez, Mintz and Stein did not rule out use of the standard of reasonableness but found a different way ("judgment estoppel") to quash the appointment. It therefore transpires that the Supreme Court, sitting as a panel of 11 justices only, recently needed the standard of reasonableness and affirmed that its use is necessary in cases of improper appointments – this includes justices who consider that use of the standard should be reduced (see and compare: High Court of Justice File 8076/21 **Panel of Judges for the Award of the 5781 Israel Prize for Computer Science Research v. Minister of Education,** paragraph 52 of the judgment of the Honorable Justice Willner (published in the Nevo database, March 29, 2021)).

101. It can only be assumed what those responsible for the amendment to the Basic Law: The Judiciary have in mind and what appointments they wish to immunize against judicial review. It can only be asked, if the government appoints a particular minister tomorrow under circumstances that amount to **"An exceptional and extreme case that leaves no choice but for intervention in the decision to appoint him as a minister in the government, notwithstanding the restraint and stringent criteria that must be applied to judicial review in this area,"** as per the remarks of the Honorable Justice Willner in paragraph 15 of her opinion in the **Fourth Deri Case** – who will save the Israeli public from such an appointment and on what ground?!

D(3) <u>The abolition of the standard of reasonableness exempts the heads of the executive branch from complying with the law that empowers them and thereby eviscerates the rule of law and the separation of powers</u>

102. The abolition of the standard of reasonableness with respect to ministerial and governmental decisions eviscerates both the <u>rule of law</u> in Israel and the <u>separation of powers</u> in many ways.

103. As we know, the first and most basic import of the rule of law is that: **"The governance of the State is given over to the law and not a person, even the person who is the head of state.** Therefore, **everyone is subservient to the law, must honor the law and is required to comply with the law"** (Yitzhak Zamir, **Administrative Power** 83 (Vol. A, 2010) (hereinafter: **"Zamir, Vol. A"**)).

104. The principle of the rule of law states, therefore, that **the law – and not the executive branch – is the sovereign.** The legislature, the Knesset, as the representative of the people, which is the sovereign, creates the law. **The executive authority is subservient to the law and does not control it and is only empowered to act in the framework of the scope of the power granted to it by the law.** In the field of administrative law, this principle is also known as **"administrative legality"** and is a critical component of the principle of the rule of law (**Zamir, Vol. A,** 83; High Court of Justice File 11163/03 **High Monitoring Committee for Arab Affairs in Israel v. Prime Minister of Israel,** PD 61(1) 1, 42 (2006) (hereinafter: the **"Monitoring Committee Ruling"**)).

105. The executive branch is therefore subservient to the law and, first and foremost, is subservient to the laws enacted by the Knesset. This also stems directly from the principle of the **separation of powers.** A core component of the separation of powers is the separation between the Knesset, which has the power to enact the law, and the government, which is subservient to the law and required to implement it. The purpose of this principle is to prevent the concentration of power in one place – a concentration that would render the relevant entity into an autocratic ruler. Therefore, **<u>a government that can overcome the provisions of the law frustrates both the principle of the rule of law and the principle of the separation of powers</u>** (**Monitoring Committee Ruling,** 55-58. See also: 910/86 **Ressler v. Minister of Defense,** PD 42(2) 441, 518 (1988) (hereinafter: the **"Ressler Case"**).

106. The subservience of the government to the law is assured by the **court.** The function of the court is to **ensure that the law is actually observed.** The court is the entity that enforces the provisions of the law against the government and scrutinizes whether **the government has exceeded the mandate given to it by the legislature.** In this way, it ensures that both the rule of law and the separation of powers will be upheld. In doing this, it also interprets the law. Indeed, the court is the competent interpreter of the law created by the Knesset. This is also part of the principle of the separation of powers.

107. Thus, **both the principle of the rule of law and the principle of the separation of powers require the government to comply with the laws of the Knesset as they are interpreted by the court. If this is not the case, the linchpin of the democratic regime in Israel will be fatally harmed.**

108. The abolition of the standard of reasonableness with respect to those who head the executive branch means, by definition, that a large space has been created in which the executive branch is free to act **other than in compliance with the law.** In the absence of a duty of reasonableness, the executive authority will find itself **exceeding the power** that the law has entrusted it with. Such abolition does not only "harm" the principle of the rule of law and the principle of the separation of powers, but **materially eviscerates them in a manner that goes to the root of the matter.**

109. To explain why this is so, it is important to dwell upon two critical aspects of the standard of reasonableness in Israeli law. Notwithstanding their importance, these aspects are almost entirely absent from the public discourse. The time has therefore arrived to return them to the front of the stage and to put them in the spotlight.

D(3)1 Reasonableness is legality is power

110. As we will show below, the function of the standard of reasonableness is to ensure that the executive branch exercises its discretion in accordance with the law **on whose basis it acts** and does not exceed the **function and objectives intended by the law and the legislature.** Only in such a case will it be acting **within the boundaries of its power** by virtue of a Knesset law. In fact, this is the fundamental nature of this standard.

111. A holding that a decision is unreasonable to an extreme degree is a holding about t**he correct interpretation of the law that creates the relevant power.** In practice, it determines the **scope of the power** of the authority in accordance with the binding interpretation of the law by the competent interpreter.

112. An exemption from the standard of reasonableness therefore negates the subservience of the authority to the substantive restrictions that the law imposes on its discretion. It is a permanent license not to comply with the law that creates the relevant power as interpreted by the competent interpreter. It is a blank check to abuse powers other than for the purposes for which they are granted by the law. It is an unlawful act that falls outside of the power of the authority. **A lack of reasonableness is a lack of power.**

113. As has already been demonstrated in this Petition, these points were made clear from the dawn of the appearance of the standard of reasonableness in Israeli law, and they are also true today. While it is customary to categorize and distinguish between "discretionary" laws and "formal power" laws to make life easier for jurists, in practice (as we will show) these laws – including the standard of reasonableness – establish the boundaries of the relevant power from a legal perspective. At issue is a binding interpretation of the law that creates the relevant power that is formulated in accordance with the rules of statutory interpretation and establishes the boundaries of the power thereunder. This was true in the past and remains true today.

114. Thus, for example, Justice Berenson made it clear in the **Dizengoff Case** that an extremely unreasonable decision is unlawful since it falls outside of the scope of the power according to the proper interpretation of the empowering law:

> What is the interpretation of this test of reasonableness? […] If the court finds that the secondary legislation is so illogical and intolerable that a sentient person would not dream that a reasonable minister could enact it, then it will concur with the statement that the legislature **never intended to invest the minister with such a power.** The secondary legislation is inconceivable and **falls the outside of the scope of the power.**

115. Similarly, in the **Binenbaum Case,** the Honorable Court held, per Justice Agranat, that even if municipalities are empowered to enact retroactive by-laws, they are not empowered to do so if the decision "is illogical or unacceptable… to the extent that sentient people could not justify it." In such a case, "the court is forced to say: **the legislature never intended** such a by-law to be given retroactive effect; **the provision that leads to this outcome is illogical and should be deemed null and void.**"

116. Justice Shamgar also made this clear in the Dakkah Case:

> A regulation that is unreasonable in a manner that goes to the root of the matter should be deemed to be in **excess of the power** of the person that enacted it and should therefore be deemed null and void…
>
> The excess in power in such a case might be manifest in the enactment of a regulation whose provisions do not, according to their simple reading, fall squarely within the empowering section of the statute, **and the excess in power might be manifest in the unreasonableness of its content since the assumption is that the legislature did not intend to grant a power to enact unreasonable regulations. If such a defect is discovered, the enactment of the regulation is deemed to be *ultra vires*.**

117. See also the remarks of Justice H. Cohn in Civil Appeal 780/70 **Municipality of Tel Aviv-Jaffa v. Sapir,** PD 25(2) 486, 494-495 (1971) and the remarks of Justice Bekhor in High Court of Justice File 310/80 **Dror Hadarom Development Co. Ltd. v. Municipality of Tel Aviv-Jaffa,** PD 35(1) 253, 262 (1980):

> From the perspective of the validity of the provisions of the secondary legislator, **the test of unreasonableness is a tool for examining the will and intention of the sovereign legislature that granted the power to the secondary legislator.**

118. This is how Israeli law incorporated the standard from the English law at the outset. There, too, the standard established the scope of the power of the administrative authority in the form of interpreting the law that created the power, on which see **Zamir, Vol. E,** page 3548.

119. Indeed, this is the law to this very day. As Prof. Zamir only recently explained (**Zamir, Vol. E,** 3851-3852, 3854):

> Options that fall outside the field of reasonableness are actually options that are **unlawful** or, to put it differently**, are decisions that the law, according to its intention, did not empower the authority to make** and in which the court therefore has jurisdiction to intervene. However, it will refrain from intervening in the question whether the decision is sensible or effective **as long as the decision remains within the scope of the power of the authority**… From a legal perspective, the boundaries of reasonableness in respect of a particular matter are not determined by the competent authority or by an organ of the authority. They are also not determined by the fictitious character of the reasonable person. **They are determined by the law that creates the relevant power as interpreted by the court.** They primarily reflect the intention of the law. Accordingly, **the fictitious character of the reasonable person is essentially an incarnation or expression of the intention of the law.**
>
> In other words, **when the court rules that a particular decision is unreasonable, it is saying on the basis of an interpretation of the law that creates the relevant power, including the purposes behind the law, that the law did not intend to empower the authority to make the decision that it did.**

120. The standard of reasonableness has thus established the scope of the legal power of the administrative authority to this very day. A lack of judicial review applying the standard of reasonableness to the decisions of the most senior and important individuals in the executive branch means allowing them to violate the law that empowers them as interpreted by the competent interpreter. It means allowing them to contravene Knesset laws in accordance with their authorized interpretation. This – truly by definition – frustrates the principle of the rule of law. It removes the yoke of the law from the necks of the members of the executive authority. It enables them to act in excess of the scope of the power granted to them by the law established by the Knesset and interpreted by the court, and thereby frustrates the principle of the separation of powers.

121. Indeed, the Honorable Court has made it clear in words that could not be more explicit that the subservience of the government to the standard of reasonableness is vital to uphold the principle of the rule of law in a democratic state (the rule of law both in its formal sense and in its substantive

sense), while emphasizing that reasonableness defines the scope of the legal power of the government, i.e., the very legality of its acts:

> Since we have reached the conclusion that the decision falls an extremely long way outside of the field of reasonableness and is tainted by illegality, there is no escaping declaring it void. **The exalted status of the government as the executive branch of the State… cannot give it powers that are not given to it by law.** Any governmental authority might make an unreasonable decision that will be quashed by the court, and the government is not an exception to this rule… Indeed, **herein lies the power of a democracy that respects the rule of law. This is the formal rule of law according to which all governmental authorities, including the government itself, are subservient to the law. There is no authority that is above the law; there is no authority that is allowed to act unreasonably. It is also the substantive rule of law** according to which a balance must be struck between the values, principles and interests of the democratic society, with the government being empowered to exercise discretion as to the manner in which to strike the proper balance between the appropriate considerations.
>
> (High Court of Justice File 6163/92 **Eisenberg v. Minister of Construction and Housing,** PD 47(2) 229, 274 (1993)).

See also: **Meatreal Case,** paragraph 9 of the opinion of Justice T. Or.

122. If the court is deprived of the power to adjudicate the unreasonableness of an administrative decision, then it is deprived of the possibility of interpreting the law and determining whether or not the authority has violated it, whether or not it has acted *intra vires*. In other words, depriving [the court] of the power to adjudicate the reasonableness of an administrative decision is akin to depriving it of the power to scrutinize the executive branch so as to ensure that it is acting *intra vires*. It frustrates the principle of the separation of powers twice over – once because, *de facto*, the executive branch will be exempt from the yoke of the law of the Knesset, and again because the executive branch will be exempt from the yoke of the scrutiny of the court.

D(3)2 The standard of reasonableness continues to establish the scope of the legal power of the authority and, since the Golden Pages Case, it goes even further in ensuring that the administrative decision accords with the statute and the law

123. The frustration of the principle of the rule of law intensifies and worsens in light of the sharpening of the standard of reasonableness over the years. Initially, as we have seen, the standard of reasonableness defined the scope of the power of the authority on the basis of the interpretation according to which the legislature did not intend to empower the authority to act unreasonably to an extreme degree. The rule that was established in the **Golden Pages Case** refined this rule and provided more precise tools to identify when the decision of the authority is so discordant with the

empowering law that it falls outside of the boundaries of the power prescribed therein in light of its unreasonableness.

In other words, the standard of reasonableness protects the principle of the rule of law better today than in the past. It ensures that the executive branch will act within the framework assigned to it by the law.

124. The way in which the standard of reasonableness has been doing this since the **Golden Pages Case** is by a punctilious examination of the **purpose and interpretation of the empowering law** and adopting the same theoretical basis that has always underpinned the grounds [of review] being the prohibition on taking into account extraneous considerations and the duty to take into account all of the relevant considerations.

125. We will clarify what we mean by this. As we know, Israeli administrative law has three related grounds: The prohibition on taking into account extraneous considerations, the duty to take into account all of the relevant considerations and the standard of reasonableness. These three grounds complement each other. They all ensure that the decision of the administrative authority will **flow** from the relevant considerations and will **accord** with them. All of them are intended to ensure that the decision of the authority will be based on the relevant considerations and on those alone. Therefore, the authority is prohibited from **weighing** considerations that are irrelevant; it has a duty to **take into account** all of the relevant considerations; and the decision must be **based** on them and also **accord** with them.

126. The need to ensure that an administrative decision flows from the relevant considerations and realizes them is, in fact, the need to ensure that **the authority will uphold the law that empowered it, will comply with it and will exercise its power for the purposes intended by the law.** Therefore, both the relevant considerations and the balance among them flow from **the empowering law based on the purposes and the binding interpretation thereof.**

127. With respect to the ground that prohibits taking into account extraneous considerations, this has actually always been the requirement **for the authority to comply with the empowering law.** The relevant considerations flow from the empowering law since the authority must exercise its power for the purposes intended by the law and the legislature and not for extraneous purposes. The boundaries of the discretion of the authority are a legal requirement, the entire essence of which is the exercise of the rule of law by the governmental authorities so that the powers granted by the law will be exercised with a view to realizing the law and the purposes thereof. It is based on the rule that **"Even the most absolute of discretions must restrain itself to the framework of the law that gave it life… This discretion must be exercised with a view to realizing the purposes of the legislation from which their power derived"** (High Court of Justice File 742/84 **Kahana v. Speaker of the Knesset,** PD 39 (4) 85, 92 (1985)). Therefore, as has been held more than once:

> Governmental discretion must take into account those considerations that fall squarely within the law empowering it to exercise discretion. **A consideration that**

> **falls outside of the purposes of the empowering law is an extraneous consideration** and is therefore disqualified, and the governmental authority may not take it into consideration.
>
> Moreover, **the governmental authority does not have the freedom to shape the purposes for which it may exercise its discretion for itself. Discretion that is exercised by virtue of the law must exist within the framework of the purposes established by the law and within that framework alone.**
>
> (High Court of Justice File 953/87 **Poraz v. Mayor of Tel Aviv-Jaffa,** PD 42(2) 309, 324 (1988) (hereinafter: the **"Poraz Ruling"**). See also: High Court of Justice File 5016/96 **Horev v. Minister of Transport,** PD 51(4) 1, 34 (1997)).

128. Since a consideration is only relevant if it stems from one of the purposes of the empowering law, there must always be an **interpretation** of the empowering law and its purposes must always be identified. The purpose might be **particular** to the specific law or might be a **general purpose** that the law is intended to realize on the basis of the (rebuttable) interpretive presumption that every piece of legislation is intended to promote this general purpose. In other words, while it is necessary to have regard for the fundamental principles of the legal system, human rights and so forth, when identifying the relevant considerations, this is because they form part of the **purpose of the empowering law** and impinge on its interpretation (**Poraz Ruling,** 326; High Court of Justice File 77/02 **Ma'adanei Aviv Osovlensky v. Council of the Chief Rabbinate,** PD 56(6) 249, 275 (2002)).

129. To emphasize, the considerations flowing from the purpose of the law limit the power of the executive branch even if they are not expressly mentioned in the law as those for which the power must be exercised. This Honorable Court made it clear decades ago that there is no absolute discretion and that all discretion is subject to the considerations that flow from the purpose of the legislation, even if they are not expressly established in the law. In this regard, **"There is no fundamental difference between a case in which the purpose is expressly specified by the legislature as being the purpose for which the power at issue is intended to be used and a situation in which the purpose is implied"** (High Court of Justice File 241/60 **Kardosh v. Registrar of Companies,** PD 15 1151, 1162 (1961). In both cases, the identification of the relevant considerations constitutes a **binding interpretation of the empowering law, which defines the boundaries of the power of the administrative authority.**

130. These fundamental principles, on which the ground of extraneous considerations has always relied, is now also the basis for the standard of reasonableness. Since the **Golden Pages Ruling** (and, in fact, already since the **Dakkah Case**), it is clear that, like the relevant considerations, the boundary of the possible ways of balancing among them (the "field of reasonableness") flows from the law and is examined on the basis of the purpose thereof. Both the considerations and the balance among them are intended to ensure that the administrative authority acts in accordance with the empowering law, i.e., *intra vires*.

Therefore, while the standard of reasonableness has always existed and has always defined the boundaries of the legal power, the method of identifying these decisions that was presented in the **Golden Pages Ruling** only tightened the link between them and the empowering law and thereby further assured that the standard of reasonableness would implement the rule of law.

131. Indeed, in the **Golden Pages Ruling,** it was made clear that, like the relevant considerations, the boundary of the possible ways of balancing among them (the "field of reasonableness") is derived from the empowering law. The balance that is struck among the various interests when the specific decision is made, flows from the empowering law and the balance prescribed by it. The balance is lawful ("reasonable") if it is made in accordance with the purpose of the empowering law and implements it. The "field of reasonableness" is nothing more than the field of discretion **granted by the law** to the authority as interpreted by the court.

132. In this regard, we will refer to the incisive remarks of Prof. Yitzhak Zamir (**Zamir, Vol. E,** 3576-3579):

> The organ of the authority acts on behalf of the authority **and is required to act as the authority is required to act, in other words, in accordance with the law: not only in accordance with the language of the law but also in accordance with the purposes of the law,** which also include the basic values of the system…
>
> In other words, the organ of the authority must give every pertinent consideration the proper weight and strike the proper balance between the considerations, not in accordance with a particular social outlook or the personal inclination of the organ but **in accordance with the purposes of the empowering law** and the circumstances of the relevant case. **This is required in accordance with the fundamental principles of administrative legality,** legal certainty and proper administration.
>
> The same is true of the court when it reviews the discretion of the authority: It determines the proper weight of a particular consideration and the proper balance between the considerations, for example, the proper balance between the public peace and freedom of expression, not in accordance with a subjective test, i.e., the social outlook or personal inclination of the judge, but in accordance with an objective test, **namely the purposes of the empowering law** and the circumstances of the relevant case.

133. Prof. Zamir makes additional remarks that are **extremely important for the present case** (**Zamir, Vol. E,** 3580-3581):

> Although it is appropriate to require a civil servant to act in accordance with the purposes of the empowering law and the circumstances of the relevant case, is this really a requirement of reasonableness? The requirement of reasonableness in the accepted sense is a requirement of common sense, logic or wisdom. **However, the requirement for the authority to act in accordance with the purposes of the**

> **empowering law and the circumstances of the case is not a requirement of reasonableness in this sense but a requirement of law: a requirement that the authority complies with the law, which primarily depends on the interpretation of the law. The court determines what the purposes of the empowering law are in accordance with the rules of interpretation,** and, in light of these purposes, what weight should properly be given to the pertinent considerations and, as a corollary of this, what the proper balance is among the considerations in light of the circumstances of the case. Therefore, **where an administrative authority gives improper weight or strikes an improper balance, it can be said that it has made a legal error.**
>
> […]
>
> **It is important to understand this test properly** [the reasonable authority test – the undersigned]: **It states that the authority must give every consideration the proper weight and strike the proper balance among the considerations in accordance with the purposes of the empowering law and the circumstances of the relevant case,** and this is adequate without having to delve deeply into the supposed thought processes of the fictitious character known as the reasonable person.

134. Obviously, these comments were made in the **Golden Pages Ruling** itself in clear words – words that the critics of reasonableness tend to ignore. It was made clear in that case that the weight that the authority must give to each consideration is **"The weight required in accordance with the interpretation of the legislative norm that the administrative authority is executing."** The field of reasonableness (the scope of the discretion granted by the law) is also based on the fact that, "**based on the interpretation of the law, a 'field of reasonableness' is likely to be created** whereby every relationship among the various interests that enters that field will **fall within the legislative framework prescribed by the legislature.**" This is because "the administrative authority must balance the various interests **in the framework of the general norm prescribed by the legislature**" (*ibid.*, 445). It was also made clear in the Golden Pages Ruling that reasonableness varies depending on the empowering law since it flows from the interpretation of that law in accordance with its purpose: "The proper balance is not an absolute matter but is a matter that **varies from one piece of legislation to another** since the reasonableness of the balance is measured by its potential to **realize the legislative purpose** that faces the administrative authority" (*ibid.,* 447).

135. Thus, the standard of reasonableness therefore ensures even now – and more precisely than in the past – that the authority **"will comply with the law,"** as per the remarks of Prof. Zamir above. It realizes the important rule according to which the power of the authority is limited by the law that it is intended to realize.

136. It is important to note that the greater the scope of the administrative discretion and the greater the number of fields governed by the administration in place of the legislature, the **more critical** the standard of reasonableness becomes. According to the principle of the separation of powers, the fundamental balance of interests must be determined by parliament in the framework of the general law (High Court of Justice File 4491/13 **College of Law and Business v. Government of Israel,** PD 67(1) 177, 202-212 (2014)). Giving the executive branch broad discretion creates a real democratic deficit and turns the executive branch into a legislative branch (in addition to the fact that it opens the door to arbitrary, personal or political decisions). Therefore, the need to ensure that administrative discretion is exercised in accordance with the purposes of the empowering law and the fundamental principles of the system is **especially necessary.**

137. Prof. Yoav Dotan has dwelt upon the damage to the principle of the separation of powers in the modern administrative state (damage that the standard of reasonableness is critical in limiting) stating that, although the traditional approach is that the public administration does not have significant discretion since the Knesset creates laws, the court interprets them and the public authority only implements them, the reality in the modern state is the reverse: In the modern administrative state, there is an "operative need for a broad grant of powers of action, in general, and discretionary powers, in particular, to every administrative authority" (Yoav Dotan, **Judicial review of administrative discretion,** Vol. A 323-328 (2022)). In light of the extensive grant of powers to the administrative authorities, the importance of judicial review using the standard of reasonableness only becomes sharper.

138. As explained by Prof. Zamir, **"This situation does not adequately ensure that the principal of the rule of law will be upheld. This principle, which accepts the reality of administrative discretion, requires such discretion to be guided and scrutinized"** (Yitzhak Zamir, "Administrative Power" **Law and Governance** A 81, 90 (1992)). In light of the breadth of the discretion granted to the administration today and the reduction of the power of parliament, the need to ensure that the administration indeed acts in accordance with the law and realizes it intensifies. This is precisely for what the standard of reasonableness is meant.

139. This is also the place to mention that, since the standard of reasonableness is used to review the legality of the acts of the administration, the legislature can change the case law by enacting an empowering law that expressly clarifies the scope of the relevant power and the purposes of the legislation. Such a law will be subject to constitutional, but not administrative, review. This occurred, for example, after the **Golden Pages Case,** when the Knesset enacted the Mandatory Tenders Law, 5752-1992. In other words, **the standard of reasonableness is not a tool for making the world of the values of the Knesset submit to the world of the values of the court. Not at all.** The Knesset is always allowed to enact a new empowering law that will reflect its values. **What cannot be allowed is for the executive branch to do whatever it wishes, to violate the law and the purposes thereof and to become the *de facto* legislature** without the orderly legislative process of the legislative branch and without judicial review.

140. Finally, **the abolition of the standard of reasonableness actually means that a fundamental element of the principles of the rule of law and the separation of powers has been frustrated insofar as concerns the heads of the executive branch. It enables them to exercise powers by virtue of the law, but other than in accordance with the empowering law and other than in realization of its purpose, in other words, to exceed their powers. It actually creates an exemption from subservience to the law of the Knesset as interpreted by the competent interpreter. It enables government to act unlawfully on a permanent basis.**

D(4) The abolition of the standard of reasonableness actually means the abolition of the duty to act reasonably

141. As set forth above, in a democratic state, the people are the sovereign. The government and its employees act – faithfully – for the entire public and not for themselves. Everything that is entrusted to the administrative authority, and the government in particular, is done so **in trust for the purpose of serving the public.** In the words of Justice H. Cohn:

> The individual authority is not like the public authority, since the former acts for itself, if it wishes it provides and if it wishes it refuses, while the latter is created entirely for the sole purpose of serving the public and has nothing of its own. **Everything that it has is entrusted to it as trustee and, in and of itself, it has no rights or duties additional to, or different and separate from, those that flow from this trust relationship or that are granted to it or imposed upon it by statute.**
>
> (**Shapira Case,** 331).

142. Therefore, the government does not work for itself but for the public, and it must discharge its functions faithfully for the public. This is a basic legal fact (High Court of Justice File 492/79 **John Doe Co. v. Ministry of Defense,** PD 34(3) 706, 714 (1980) (the Honorable Justice A. Barak). The duty of the government **to act reasonably** toward the public and the individual is derived from its fiduciary duty.

143. As stated above, the fiduciary duty of the government is also prescribed in the Basic Law: The Government. Thus, Section 3 of the Basic Law provides that "The government holds office by virtue of the confidence of the Knesset" (which, as stated, holds office by virtue of the confidence of the public). Once the Knesset has expressed confidence in the government, the prime minister, governmental ministers and deputy ministers undertake **"to faithfully safeguard the State of Israel and uphold its laws, to faithfully fulfil my role as prime minister/a member of the government/deputy minister and to comply with decisions of the Knesset"** (Section 14 and Section 25 of the Basic Law: The Government, respectively).

144. The government and its ministers are public servants (which would be true even if they were "publicly elected officials"). They serve in their roles by virtue of and for the public confidence. This means that the duty of the government to act reasonably, like the duty of every administrative

authority to act reasonably, is part of its duties as public trustee. This was made clear, for example, in the **Amiti Case,** pages 461-462 (the Honorable Justice A. Barak):

> Indeed, the government, the prime minister and each minister are public trustees. They have nothing of their own. Everything they have, they have for the public […] **Derived from this fiduciary duty is the rule – a general rule that applies to every governmental authority, including the government, prime minister and ministers – that the discretion granted to a public authority must be exercised fairly, honestly, for relevant considerations only and reasonably.**

See also: High Court of Justice File 840/79 **Israel Center for Contractors and Builders v. Government of Israel,** PD 34 (3) 729, 743-744 (1980) (the Honorable Justice A. Barak); Civil Appeal 7726/10 **State of Israel v. Machlev,** paragraph 29 (published in the Nevo database, October 16, 2012) (the Honorable Justice Y. Danziger); High Court of Justice File 6150/22 **Datz v. Israel Defense Forces,** paragraph 21 (published in the Nevo database, September 19, 2022 (the Honorable Justice A. Stein).

145. These points are almost self-evident in light of the use of the standard of reasonableness as a common criterion for reviewing the exercise of the discretion of officeholders, whoever they may be. The concept of "reasonableness" is an expression of the varying and rich circumstances of life that means that it is impossible to foresee all of the possible scenarios in which a given power will be exercised. Therefore, the concept of reasonableness is used extensively in Israeli law. It is used in different forms in all of the fields of law although its meaning and analysis in each field is different.

146. Moreover, the duty of a trustee to act reasonably for his principle is expressly prescribed in the Trust Law: **"In discharging his functions, the trustee shall act with the faith and diligence that a reasonable person would exercise under the same circumstances"** (Section 10(b)). It therefore transpires that, in light of the provisions of Section 15(d1) of the Basic Law: The Judiciary, the fiduciary duty that applies to the government is more limited than the fiduciary duty that applies to any other trustee.

147. **The abolition of the standard of reasonableness as a ground for judicial review actually constitutes a *de facto* exemption from the duty to act reasonably.** In this way, the government (with the approval of the Knesset) has divested itself of one of its most basic duties to the people. The government is upending the basic constitutional structure according to which the government acts for the public. At the very least, this represents a regime change (which is in addition to the other far-reaching changes that the government has declared it intends to establish).

148. The sweeping exemption from the duty to act reasonably that has been given to the government is many times worse under circumstances where the Knesset has never enacted or established the collective duties that apply to the government when exercising its powers. In the absence of general regulation of the *modus operandi* of the government (and its ministers), the standard of

reasonableness is the main duty that applies today to governmental acts. The government and the ministers are key actors in the setting of policy and in decisions of broad public importance. A large part (at the very least) of the *modus operandi* of these actors is not governed by legislation at all. Thus, for example, many decisions are not published and the process by which these decisions are made is certainly not published. Similarly, no criteria have been established for implementing the process. This is a fundamental defect in the system of governance in Israel, which the application of the standard of reasonableness is intended to fix, if only partially.

149. Thus, for example, the issue of the appointment and dismissal of the attorney general, an issue that is critical for the rule of law, has never been regulated by legislation. The standard of reasonableness has remained a key ground for reviewing the legitimacy of the appointment and dismissal. Simply, the appropriate amount of time for filing a criminal indictment by the State, which is a critical issue for protecting the rights of suspects, has never been prescribed or regulated. The standard of reasonableness has remained a key ground for reviewing this issue.

150. The abolition of the standard of reasonableness without the concurrent establishment of a process for regulating governmental and ministerial decisions will clearly be damaging to the public interest with respect to all of the many issues for which no express criteria have been established by which the government and ministers are required to make decisions in respect of them.

D(5) Abolishing the reasonableness standard severely detracts from the judicial review of the government and the right of access to the courts

151. From a purely legal standpoint (in contrast to the practical significance), the abolition of the reasonableness standard as a standard for judicial review does not abolish **the very obligation** for the authority to act with reasonableness. However, under that assumption, the meaning of Section 15(D1) is that a private individual, who is harmed by the making of unreasonable administrative decisions that breach the duty of reasonableness, cannot apply to the courts and cannot win a remedy against the administration.

152. What this means is that, notwithstanding the existence of a law (the duty of reasonableness), there is no effective ability to enforce it on the government. With the use of the phrase "will not hear a case," Section 15(D1) of Basic Law: The Judiciary applied a sweeping lack of justiciability, and, in addition, detracted from the right of access to the courts. This, then, amounts to the creation of a new area of governmental action – an area in which acts can be performed in contravention of the law, with no supervision and no judicial enforcement.

153. A sweeping exemption from judicial review of the upholding of the law – a law that still exists – shakes the principles of separation of branches and the rule of law. Judicial review is an essential component of **separation of branches**. With no judicial review, the mechanism of checks and balances, which is critical to the democratic identity of the State, cannot exist. Basically, the principle of separation of branches means that the judicial branch is required to review and examine the acts of the other branches (and especially of the executive branch), and to enforce the law upon them. An exemption from enforcing the law, in practical terms, also means permission to violate

the law and to act in contravention of the law, and, therefore, it also frustrates the principle of **the rule of law**. As we know, **"where there is no judge, there is no law"** (High Court of Justice File 2/80, **Batt v. Minister of Religious Affairs**, PD 34 (3) 144, 146 (1980)). Therefore, an appropriate wording of the law should refer to the way in which the court exercises its jurisdiction, and not to the total inapplicability of jurisdiction.

154. In addition to the foregoing, this exemption also detracts from the right of access to the courts – that is, a person's right to apply to a court in order for it to enforce the law. Where public laws are concerned, the right of access to the courts is an extremely important aspect of democracy, and subverting that right actually undermines the foundations of democracy. As was determined on more than one occasion:

> In the latter case [of a dispute between an individual and the administrative authorities – the undersigned], the recognition of the right of access [to the courts] is also founded on the recognition that judicial review of **"acts by the authorities is an integral part of a true democratic regime, and anyone who subverts it might undermine one of the pillars supporting the building of the State"** (**Arpal Case**, page 590).

155. On the assumption that the duty of reasonableness still exists, eliminating the reasonableness standard as a standard of review is especially harmful and drastic. The reasonableness standard is of vast importance for the purpose of exercising the ability to conduct effective judicial review of decisions by the executive branch. This is for two reasons:

a. **First**, in its own right, as we have seen in previous chapters, it ensures that decisions will actually be reasonable, will be made according to the law and in accordance with its purpose, and will fulfill the administration's duty of loyalty to the public. This is a safety valve concept – a legal foundation stone, on which considerable portions of Israeli administrative law are based, and by means of which the rule of law and the separation of branches are accomplished.

b. **Second**, it is also a major standard of review for the purpose of enforcing other standards of review – such as extraneous considerations, favoritism, inequality, arbitrariness, the absence of a factual foundation, and the like. The unreasonable outcome of the decision often indicates another flaw that cannot be proven. Eliminating the reasonableness standard will also be a fatal blow to enforcement and supervision of the other standards, while increasing the harm to the principles of the rule of law and separation of branches.

As a result of those characteristics, it is also customary to consider the reasonableness standard as a residual judicial measure, which is necessary so that it will be possible to conduct effective judicial review, which is essential to the rule of law.

156. The Honorable Court, on more than one occasion, has pointed out the importance and centrality of the reasonableness standard, in light of the above characteristics. This, for example, is how the

Honorable Chief Justice Naor described the situation in Section 2 of her opinion in the **Hanegbi Case**:

> The reasonableness standard as a standard of judicial review of administrative acts is known to be important… The importance of reasonableness as a legal concept results, *inter alia*, from its nature as a safety valve concept. This fact enables reasonableness to be "the bridge by means of which the law may provide modern solutions to the new social problems" (Aharon Barak, ***The Judge in a Democracy*** [Hebrew] 254 (2004)). **Not infrequently, the reasonableness standard enables judicial review of a decision by an administrative authority, which is tainted by another or an additional flaw that is *per se* difficult to prove, such as favoritism and extraneous considerations**. In fact, as my colleague, Deputy Chief Justice E. Rubinstein, stated (Chapter 2): **not infrequently, the reasonableness standard is the only standard for intervention by means of which an improper appointment can be prevented**. This also explains the importance of reasonableness in deterring the administrative authorities in advance. **An authority that knows that, if it acts unreasonably, the court may intervene in its action, and will itself examine the reasonableness of its decision before issuing it**.

157. Similarly, the Honorable Justice A. Stein ruled, in the **Fourth Deri Case**, that the reasonableness doctrine provides the courts with an efficient and necessary tool for judicial review under uncertainty and does not allow the administrative authorities to conceal their wrongdoing by exploiting the vagueness of the factual foundation (see Section 1312 of this Petition).

158. As we have seen, eliminating the standard as a standard of judicial review deals a grave blow to the separation of branches and to the rule of law. Blocking the judicial review of illegal administrative acts constitute a head-on collision with those principles. This applies both in general and specifically with respect to the reasonableness standard. A statement by the Honorable Justice A. Baron, in Section 4 of her opinion in the **Fourth Deri Case** (which was cited in Section 12 above) applies to the matter at hand.

159. The importance of checks and balances, and the importance of the principle of separation of branches in creating good governance and maintaining democracy, were also discussed by the Honorable Justice Shamgar in the **Ressler Case**, in which he stated that only by **"preventing the excessive and exclusive concentration of power in the hands of one branch is democracy assured and individual and universal freedom preserved"** (*ibid.*, page 518).

160. Judicial review plays an exclusive role in the ability of the judicial branch to serve as a check on the executive branch, and, in this way, to accomplish, in practical terms, the principle of separation of branches. This role of the judicial branch requires it to take a stand with respect to the reasonableness of the administrative decision facing it, as, otherwise, the branch would not be able to decide on issues brought before it and fulfill its role as a "check," which balances the power of the executive branch. Thus, recognition of the principle of separation of branches and the role of

the judicial branch as an entity that decides in disputes, necessarily also entails a need for its power to conduct judicial review of the reasonableness of the administrative decision. In the words of Menachem Begin: **"Indubitably, even greater than the danger of blurring the boundaries between the executive branch and the legislative branch is the danger of eliminating the boundaries between the executive branch and the judicial branch… When the fortress of law falls, no one is left to save a person who is being ground between the millstones of rulership"** (Menachem Begin, "A Philosophy of Life and a National Philosophy" [Hebrew], ***Herut*** [newspaper] (March 23, 1951)).

161. Section 15(D1) of Basic Law: The Judiciary releases the prime minister, the government, its ministers and any person who is deemed appropriate from any subjection to judicial review for a breach of the duty of reasonableness. This also applies in the case of decisions that do not entail the setting of system-wide or value-related policy, as well as in the case of decisions that are completely far-fetched, surreal, and a long way beyond any possible range of reasonableness. This exemption from judicial review directly conflicts with the principle of the rule of law and that of the separation of branches. It permits the heads of the executive branch to break the law, in that it blatantly prevents the court – any court – from fulfilling its basic role and enforcing the law upon the executive branch.

D(6) Section 15(D1) of Basic Law: The Judiciary is tainted with extremism, due to the *de facto* permission to act in an absolutely unreasonable way

162. An additional significant flaw is the sweeping and absolute wording of Section 15(D1) of Basic Law: The Judiciary, which does not provide an inherent and material linguistic distinction among the types of decisions made by the government and its representatives. This constitutes the granting of *de facto* permission to act unreasonably – even extremely unreasonably – which applies uniformly to all decisions by the government (including the prime minister and the governmental ministers) - this, although the reasonableness standard is a complex standard, which has been interwoven with all branches of Israeli administrative law for decades. The sweeping cancellation of the reasonableness standard, without distinguishing among the types of decisions to which it applies, and without estimating the damage involved in doing so for each area, is expected to have disastrous consequences.

163. Thus, for example, Section 15(D1) does not distinguish between a general policy decision and a specific decision; it does not distinguish between various areas of decisions, such as areas that pertain directly to human and civil rights, or, in the alternative, areas with far-ranging economic implications; and it does not distinguish between process-related aspects and content-related aspects involved in a decision.

164. Prof. Yoav Dotan distinguishes between two models of reasonableness, which can be used for the purpose of illustrating the severe flaw in the wording of Section 15(D1): **"process-related reasonableness,"** which pertains to a review of the decision-making process itself, including consultation with entities that are meant to participate in making the decision, the obligation to cite

grounds, the conducting of a scheduled hearing, and other aspects related to the process carried out by the decision-maker until the decision is made; and **"balance -related reasonableness,"** which refers to the conditions that were weighed for the purpose of making the decision, the appropriate weight given to each of those decisions, and the content of the decision that was made. Prof. Dotan believes that this is a relatively broad criterion, whose application involves the exercise of judicial discretion (see *e.g.* Yoav Dotan, "Two Concepts of Reasonableness" [Hebrew], ***Shamgar Commemorative Volume – Part I*** 417 (2003); Yoav Dotan, "Two Concepts of Restraint – and Reasonableness" [Hebrew], ***Mishpatim*** LI 673 (5782-2022)).

165. This distinction was adopted by the Honorable Justice N. Sohlberg in High Court of Justice File 4252/17, **Jabarin v. Knesset** (published in the Nevo database, July 14, 2020), in which he expressed the position that it is appropriate to concentrate the examination of decisions by ministers on the reasonableness of the process, and to limit or to refrain from examining the reasonableness of the content and essence of a minister's decision, if there was no flaw in the reasonableness of the process (or, according to a different interpretation, at least, if "an adequate outline" was decided upon, and the process definitively indicates a serious and professional examination, which properly examines all of the relevant considerations). It should be noted that the Honorable Justice G. Kara did not concur with this approach (for the manner in which the positions were described, see also High Court of Justice File Further Hearing 6679/20, **Jabarin v. Knesset** (published in the Nevo database, May 26, 2021). See also: Appeal from an Administrative Petition 1798/20, **Middle East Forum – Israel v. Municipality of Tel Aviv-Jaffa**, page 20 of the Honorable Justice Sohlberg's opinion and pages 1-2 of the Honorable Justice G. Kara's opinion (published in the Nevo database, January 7, 2021)).

166. These different approaches illustrate the extremism involved in a total elimination of the reasonableness standard, in light of the phrasing of Section 15(D1) of Basic Law: The Judiciary. The executive branch assumed permission to perform any act, including extremely far-fetched and harmful acts. As long as there is no explicit violation of another law (which, as stated, generally does not happen with respect to governmental acts); as long as no extraneous considerations (which, by their nature, are difficult to prove) were taken into account; as long as all of the relevant considerations are claimed to have been weighed; and as long as there is no proven and clear harm to a recognized basic right (a bar that is not easy to pass) – it will not be possible to review governmental acts.

167. Furthermore, the wording of Section 15(D1) of Basic Law: The Judiciary enables the government (and its members) to evade the fulfillment of its explicit legal duties. This is because there is no possibility of judicial review of a decision not to exercise any authority. What this means is that any governmental minister can decide not to act (at all) within the framework of the powers conferred upon him, and not to fulfill his role. In other words, this is an "open ticket" for harm to the rule of law.

168. The distinction between various aspects of unreasonableness as also been made in case law handed down by this Honorable Court. Thus, for example, the Honorable Justice A. Stein stated, in the **Deri Case**, that he is **"opposed to invoking the doctrine of reasonableness in the format that I have termed 'I am the law,' in which the court subjects the value of the considerations weighed by the authority before making its decision to its own moral and ethical examination,"** notwithstanding his support of the application of the reasonableness standard in other cases (*ibid.*, Section 25). Similarly, the Honorable Justice N. Sohlberg's criticism of the reasonableness standard is focused on "essential reasonableness," and not on the traditional standard of **"unreasonableness as [unclear typographical error] which sought to prevent arbitrary and absurd decisions"** (see Section 165 above; see also: Noam Sohlberg, "On Subjective Values and Objective Judges" [Hebrew], ***Hashiloach*** 18, 37 (2019) (hereinafter: "***Hashiloach***")). Before him, Chief Justice Landau also believed it is appropriate to leave within the law the power to invalidate **"an administrative decision that is *prima facie* so far-fetched (absurd) that should be viewed as exceeding the authority of the entity making it"** (Moshe Landau, "On Justiciability and Reasonableness in Administrative Law" [Hebrew], ***Iyyunei Mishpat*** XIV (1) 5, 13 (1989)).

169. The wording of Section 15(D1) completely cancels the reasonableness standard – not only its updated formulation in the **Golden Pages Case**, but also the standard in its "traditional" version, as drawn from English law and reflected in the case law of this Honorable Court prior to the doctrine established in the **Golden Pages Case**, as described above. If there is no authority to even hear a case involving the reasonableness of the decision, how will the court decide that the decision is **"*prima facie* so far-fetched,"** as Chief Justice Landau put it?

170. In fact, the cancellation of the duty of reasonableness, as reflected in the wording of the new Section 15(D1), does not merely destroy the doctrine that was established in the **Golden Pages Case**. It destroys the rules pertaining to reasonableness since the establishment of the State of Israel. This wording does not take us back to 1980, but, rather, to 1948, and even earlier (as the reasonableness standard was customary during the British Mandate as well).

171. In other words, the cancellation of the obligation to act reasonably not only allows the executive branch to make extremely or materially unreasonable decisions, in the wording of the ruling determined in the **Golden Pages Case**, but also allows it to make decisions that are *prima facie* far-fetched and absurd, decisions that no one would imagine giving it the authority to make. All this will be possible according to the new amendment.

172. It should be emphasized that there is a greater degree of risk that the government will abuse its power than that the Knesset will do so. The Knesset acts in public and takes into consideration (even if it is forced to do so) a range of opinions, which often lead to compromises regarding legislative processes and the Knesset's activity. In addition, the members of Knesset are elected public officials, and the public can express its criticism of their decisions in periodic elections. Therefore, the risk that the Knesset will abuse its power does exist, but is principally relevant to

harm to minority groups that are not represented (in the coalition or at all) and where individuals' interests (human rights) are concerned. Generally speaking, the risk that the legislative branch will abuse its power is small, relative to other entities. In the case of the executive branch, however, the risk is greater. Thus, governmental entities often act in secret, with no open public hearings; a broad consensus, representing various interests from among the public, is not required; governmental entities are exposed to the influence of lobbyists and other pressure groups, at both the business and political levels; and, therefore, decisions are made quickly, with preference given to short-term considerations over long-term ones.

173. In the following sub-chapters, we will show just how flawed the across-the-board application of the amendment to the Basic Law is, and we will illustrate the breadth of the window opened by the amendment to the legitimization of far-fetched and absurd decisions. We will first illustrate, to some slight extent, the feasibility of making decisions that seriously violate human and individual rights; we will then recall that many of the powers conferred upon governmental ministers involve the exercise of individual authority, which has absolutely nothing to do with policy or "value-related balances."

D(6)1. <u>The reasonableness standard shields against omissions that severely violate human and individual rights</u>

174. The amendment to the Law determines that "decisions" that are immune from review under the reasonableness standard also include **"a decision to refrain from exercising any authority."** This amendment, in practical terms, legitimizes omissions by governmental ministers involving administrative paralysis and the freezing of essential regulatory processes, including the issuance of licenses and the enactment of essential regulations, thereby doing grievous harm to rights and interests in many areas.

175. When a minister refrains from exercising his authority, he deletes, in practical terms, the provision of law that empowers him and considers himself free to refrain from upholding that provision of law. This could be harmful to individuals' rights and interests. The only standard that would be available, in such a case, for opposing the arbitrary and harmful avoidance of exercise of authority is the material reasonableness standard.

176. High Court of Justice File 297/82, **Berger v. Minister of the Interior**, PD 37 (3) 29, 35 (1983), addressed a decision by the minister of the interior to refrain from exercising the authority conferred upon him in the Setting the Time Ordinance, and not to schedule a switch to daylight savings time. The court commented on the fact that refraining from the exercise of authority should be based on generally accepted criteria and reasonable considerations. A statement by the Honorable Justice (as his title was then) A. Barak applies to the present matter:

> **In fact, if unreasonableness in the enactment of a regulation suffices to give rise to the nullity of the regulation, then unreasonableness in not enacting it suffices to give rise to the nullity of the decision not to enact it. […] And administrative authority is not entitled to refrain from exercising its discretionary powers to**

> **enact secondary legislation with no pertinent lawful reason. The administration acts within the law, and every decision by it must be made within the law, and according to lawful considerations.**

177. See also a statement by the Honorable Chief Justice Shamgar in High Court of Justice File 376/81, **Lugasi v. Minister of Communications**, PD 36 (2) 449, 458 (1982), regarding the role of the court: **"This court intervenes in order to confer a remedy upon a citizen, in cases when it has been proven, to its satisfaction, that the authority unlawfully refrained from exercising its powers or exceeded its authority."**

178. The effectiveness of judicial review of refraining to exercise authority was discussed by the Honorable Chief Justice Shamgar in High Court of Justice File [3094/93], the **Deri-Pinchasi Case**, on page 423:

> **Even if the authority refuses to exercise a discretionary power, it is possible to examine its above-referenced refraining from action according to the generally accepted criteria at the time of the examination of statutory powers – that is, it is possible to examine whether refraining from the use of a power resulted from reasonable considerations, or whether, perhaps, the entire set of circumstances required that power to be exercised. We will also examine whether that refraining is not founded on unreasonableness, arbitrariness or discrimination, which might invalidate the acts or omissions of the authority. This means that not only the exercise of powers, under circumstances when that exercise is unreasonable, but also refraining from the exercise of discretionary powers on unreasonable grounds, can lead to the conclusion that the refraining from action is null and void.**

179. When a minister refrains from exercising his powers, he may violate individuals' basic rights and the general public's interests in the various areas of life. When the minister of education **refrains** from exercising his powers in the areas for which his ministry is responsible, he is violating the right to education; when the minister of health **refrains** from making necessary decisions, he is violating the right to health, and, at times, even the right to life; and so forth.

180. Thus, High Court of Justice File 4540/00, **Afash v. Minister of Health** (published in the Nevo database, May 14, 2006), addressed a claim that the minister had refrained from enacting regulations and determining rules for the establishment of clinics in all of the betterment settlements. The Honorable Justice E. Rubinstein, in Section 6(c) of his judgment, stated as follows: **"Providing health services to Israel's residents is a legal duty, and grounds of illegal construction by unspecified individuals do not justify evading that duty *per se*. That duty is reinforced in light of its nature – health services, which affect every person's fundamental and personal well-being."**

181. High Court of Justice File 1105/06, **Kav La'oved v. Minister of Social Welfare** (published in the Nevo database, November 18, 2013), addressed a petition that called for requiring the minister of health and the minister of social welfare to enact regulations conferring rights upon foreign workers. It was ruled that the minister's decision not to exercise his powers was not within the realm of reasonableness, and the Honorable Court emphasized the importance of the referenced rights. Thus, in Sections 82-84 of the opinion of the Honorable Justice E. Arbel:

> **… A society is measured by its attitude toward the weak within it. […] The State, as we should know, has a supremely broad prerogative in all of these areas, and it is entitled to decide who will enter its gates – and under which conditions – and who will remain outside it. However, these arguments apply only up to a certain point. After all, it is obvious that the entry permit for work purposes, which the State has issued to the foreign employee, should not be used to derive an unreserved authorization to violate his rights. The foreign employee entering the State does not shed his humanity and his basic rights. […] The Respondents' decision not to make any use of their powers under Section 56 of the State Health Insurance Act, with respect to nursing care workers with strong ties to Israel, is not within the realm of reasonableness.**

182. High Court of Justice File 6300/93, **Institute for the Training of Rabbinical Pleaders v. Minister of Religious Affairs**, PD 48 (4) 441, 451 (1994), addressed the minister of religious affairs' decision to refrain from recognizing the petitioner in that case as an "educational institution," after it did not accede to [the ministry's] requests. The Honorable Justice D. Levin ruled as follows: **"A competent authority is required to act reasonably. Reasonableness also means adherence to a reasonable timetable."**

183. Similarly, with respect to the issuance of licenses, in a case that addressed the minister of transport's decision to refrain from setting a new date for filing applications for taxi licenses, it was ruled that the minister of transport was required to exercise his authority and to set a new date with **"the appropriate speed,"** because **"it would be reasonable"** to do so. High Court of Justice File 679/84, **Maor v. Minister of Transport**, PD 39 (2) 825, 830 (1985).

184. Allowing the amendment to the Basic Law to remain in effect would mean that individuals harmed by the arbitrariness of a minister's decision not to exercise his authority in favor of the public interests and the safeguarding of rights would be left with no recourse and no remedy. **The Honorable Court must intervene and determine, at the very least, that the amendment to the Basic Law will not apply to a decision to refrain from exercising any authority.**

D(6)2. Many decisions by governmental ministers are of an individual regulatory nature, and are not policy decisions

185. Underlying the amendment that constitutes the object of the Petition is an argument that intervention in ministerial decisions on the grounds of extreme unreasonableness intervenes in the **"value-related balance among the various considerations that pertain to the decision"**

(Explanatory Note to the Draft Law, as quoted in Section 59 above). According to that argument, as expressed in the Explanatory Note to the Draft Amendment, that value-related balance should be reserved for elected public officials, and them alone.

186. The Honorable Justice N. Sohlberg distinguished between decisions that pertain to the outlining of policy with broad implications – which, by nature, reflect a professional and value-related decision – and decisions that he called "bureaucracy," which pertain, in his words, to "tenders, permits, licenses, certificates and other such administrative processes, which exhaust a person's strength" (***Hashiloach***; and see also the judgments in Section 165 above). Regarding decisions of the second kind, the Honorable Justice Sohlberg stated that, in **"situations of this type, there is greater justification for using the material reasonableness standard."**

187. In other words, the subjective purpose of those who drafted the amendment to the Law, as that purpose is learned from the Explanatory Note (regarding the subjective purpose as expressing the intentions of the legislature, see Leave for Civil Appeal 3961/10, **National Insurance Institute v. Sahar Claims Co. Ltd., Migdal Insurance Co. Ltd.**, PD 65 (2) 563, 582 (2012)), is to limit the reasonableness standard with respect to the value-related decisions of the government and its ministers, in contrast to their "bureaucratic" decisions.

188. The amendment to the Basic Law, however, totally ignores the broad spectrum of the ministers' powers, and especially the fact that ministers wear various "hats," among which are actual regulatory powers, which are perceived as powers belonging to the professional echelon.

189. Please note that, in various items of legislation, ministers have been given professional powers that do not pertain to a "professional and value-related decision." Rather, these are professional powers, which entitle the ministers to deal with that "bureaucracy," which, as stated, includes "tenders, permits, licenses, certificates and other such administrative processes, which exhaust a person's strength" (***Hashiloach***).

190. We will briefly illustrate this by means of the following table:

Minister of Energy – Israel's electrical resources	Section 4(B2) of the Electrical Resources Law, 5756-1996, determines that a generation license at a scope greater than 100 MW, a supply license at a scope greater than 100 MW, a distribution license at a scope greater than 5% of the annual scope of consumption, a conduction license or a system management license will take effect **after its approval by the minister**.
	Section 7 of the Electrical Resources Law determines that **the minister** is entitled to establish conditions for the granting of a license, ways of choosing among applicants for a license, rules for the use of a license, the duties that will apply to a license holder, and more.
	Section 9 of the Electrical Resources Law determines the conditions for canceling a license, including approval by the minister. In addition, the

	ministers are entitled to establish rules for the awarding of compensation, and it is possible that, according to those rules, the rate of compensation will be zero.
Minister of Transport – Railways (light rail)	Pursuant to Section 46A of the Railways Ordinance [New Version], the minister is entitled, with the approval of the government, to grant a concession for the construction, operation or management of a railway; with the approval of the minister of transport and the minister of finance, it is possible to establish conditions that limit the right to participate in a tender and to hold a concession; conditions pertaining to the duration of the concession, ticket prices and their adjustment also require the approval of the ministers.
	Pursuant to Section 46I of that Ordinance, if an operating permit has been suspended, the director, with the approval of the minister, will issue instructions regarding the manner of provision of the service during the suspension period. In addition, following the cancellation of the operating permit, the minister is entitled, with the approval of the government, to issue an order stating that the railway will be operated by the entity determined in the order and in accordance with that stated therein.
Minister of Transport – ports	Pursuant to Section 10 of the Shipyards and Ports Authority, 5764-2004, the minister, with the consent of the minister of finance, is entitled to authorize a company to be a port company, which will operate a port and will provide port services; the minister is also entitled, with the approval of the minister of finance, to authorize a corporation that was not authorized as a port company to provide port services. The minister is further entitled to make the authorization contingent upon conditions.
	Pursuant to Section 11(B) of that Law, a licensed corporation will not purchase land within the boundaries of a port other than with the approval of the Development and Properties Company; if the Development and Properties Company did not approve, the ministers, at the request of the licensed corporation, are entitled to approve the purchase or the receipt of the land as stated.
Ministers of Transport and Finance – toll roads	Section 3 (A) of the Toll Roads Law (Carmel Tunnels) determines that the ministers of transport, finance, and construction and housing, with the approval of the government, will determine the tender documents that will be given to bidders, for the purpose of selecting the concession holders; Section 5 of that Law determines that the transfer of control of the concession holder requires the consent in advance of the minister of finance and the minister of transport; and pursuant to Section 11, if the concession contract was terminated before the end of the period set forth therein, the

	minister of transport (with the approval of the government) may take measures toward the granting of a concession to a new concession holder.
	Similar powers were determined in the Toll Road Law (National Road for Israel), 5755-1995.
A Minister appointed by the Government	Extensive powers under the Petroleum Law, 5712-1952, including the powers set forth in Section 28(A) of that Law, pursuant to which the ministers entitled, after consultation with the Council, to announce, in a notice published in *Reshumot* [the Official Gazette of the State of Israel], that a certain area of land on which there are no oil rights, and which is not included in a pending application for an oil right, will be opened for bidding on its possession; as long as such a notice is in effect, no further oil right will be granted for that land, other than possession according to the bidding. Pursuant to subsection (E) of that Law, a possessor that considers itself to be disadvantaged by the minister's act pursuant to this section is entitled to appeal to the court within 30 days of the date on which it learned of the minister's act.
	Section 45(A) of the Petroleum Law determines the rights of the holder of an oil right regarding water use. Pursuant to Section 45(B), "the holder of an oil right is entitled to require **the minister** to supply it, at the price that applies at that time, with the quantity of water that it requires, on reasonable grounds, for its activity, if the holder of the right has paid the expenses involved in the supply and the installation of the means thereof, and has supplied the materials required for that purpose; the water supply will be according to conditions to be determined by **the minister**."
Minister of Communications	Pursuant to Section 2 of the Communications Law (Telecommunications and Broadcasting, 5742-1982), the minister of communications is given extensive powers, including the power to determine additional telecommunications services, the provision of which as a business will require a license (Section 2(C)); to instruct any entity registered in the Ledger that the services that it provides will require a license (Section 2(D)); the power to instruct a licensed provider to allocate telephone numbers, to instruct it regarding the implementation of a numbering program, and even to determine fees with respect to the allocation (Section 5A).

191. These powers are **definitively regulatory powers, in professional matters**. In exercising powers related to the approval of the transfer of shares; powers for the granting and the cancellation of licenses, permits and concessions; and additional powers in the areas of energy, transport, communications, planning and construction, and more, **the minister does not set policy based on a value-related decision**. The use of those powers has **a dramatic effect** on the State's economy,

and on its ability to attract foreign entrepreneurs to participate in tenders and projects for the development of Israel's infrastructures, and to convince foreign banks to finance such projects. These are one-time decisions, and they have **a direct impact** on the public interest. In subjecting those powers to its review, the court endeavors to draw a balance between the government and the private sector. To this end, the Honorable Justice N. Sohlberg wrote: "We are interested in allowing the court greater freedom of movement when it is required to review a decision by the administrative authority" (***Hashiloach***).

192. The outcome, then, is that **the amendment to the Basic Law deprives the court of the practical possibility of reviewing professional decisions that are tainted with extreme unreasonableness** – all due to a binary, and erroneous, distinction between the "professional echelon" and the "elected echelon" (which, as stated, is not elected at all). This also appears to contradict the intentions of the legislature, as those intentions arise from the Explanatory Note to the Draft Law, which expressly discussed the wish to leave "value-related balances" to the elected echelon – the same value-related balances that, as stated, are drawn in decisions regarding the formulation of policy, and not in professional-regulatory decisions.

193. The necessity of the reasonableness standard with respect to regulatory-professional powers is emphasized in light of the **evidentiary difficulty** in proving the applicability of other administrative standards in such cases. Thus, for example, when a minister refrains from granting a license or a concession to a company that meets all of the professional conditions, or decides to cancel a permit that was given to a certain entity in a brief decision, it is very difficult, and usually impossible, to point to extraneous considerations that underlay that "technical" decision. Especially in such cases, the reasonableness standard provides an essential and important tool for reviewing the decisions that were made on the basis of extraneous considerations, in light of the inherent vagueness and the evidentiary difficulties that prevent "mere citizens" from contending with "the system." A statement by the Honorable Justice D. Barak-Erez in Section 5 of her judgment in High Court of Justice File 3823/22, **Netanyahu v. Attorney General** (published in the Nevo database, July 17, 2023) applies to the present matter:

> **The reasonableness standard also provides an important tool for the review of flawed decisions in which extraneous considerations were involved, in those cases in which various evidentiary barriers make it difficult to point to those considerations. As we know, matters of the heart are difficult to prove; on the other hand, the advantage of the reasonableness standard lies in its examination of the balance among the considerations that underlie the decision, without addressing matters of the heart and hidden intentions.**

194. In light of the foregoing, a clear contradiction arises between the Explanatory Note and the manner in which the statements therein were realized in the Law itself, and certainly with respect to governmental ministers' powers in regulatory-professional matters. In those matters, if the

amendment is allowed to stand, there will be no protection, for either individuals or the public, against the arbitrariness of the administration in such contexts.

E. The Abolition of Reasonableness Law negates the core values of the State of Israel as a Jewish and democratic state

E(1) The State of Israel as a democratic state

195. The legislation that constitutes the object of the Petition deals a fatal blow to two of the five characteristics, harm to which has been defined by this Court as **"a fatal blow to basic democratic principles"** (the **Hasson Case**, paragraph 29 of the Honorable Justice E. Hayut's judgment), these being – **the separation of branches** and **the rule of law**. It follows that said legislation requires the taking of the exceptional measure of judicial intervention in basic legislation, and all as set forth below.

196. As stated in Chapter D(3) above, in a democratic state, one of the roles of the Supreme Court is to subject to judicial review the decisions of the various administrative authorities, and to grant remedies in cases in which the administrative authority is found to have acted unlawfully. This is an integral part of the core democratic values of the state. Negation of the judicial review of the reasonableness of the government's actions, and the absolute and sweeping blocking of the possibility to apply to the Supreme Court in this regard, **gives, *de facto*, absolute discretion to the government, to its ministers, and to an undefined group of officials within the executive branch, in many various areas, without the Supreme Court having the ability to supervise this, and without the public having any entity to which to turn, which could address disputes with the government.**

197. Abolishing the possibility to perform active review of administrative actions and of the reasonableness of these actions materially harms the very core of the democratic regime. This is not a novel claim. The connection between the possibility of performing judicial review of the government, **and especially by virtue of the reasonableness standard**, and the principles of the democratic regime has been clearly and expressly determined by the Supreme Court.

198. Thus, for example, the Honorable Deputy Chief Justice E. Rivlin ruled in High Court of Justice 1993/03, **Movement for Quality Government in Israel v. Prime Minister, Mr. Ariel Sharon**, PD 57 (6) 817, 835 (2002):

> **All of these principles – the rule of law, the separation of branches while maintaining checks and balances among them, the power of judicial review as well as the additional democratic review mechanisms – stand as the central pillars of the democratic regime. They are the *sine qua non* for protecting human rights, and they are the very core of the democratic regime, which strives to promote the individual's best interests. For all of these reasons, it has been stated, more than once, that this court is entrusted with the legality and the reasonableness of the actions of the branches of government in the State** (High

> Court of Justice 403/71 Alkordi v. National Labor Court [14], on page 72). **The court's jurisdiction over and power to review the actions carried out by the governmental bodies is "an integral part of a true democratic regime, and, if it is undermined, it is likely to destroy one of the central pillars of the building of the state"** (High Court of Justice 222/68 National Circles, Registered Association v. Minister of the Police [15], on page 172), given that "absolutism – however enlightened it may be – is the enemy of freedom. We are free people, and anyone who has been born free or who knows what freedom is will not be enslaved to another – not to another person and not to absolute discretion" (on pages 835-836).

199. This was also recently discussed by the Honorable Deputy Chief Justice U. Vogelman, who ruled that judicial review of administrative actions is an essential condition for the rule of law:

> **As I have already stated, judicial review of administrative actions is a *sine qua non* for the rule of law. Examination of the discretion of the administrative authority – also using the reasonableness and proportionality standards – forms an integral part of this review**. […] Finally, I would like to add to the comments made by my learned colleague, Chief Justice E. Hayut, with respect to the place of the reasonableness standard in Israeli law (paragraph 12-14 of her opinion; see also paragraph 1 of the opinion of my learned colleague, Justice Y. Amit). **The reasonableness standard is one of the cornerstones of administrative law**." (In Further Criminal Hearing 5387/20 **Rafi Rotem v. State of Israel**, paragraphs 34 and 105 of Justice Vogelman's opinion (published in the Nevo database, December 15, 2021)).

200. See also the unequivocal statements made by the Honorable Justice A. Baron (which were also presented in Section 12 above) – **"this is the nature of democracy"** – with respect to the reasonableness standard forming an integral part of the principle of the separation of branches:

> **Administrative discretion is subject to judicial supervision according to several delineated and defined standards of review – including the reasonableness standard.** Judicial review of administrative acts is intended to protect human rights and the basic values against the abuse of power, and to ensure governance that is good, clean-handed and fair. The court is the entity in charge of maintaining the boundaries of the administrative authority's powers and the legality of the exercise of those powers (High Court of Justice 5016/96 Horev v. Minister of Transport, PD 51(4) 1, 40 (1997)).… **This is the essence of the doctrine of checks and balances, which underlies the principle of separation of branches; this is the nature of democracy** (High Court of Justice 742/84 Kahana v. Shlomo Hillel, Chairman of the Knesset, PD 39(4) 85, 91-92 (1985); Yitzhak Zamir, The Administrative Authority. Volume E –Standards of Judicial Review 3613 (2020)).
>
> (The **Fourth Deri Case**, paragraph 4 of Justice Baron's opinion (January 18, 2023)).

201. According to Professor Zamir, without the reasonableness standard, the court will not be able to perform the duty of judicial review that rests with it, a duty which is material, pursuant to the theory of separation of branches.

> **Indeed, judicial review in a democratic state, according to the theory of separation of branches, and the doctrine of checks and balances that arose from this theory, was not intended to strengthen governance, but, rather, the very contrary: it is intended to curb the power of the government**, insofar as the law requires, in order to protect human rights and the basic values against the abuse of power, and to guarantee governance that is good, clean-handed and fair. **This duty has been entrusted to the Supreme Court, and the Court cannot carry out this duty properly, without the reasonableness standard** (**Zamir, Vol. E**, 3613).

202. And it should be noted in particular – even though there are other standards that exist, with whose aid the court reviews the government's actions and the discretion that underlies them, the reasonableness standard has no substitute in the existing law in the field of judicial-administrative review (the vast majority of which is determined in the case law). This being the case, the sweeping abolition of the reasonableness standard "at the level of elected public officials" will leave a significant void, which cannot be filled with the aid of other standards, and which would leave the public "vulnerable on the front line."

203. This has also been discussed by the Supreme Court on many, various occasions. See, for example, the statements made by the Honorable Justice A. Procaccia in the **Haim Ramon Case**:

> Narrowing the means of judicial review that are intended to examine the rationality of the administrative decision, as proposed by my learned colleague [narrowing the reasonableness standard], is likely to bring about a revolution in the perception of the principle of the legality of the administration, and to cause harm to the box of legal tools that are available to the court for the purpose of examining the actions of a public authority in the framework of the judicial protection that is afforded to the individual against the arbitrariness of the government. **Narrowing the reasonableness standard is likely to create a void in the sphere of judicial review that other review standards will not fill, and to greatly narrow the court's willingness to intervene in situations in which the administrative authority, in its decision, failed to consider the entirety of the relevant considerations, and those alone, or it did consider them, but failed to attribute the appropriate relative weight thereto.** It is easy to imagine the damage anticipated from such a process to the idea of the legality of the administration and to the purpose of the protection of the citizen in his dealings with the government, which form the basis of the definition of the standards of judicial review of the administration" (***ibid.***, 487).

204. See also, in the same matter, the worrying statements made by the Honorable Justice E. Arbel:

> **In my opinion, narrowing judicial review by almost totally negating the reasonableness standard leaves the public "vulnerable on the front line," because it is the public that will bear the price of those decisions that lie beyond the realm of reasonableness** (***ibid.***, 511).

205. One of the areas in which a void will be created in the absence of the reasonableness standard is the area of appointments. This was addressed by the Honorable Chief Justice M. Naor in the **Hanegbi Case ("Many a time the reasonableness standard is the only standard of intervention through which an improper appointment can be prevented"**). Hence the importance of the reasonableness standard in acting as a deterrence in advance to the governmental authorities. **"An authority that knows that if it acts with an extreme lack of reasonableness, the court is likely to intervene in its actions, will, itself, examine the reasonableness of the decision, before making it."** (***ibid.***, in paragraph 2 of the Honorable President M. Naor's opinion).

206. In the same matter, see also the statements made by the Honorable Deputy Chief Justice E. Rubinstein:

> To the best of my understanding, Chief Justice Landau, who had reservations about the reasonableness standard (see his article, "On Justiciability and Reasonableness in Administrative Law," Tel Aviv University Law Review (*Iyunei Mishpat*) 14, 5 (1984), as cited by my learned colleague), would also admit, based on his sense of integrity and strict adherence to the integrity of public administration, that **there are cases in which this standard is the only way to prevent improper appointments**" (***ibid.***, in paragraph B of Deputy Chief Justice Rubinstein's opinion).

207. And indeed, there is almost no aspect of the decisions of the executive branch that will not be affected by the abolishing of the reasonableness standard. This is true with respect to governmental ministers' decisions regarding appointments in respect of which there are suspicions of corruption; decisions not to appoint governmental ministers and other officials; executive decisions of governmental ministers in respect of which the proper groundwork was not put in; a decision to allocate resources unequally; decisions of the government to violate the individual's rights; exceptional decisions made by a caretaker government, and many other examples.

208. In other words, without the reasonableness standard, the court will find itself lacking the tools and lacking the ability to perform effective judicial review of those actions of the government which are extremely unreasonable. A government with unlimited power can unjustifiably harm the rights and interests of its citizens, it can harm the standards of proper administration, and it can normalize governmental corruption. This does not constitute **the rule of law**.

209. Furthermore, and as set forth at length in Chapter D(6) above, the sweeping abolition of the reasonableness standard with respect to the government and its ministers, which is, in fact, identical to the sweeping abolition of their duty of reasonableness, releases the government from the

fiduciary duty that it owes to the public, thereby harming the very base of the democratic regime in Israel. In addition, blocking the public's path to applying to the courts and to being granted relief against the government in respect of an unreasonable decision that it made, deals a mortal blow to the judicial branch's ability to perform judicial review with respect to those decisions, and it thereby directly violates the principle of separation of branches. All of these demonstrate the cumulative harm to the various and material characteristics of the democratic nature of the State.

210. The conclusion is clear – without effective judicial review of the government to curb such power – there is no genuine separation of branches. Without reining in and supervising the administrative discretion – there is no way of guaranteeing the existence of the rule of law. Without the reasonableness standard, the most basic democratic principles upon which the State of Israel is founded will, in fact, be violated.

211. And it should be emphasized that this clear and mortal blow to the very core of Israeli democracy does not exist in a vacuum. The overall picture with respect to the anticipated harm to Israeli democracy is far more egregious when we take into account the planned legal reform in its entirety, and the declared intentions of the government to continue to legislate anti-democratic laws, which will, each and every one separately, deal a mortal blow to the basic democratic values. This is especially true with respect to the law to change the structure of the Judicial Selection Committee, which will confer on the coalition absolute control of this Committee. This law has already passed on first reading, and it is just a short step away from being finally passed on second and third reading. One cannot close one's eyes, and ignore the situation as a whole. This must be taken into account.

E(2) <u>The State of Israel as a Jewish state</u>

212. The Jewish nature of the State of Israel constitutes a **"basic constitutional fact"** (Elections Appeal 1/65 **Yardur v. Chairman of the Central Elections Committee for the Sixth Knesset**, PD 19, 365, 386 (1965)) (hereinafter: the **"Yardur Case"**) and, in the words of the Honorable Justice M. Cheshin, the definition of the State of Israel as a Jewish state should be deemed to be **"a fundamental principle of our law and legal system"** (Leave for Civil Appeal 7504/95 **Yassin v. Registrar of Parties**, PD 50(2), 45, 63 (1996)). This fundamental principle should not be changed.

213. And what is a **"Jewish state"**? Case law has discussed the basic characteristics of this definition, which are not in dispute:

> What are, therefore, the "core" characteristics that shape the minimal definition of the State of Israel as a Jewish state? **These characteristics have at one and the same time both Zionist and traditional features** (see High Court of Justice 6698/95 Ka'adan v. Israel Lands Administration, PD 54 (1), 258, 281; hereinafter: the "**Ka'adan Case**"). At their heart lies the right of every Jew to immigrate to the State of Israel, where the Jews will constitute the majority; Hebrew is the official, principal language of the State, and its national holidays, religious festivals and symbols reflect the national revival of the Jewish people; **Jewish heritage is a key element of its**

> **religious and cultural heritage** (Elections Confirmation 11280/02 **The Central Elections Committee for the Sixteenth Knesset v. Tibi**, paragraph 12 of the judgment of the Honorable Chief Justice A. Barak (published in the Nevo database, May 15, 2003)).

See also: Elections Confirmation 852/20 **The Central Elections Committee for the 23rd Knesset v. Yazbek**, paragraph 4 of Chief Justice Hayut's judgment (published in the Nevo database, February 9, 2020); Elections Confirmation 1806/19 **The Central Elections Committee for the 21st Knesset v. Kassif**, paragraph 13 of Chief Justice Hayut's judgment (published in the Nevo database, July 18, 2019); Elections Confirmation 9255/12 **The Central Elections Committee for the 19th Knesset v. Zoabi**, paragraph 21 of Chief Justice Grunis' judgment (published in the Nevo database, August 20, 2013); Elections Appeal 561/09 **Balad – The National Democratic Assembly v. The Central Elections Committee for the 18th Knesset**, paragraph 6 of Chief Justice Beinisch's judgment (published in the Nevo database, March 7, 2011).

214. Professor Aharon Barak also addressed this subject in his article "A Jewish and Democratic State," where the Jewish nature of the State of Israel is described as follows:

> **The "Jewish State" is a state whose history is interspersed and interwoven throughout the history of the Jewish people…** It is a state whose values are drawn from its religious tradition, whose Bible is the most basic of its books and the prophets of Israel are the very foundation of its morality ... It is a state in which Hebrew jurisprudence fulfills an important role ... It is a state in which the values of the Torah of Israel, the values of the Jewish tradition and the values of *Halacha* [Jewish law] are among the basic values ... **Zionism, on the one hand, and Jewish heritage, on the other hand, have stamped their seal on the Jewish character of the State of Israel**" (Aharon Barak, "A Jewish and Democratic State," **Tel Aviv University Law Review** (*Iyunei Mishpat*) 24, 9, 10 (2000)).

215. The close connection between Judaism and the basic values of democracy, such as the separation of branches and the rule of law, was also discussed by Professor Moshe Halbertal, in an interview that he gave regarding the "reform":

> **Jewish tradition throughout the generations did not invent the principle of separation of branches; however, Jewish tradition is deeply aware of the dangers of power. <u>In the Bible, the king does not have a legislative role. The law is the Torah, so that there is a separation between the executive branch and the legislative branch</u>. Already in the book of Deuteronomy, there is an understanding of the concern that "the King should not consider himself better than his fellow Israelites." There is nothing Jewish about giving unlimited power to the sovereign, the very contrary is true. <u>Today, we already know that the separation of branches is one of the most pivotal ways of dealing with the</u>**

perils of power" (Shlomo Teitelbaum, "This is a battle for the soul of Judaism, not only for the soul of the State" **Calcalist**, March 23, 2023)).

216. The principle of the separation of branches and the principle of judicial independence are reflected extensively in the sources of Jewish law. The importance of these principles in Jewish law can be inferred from the position statement of Professor Benny Porath and Dr. Haggai Shlesinger, which was published by the Israel Democracy Institute (Appendix 35 above), and also from the position statement of Rabbi Dr. Ariel Picard, which was published by the Forum of Law Lecturers for Democracy ("The Perception of the Law and Jurisprudence and the Separation of Branches in Jewish Law," Appendix 8 above).

217. The sources of Jewish law teach the importance of the separation of powers between the executive body (the King), the judicial body (the Sanhedrin), the spiritual body (the priests), and the supervisory body (the prophets). Jewish law mainly warns against the executive body taking over the judicial body, and it recognizes the basic principle of the judges' independence as a condition for moral and just law. It has therefore been determined that the Sanhedrin is an independent institution, of which the King is not a member and which he does not control (and see the words of Maimonides in Laws of the Sanhedrin 2:4, whereby: **"A king of Israel may not be included in the Sanhedrin, for we are forbidden to disagree with him and repudiate his words"**).

Indeed, the State of Israel needs both its legs. According to the Petitioners, the Jewish characteristics of the State of Israel and the democratic characteristics of the State of Israel both clearly show the inconsistency of the legislation that constitutes the object of the Petition with the basic principles of the State. Under the law, [the legislation] should be abolished.

F. Judicial review of the legality of the Basic Laws

Section 7A of the Basic Law: The Knesset is based on the perception that **"Democracy is entitled to protect itself against anti-democratic forces that seek to make use of democratic means in order to abolish democracy. This is the expression of the concept of defensive democracy"** (Leave for Civil Appeal 7504/95 **Yassin v. Registrar of Parties**, PD 50(2), 45, 66; hereinafter: the "Yassin Case"; see also Bendor, "The Right of Candidacy in the Elections to the Knesset," *Mishpatim* 18, 269 (1988)). Section 7A expresses the **constitutional equation that has been determined in our system between the freedom that democracy grants for all expression and for pluralism in the ideologies and opinions on which it is based, and the protection of its continued existence as a democracy. It expresses Israel's nature as a defensive democracy** (see the Yardur Case, on page 390; the Yassin Case, on page 71). **It protects Israel's character as a Jewish and democratic state. It is the interpretation of this equation that lies before us. This interpretation must protect the delicate constitutional balance.** The right to vote and to be elected must be upheld – for this is one of the foundations of the democratic regime. This right lies at the basis of Israel's existence as a democratic state, without

harming its existence as a Jewish state, and while negating racism and preventing support for an armed struggle against the State. This balance will not be achieved if one of the parts of the constitutional equation were to receive all of the protection. Chief Justice Shamgar quite rightly stated that: **"Alongside the danger that democracy will be abused by those seeking to abolish or weaken it lies the converse danger that excessive anxiety to preserve democracy will render its principles purely theoretical and alienated from its practical significance, imposing multiple *a priori* limitations and prohibitions on liberties"** (the First Neiman Case, on page 277). Indeed, the delicate constitutional balance will only be achieved if each one of the parts of the equation confines itself to extreme situations" (Elections Confirmation 11280/02 **The Central Elections Committee for the Sixteenth Knesset v. Tibi**, PD 57 (4) 1, 15 (2003)).

In cases where the abuse of a constitutional text by the power of the majority is identified, the political need recedes in the face of the "constitutional core" and its "sanctity," its legal and moral importance (High Court of Justice 8260/16 **Academic Center of Law and Business v. Israel Knesset**, paragraph 30 of the judgment of the Honorable Justice E. Rubinstein (published in the Nevo database, September 6, 2017) (hereinafter: the **"Academic Center High Court of Justice"**)).

218. The complexity of the judicial review of the constituent power was discussed by this Honorable Court in the **Hasson Case**, which discussed two possible doctrines for judicial review of basic legislation: "Unconstitutional Constitutional Amendment" and "Abuse of Constituent Power." The source of the two doctrines lies in the judgment in the **Bank Mizrahi Case**. In that case, Chief Justice Barak, Chief Justice Shamgar, Justice Cheshin and Justice Bach discussed the concern that the Knesset would abuse the Basic Laws, and they proposed possible tools, which required further review, to deal with the issue.

219. The first doctrine, known as the "Unconstitutional Constitutional Amendment," examines whether there is a significant limitation on the possibility of amending the constitution – at the level of the content, which relates to a contradiction of supra-constitutional basic principles or of constitutional principles (express or implied) that limit the amendment. This Honorable Court has discussed the difficulty in adopting the doctrine in Israel, in view of the fact that the task of drawing up the Israeli constitution has not yet been fully completed. In view of the foregoing, the issue requiring further review has remained (*ibid*., paragraphs 13-15 of the judgment of Chief Justice E. Hayut; see also the opinion of the legal adviser of the Constitution, Law and Justice Committee, February 6, 2023, Appendix 4 above; the opinion of the Israel Democracy Institute, dated March 8, 2023, Appendix 34 above, in paragraph 85.B).

220. Nevertheless, in the judgment of the Honorable Chief Justice E. Hayut, with which nine of the members of the panel concurred, it was ruled that also at the present time – prior to the completion of the Israeli constitutional endeavor – there are certain (narrow) limitations on the Knesset, in its

capacity as the constituent authority. Thus, it was determined that the Knesset does not have the ability **"to negate, in a Basic Law, the very fact of Israel being a Jewish and democratic state"** (the **Hasson Case**, paragraph 16), and, by virtue of this, the basic democratic principles cannot be violated (also in Basic Laws). In this manner, the chief justice determined that in Israel there are basic structural core elements, which even the Knesset, as the constituent authority, is not authorized to undermine. And thus it was ruled **in that case**, in paragraphs 28-29 of the judgment of the Honorable Chief Justice E. Hayut:

> Given the stage of Israel's constitutional endeavor, I believe that the restrictions that apply to the constituent authority are, as aforesaid, extremely narrow, and pertain to exceptional situations of a constitutional change that would negate the core essence of Israel's Jewish or democratic identity (see also: The MK Dismissal Law, paragraph 36 of my opinion). **These are situations in which the constitutional provision deals a mortal blow to the Jewish nature or to the democratic nature of the State, to the point that there is no way of reconciling, either theoretically or practically, between this provision and these elements of the State's identity. Thus, for example, there is no way of reconciling Israel's being a Jewish state with a Basic Law that severs the unique connection between the State of Israel and the Jewish people, its language and its heritage… Similarly, there is no way of reconciling a Basic Law that deals a mortal blow to the basic democratic principles – and, by virtue of this, "free and equal elections; recognition of the core human rights […]; the existence of separation of branches; the rule of law; and an independent judicial authority"** (the Tibi Case, on page 23) **– with Israel's being a democratic state.** This was discussed by Justice E. E. Levy in a different context, when he stated: "Even if, at times, a fundamental value in our legal system might find itself and its trimmings deviating from the boundaries of the Israeli constituent fabric, still, the essence of this value – the core that is surrounded by the most solid expressions of the value – will not lose its place in our constituent narrative. Damage to this core cannot help but upset the delicate balance upon which the Israeli equation has established itself. If we detract from the content at the heart of the constituent value, it will not be able to live harmoniously together with the key elements of our system. If we shed the unequivocal and basic elements, it will not be reconcilable with a "Jewish and democratic state" (the Galon Case, page 70). **In other words, in those situations in which a Basic Law negates or diametrically opposes "the 'core' characteristics that shape the minimal definition" of the State of Israel being a Jewish and democratic state… it can be said that the Knesset has deviated from its constituent authority.**"

As aforesaid, nine justices concurred with these statements by the honorable chief justice.

221. This ruling is consistent with the rulings of this Honorable Court even prior to the enactment of the Basic Laws with respect to human rights, according to which the Knesset's powers are limited in

all matters pertaining to the ability to deal a fatal blow to the key elements of the democratic system and the individual's basic freedoms (see, for example, High Court of Justice 142/89 **LAOR – One Heart and a New Spirit v. Speaker of the Knesset**, PD 44 (3) 529, 551-554 (1990); High Court of Justice 4676/94 **Meatrael v. Israel Knesset**, PD 50 (5) 15, 28 (1996); High Court of Justice 3267/97 **Rubinstein v. Minister of Defense**, PD 52 (5) 481, 541 (2000)).

222. This conclusion also arises from Section 7A of the Basic Law: Knesset. The provisions of this section determine that "A list of candidates shall not participate in elections to the Knesset, and a person shall not stand as a candidate in elections to the Knesset, should there be explicitly or implicitly in the goals or actions of the list, or the actions of the person, including his expressions, as the case may be, one of the following: (1) **Negation of the existence of the State of Israel as a Jewish and democratic state**." The protection of Israeli democracy is, therefore, a fundamental principle that justifies the violation of the constitutional basic right to participate in elections to the Knesset and to stand as a candidate in the elections. This principle is so significant that it justifies the *a priori* negation of participation in elections and candidacy to the Knesset. Furthermore, Section 7A(b) determines that a decision by the Central Elections Committee with respect to Section 7A must be approved by the Supreme Court. In other words, the section reflects the constitutional role of the Supreme Court as the defender of Israeli democracy.

223. Section 7A(c) determines that "a candidate shall make a declaration regarding this section," whose details will be prescribed in the Law (Section 7A(d)). The wording of this declaration, which all of the Knesset members make prior to being elected, is set forth in Section 57(i1) of the Elections to the Knesset Law [Consolidated Version], 5729-1969 (hereinafter: the **"Elections to the Knesset Law"**), as follows: **"I pledge myself to bear allegiance to the State of Israel, and not to perform any act in contravention of the principles of Section 7A of the Basic Law: The Knesset."** A Knesset member is required to adhere to this declaration throughout his entire term in office:

> **In this regard, it is important to emphasize that <u>the conditions set forth in Section 7A do not apply, as a material matter, solely during an election period; the Knesset member is required to comply with these conditions throughout his entire term in office</u>: Section 7A(c) determines that "a candidate shall make a declaration regarding this section"; pursuant to this provision, it is determined in Section 57(i1) of the Elections to the Knesset Law [Consolidated Version], 5729-1969, that a candidate to the Knesset will make the following declaration: "I pledge myself to bear allegiance to the State of Israel, and not to perform any act in contravention of the principles of Section 7A of the Basic Law: the Knesset."** (High Court of Justice 5744/16 **Ben Meir v. Knesset**, paragraph 9 of the judgment of Justice N. Sohlberg (published in the Nevo database, May 27, 2018)).

224. What can be seen from the foregoing is that all of the members of Knesset have pledged not to act in contravention of the basic principle of protecting the Jewish and democratic nature of the State of Israel. This was a prerequisite for their candidacy to the Knesset, and it is a positive

commitment that each and every one of them took upon themselves, and with which they are obliged to comply throughout their entire term of office. This is the boundary of the authority of the Knesset members, and of the Knesset itself, as the parliament. The Knesset, any Knesset, and the members of Knesset, all of the members of Knesset, are not entitled to harm Israel's essence as a Jewish and democratic state. Such harm would deviate from their authority, breach their fiduciary duty and breach the personal pledge of each and every member of Knesset.

225. The Knesset is not the sovereign of the State. The people are the sovereign of the State. The Knesset owes a fiduciary duty to the people. The members of the Knesset owe a fiduciary duty to the people. They do not have the power to enact whatever legislation they may please. They are required to legislate within the confines of their authority, within the confines of their obligation, and within the confines of their pledge **"not to perform any act in contravention of the principles of Section 7A of the Basic Law: the Knesset,"** in other words, in a manner that does not contradict the nature of the State of Israel as a Jewish and democratic state. The amendment that is the object of the Petition is such an illegitimate law, a law whose enactment undermines the fiduciary duty that the members of Knesset owe to the Jewish and democratic nature of the State of Israel, given that it deals a critical blow to the rule of law and the separation of branches. The enactment of such a law is tainted by a lack of authority and it is therefore void.

226. With respect to the second doctrine that was discussed in the **Hasson Case**, it is necessary to examine the abuse of power of the constituent authority. In this context, we must examine whether the Knesset – in its capacity as the entity that concurrently holds both the legislative power and the constituent power – has abused its position as a constituent authority, by granting to an ordinary item of legislation the title of a "Basic Law," even though it lacks the characteristics of a constitutional norm. In other words, this is not material content review – but, rather, it is review that pertains to identifying the norm that is being discussed as a norm on the order of the constitutional norms (***ibid.***, for example, in paragraphs 5 and 33 of the judgment of the Honorable Chief Justice E. Hayut, and in paragraph 10 of the judgment of the Honorable Justice G. Karra) (the opinion of the legal adviser of the Constitution, Law and Justice Committee, February 6, 2023, Appendix 4 to this Petition; the opinion of the Israel Democracy Institute, dated March 8, 2023, Appendix 34, in paragraph 85.B).

227. As aforesaid, the roots of this doctrine lie in the judgment in the **Bank Mizrahi Case**, in which a test of form was established to identify the use that the Knesset makes of its constituent power (***ibid.***, in paragraphs 57-58 of the judgment of Chief Justice Barak). Over the years, this Honorable Court has specified tests to identify whether a matter does indeed involve a constitutional norm or not – the stability test, the generality test and the test of the constitutional fabric – while emphasizing that this is not a closed list of considerations:

> However, as has already been emphasized – **in the doctrine of the abuse of constituent power, we do not contemplate the question of the constitutionality of the norm in terms of its content, but, rather, we look at the question of**

> **whether the type of norm, in terms of its characteristics, can be reconciled with its being enshrined in a constitution.** In this context, we can point to a number of auxiliary tests that could aid the court in performing its task: **the first is <u>the stability test of the norm</u>, according to which the question is examined of whether the norm has a transient nature, whose application is for a pre-determined period of time, or whether it involves a forward-looking stable and permanent arrangement; the second is <u>the generality test</u>, according to which the question is examined of whether the norm has general-structural application or whether it has personal characteristics (see and compare: the Academic Center Case, paragraph 6 of the opinion of Justice Hendel); and the third is <u>the test of the constitutional fabric</u> into which the norm is interwoven, according to which the question is examined of whether the norm can be reconciled with the nature of those issues that have been formalized in other Basic Laws or in the Basic Law to which the amendment is being added.** Nevertheless, this is obviously not a closed list of considerations, and as stated by Chief Justice Beinisch in the Bar-On Case, each case must be examined on the merits (*ibid*., on page 301; see and compare also: the Bank Mizrahi Case, on page 295) (the **Shaffir Case**, paragraph 27 of the judgment of the Honorable Chief Justice E. Hayut).

228. The two doctrines that were discussed in the **Hasson Case** – both the Unconstitutional Constitutional Amendment Doctrine and the Abuse of Constituent Power – pursue the path that has been taken in democratic states across the world.

229. The judgment in the **Hasson Case** therefore recognizes the limitations on the Knesset, which imbibes its power from the constitutional basis of the State of Israel. In this sense, the statements made in the **Hasson Case** can be reconciled with the way this Honorable Court has conducted itself ever since its inception. It makes it possible – with no other choice – to realize this Honorable Court's role as the keeper of the supreme principles of the State of Israel:

> Therefore, **if the constitutional issue, which we must take into consideration when interpreting the laws of the State – and especially laws that have a constitutional nature – is the issue, that the State of Israel is a durable state whose continued and everlasting existence should not be questioned**, then it is clear that this law also applies to the interpretation that should be given to that provision of the law which establishes the governing institution, for whose election these elections are held, namely, the following provision in Section 1 of the Basic Law: The Knesset, which states: "The Knesset is the house of representatives of **<u>the State</u>**" [the emphasis appears in the original]. **What do these words mean, if not an institution that consists of representatives who have been elected by all of the citizens, and whose role is to strictly protect, through the government that bears the responsibility for it, the existence and completeness of the State of Israel, and when, in any event, the question of whether action should be taken to**

> **destroy the State and to negate its sovereignty, or not – this question <u>cannot even be placed on the agenda; because, after all, the very fact of presenting this question goes against the wishes of the people who live in Israel, its vision and its belief</u>**" (the **Yardur Case**, on pages 386-387).

230. The **Hasson Case** recognized the possibility that in extreme cases, in which there is a genuine concern of the violation of the basic principles of democracy and the basic characteristics of the State, the court would serve as their last line of defense. **In the Hasson Case, the foundation was laid down for striking down a Basic Law, based on the doctrine of <u>deviation from the power of the constituent authority, and a change in the State of Israel's identity as a Jewish and democratic state, and a change in the basic structure of the nature of the regime in Israel</u>**, in the event that a Basic Law contradicts the list of characteristics, harm to which has been defined as **"a fatal blow to basic democratic principles,"** and, first and foremost, **harm to the separation of branches and harm to the rule of law**.

231. In view of all of the foregoing, it should be ruled that the legislation that is the object of this Petition constitutes a fatal blow to the basic principles of Israeli democracy – the rule of law and the separation of branches, and, therefore, it is tainted by a lack of authority and it should be nullified. In the alternative, it should be nullified due to the abuse of constituent power.

G. <u>The amendment also constitutes abuse of constituent power</u>

232. In addition to all the foregoing, the enactment of the Abolition of Reasonableness Law as an amendment to the Basic Law: The Judiciary, constitutes abuse of constituent power and should therefore be deemed null and void.

233. The Judgment in High Court of Justice 5969/20 **Shaffir v. Knesset** (published in the Nevo database, May 23, 2021) (hereinafter: the **"Shaffir Case"**), discussed the doctrine of abuse of constituent power extensively, and a two-stage test was adopted for examining the question of whether the piece of legislation at hand is part of the Basic Laws. The first test is the **test of identification**, which examines whether the norm is appropriate for the constitutional fabric and whether it is a general norm. If it emerges from this test that the norm is not, the Knesset must show justification for establishing a norm with non-constitutional characteristics in a supra-legal constitutional framework and not in an ordinary law of the Knesset (the **"Test of Justification"**).

234. The Basic Law: The Judiciary, was approved by the Knesset in 1984 and the explanatory notes thereto state that its purpose was "to define the constitutional principles guiding the judicial branch in Israel, and it is an additional step towards assembling the Basic Laws into one complete constitution." The draft law by the government also stated that:

> The proposed law concentrated the main provisions of the Courts Law 5717-1957 and the Judges Law, 5713-1953. The law deals with the judicial institutions, their powers, *modi operandi* and administrative procedures, and the judges, the uniqueness of their position, their impartiality, how they are appointed, the duration

> of their terms and the conditions of their work. **The law discussed the principles that must be enshrined in a Basic Law and merely establishes frameworks that are filled with content and details in the two aforementioned laws**, which will continue to govern the details of the various matters.

235. In other words, in the explanatory notes to the law, the government explained that the law must deal only with principles concerning the judicial institutions and their powers and not individual matters, which will be governed by ordinary laws. Consequently, the Basic Law: The Judiciary, indeed deals with the general frameworks, including ensuring the judges' impartiality; the public nature of the hearing; the general framework for appointing judges; the **general** jurisdiction of the Supreme Court; the principle of binding precedent and protecting the Basic Law from being changed by emergency amendments. The Basic Law does not define individual legal causes of action in administrative law, just as it does not deal with the definition of torts and criminal offenses.

236. The foregoing clearly shows that the answer to the question of whether Amendment No. 4 to the Basic Law: The Judiciary, meets the conditions of the test of identification is that it does not. Amendment No. 4 lacks the "basic identifiers" that characterize a constitutional norm. The amendment was included in Section 15 of the Basic Law that deals with the powers of the Supreme Court, notwithstanding that it is directed towards "any entity with judicial power pursuant to law." Thus, Section 15(d1) is an extraneous element in a section that deals with the power of the Supreme Court. The amendment also does not deal with the courts. The subject of the amendment is the reasonableness standard, i.e., a legal norm in the framework of administrative law that applies to the executive branch. The existence of the norm does not arise from the authority of the courts to hear it, but from the definition of what is allowed and what is prohibited and the restrictions imposed on the executive branch. There is no justification, even remotely, for enacting the amendment to a Basic Law that deals with judicial power.

237. Is it conceivable to enact a provision in Basic Law: The Judiciary. that states, "The court will not hear a claim of bribery"? Obviously not. An initiative for abolishing the offense of bribery belongs in an amendment to the Penal Law, 5737-1977. If the Penal Law is amended, its constitutionality can be examined in the appropriate manner in this regard.

238. It therefore transpires that the amendment does not deal with general principles that must be enshrined in the Basic Law. It does not integrate into the Basic Law. In fact, it contradicts it. It deals with the denial of judicial power based on an individual administrative cause of action. It does not provide a framework that must be filled with a law, but governs a narrow norm that is directed entirely towards the government and prohibits anyone with judicial power under law from hearing the disqualification of decisions by the government or its ministers pursuant to the reasonableness standard, and this is within the |Basic Law, which is made up entirely of general norms that deal with judges and the courts.

239. It should be emphasized that the Knesset, in its role as the constituent power, chose not to establish such arrangements in the past in any Basic Law. Indeed, unfortunately, there is not currently any administrative procedures law that governs the general administrative duties. However, when the Ministry of Justice deemed fit to propose such a law, it was in the framework of an ordinary law (drafted by the late Professor Klinghoffer) and not in the framework of a Basic Law (see Shimon Shetreet, "The Administrative Procedures Draft Law" ***Hebrew University Law Review*** 14 367 (1984)). Individual administrative obligations that *have* been enacted were enacted through ordinary legislation (see, e.g., the Mandatory Tenders Law, 5752-1992; The Administrative Procedures Amendment (Statement of Reasons) Law, 5717-1958).

240. Since it emerges that the amendment to the Basic Law does not meet the test of identification, the burden is transferred to the Knesset to justify enacting the legislation specifically in a Basic Law. One would assume that someone proposing such a draft law would make sure to describe in the explanatory notes why it was being proposed specifically in the framework of a Basic Law. However, the explanatory notes do not contain even a bit of a reason as to why denial of judicial review pursuant to the reasonableness standard should be enacted specifically in the framework of a Basic Law. The preparatory document of the Knesset's legal adviser also does not address this issue, and on the other hand, the draft law memoranda dealing with the administrative standards that were not advanced in the legislation are mentioned.

241. Indeed, a review of the amendment to the law and the amendments it underwent in the hearings of the Knesset Constitution, Law and Justice Committee, shows the motivation for enacting it specifically in a Basic Law. The wording of the amendment by the committee chairman on July 12, 2023 exempting appointments and decisions to refrain from exercising authority from the applicability of the reasonableness standard exposes the motives of those proposing the draft law and shows that this is not a fundamental constitutional position but, rather, an amendment to the law that was inserted into the Basic Law in order to extract an immediate political benefit from the Knesset's constituent power (see, e.g., Israeli Law Professors' Forum for Democracy "Position Paper No. 52: Critique of the legislative process concerning the standard of reasonableness," Appendix 33 to this Petition). It stands to reason that in this case the matter is directed at dismissing gatekeepers; the appointment of government ministers and the decision not to convene the Judicial Selection Committee.

242. Therefore, since the amendment to the law does not meet the tests of identification and *prima facie* does not meet the test of justification either, it transpires that the Knesset abused its constituent power and therefore the amendment to the Basic Law should be deemed null and void.

H. <u>Additional reason to nullify the amendment – the enactment process was fundamentally flawed</u>

243. On June 20, 2023, just one month before the Abolition of Reasonableness Law took effect, the draft law was published for the first time by the chairman of the Constitution, Law and Justice

Committee, MK Simcha Rothman, under the title "Version Proposed for Hearing," "by the chairman of the Constitution, Law and Justice Committee."

244. The proposal that was formulated in preparation for the committee hearings is not accompanied by explanatory notes as required. This flaw, as will be set forth below, is only the beginning of the long series of flaws in the process of enacting the law.

245. MK Rothman initiated and promoted the private draft law, but instead of submitting it as a private or government draft law, he made improper use of the mechanism established in Section 80 of the Knesset Rules of Procedure, and treated the proposal as if it were a draft law "by the committee." The committee chairman thus made "personal" use of the special authority of the Constitution, Law and Justice Committee to promote a draft law, in violation of Section 80 and the purpose thereof. We will elaborate.

H(1) <u>Section 80 of the Knesset Rules of Procedure – draft law by the committee</u>

246. Section 80 of the Knesset Rules of Procedure establishes a special, restricted and limited arrangement with respect to draft laws by the three Knesset committees (the Knesset Committee, the Constitution, Law and Justice Committee, and the State Control Committee), and allows them to use a special, expedited constitutional track, both compared to a government draft law and compared to an ordinary private draft law.

247. Section 80(a) of the Rules of Procedure states as follows:

> The Knesset Committee, Constitution, Law and Justice Committee and the State Control Committee are entitled to initiate, within the bounds of their respective fields pursuant to these Rules of Procedure, draft laws on the following subjects and prepare them for the first reading: **Basic Laws, matters necessitated by the amendment of a Basic Law and proposed alongside it, the Knesset, Knesset members, Knesset elections, political parties, financing of political parties, and the state comptroller.**

248. The above provision was added to the Knesset Rules of Procedure in 2011. In a hearing held on May 24, 2011 in the Knesset Committee, the committee's legal adviser discussed the limits of the section allowing use of a summary procedural mechanism due to the forum submitting the proposal (the committee, as opposed to a member of the committee), and due to the nature of draft laws submitted by the aforementioned committees:

> Arbel Asterchan: …Preparation of a draft law by the committee. We are establishing here, for the first time, the matter that is currently the most important among committee draft laws. **I will mention that it was decided here not only to consolidate the subjects, but also to consolidate the committees…**
>
> Arbel Asterchan: You cannot initiate an amendment to the Penal Law on behalf of the committee.

David Rotem: Why? …

Arbel Asterchan: Why? Because that is the significance of the preliminary reading, that a private draft law must pass four readings. The preliminary reading is important. **This is exceptional. Originally, consideration was also given to the fact that these are matters that the government initiates less frequently and on which they express an opinion less frequently.** Here as well, the committees are limited, and with respect to Basic Laws, we added "matters necessitated by the amendment of a Basic Law and proposed alongside it." A classic example is when something is transferred from a Basic Law to an ordinary law, in which case the committee can initiate both directly for a first reading.

((Transcript of the 191st sitting of the 18th Knesset, 20 (May 24, 2011) http://fs.knesset.gov.il/18/Committees/18_ptv_172643..doc).

249. In another hearing in the Knesset committee that dealt with the chapter of the Knesset Rules of Procedure pertaining to legislation, a Ministry of Justice representative discussed the reasons for distinguishing between actions by a Knesset committee and actions by a member of Knesset:

> Eyal Zandberg:…In your opinion, there is a difference between the actions of the committee and those of the individual. For a private draft law at the very, very early stage, there was concern that a member of Knesset can initiate anything he wants, as far as I understand, **so it was established that the presidency, which is a broader entity, will moderate such extreme draft laws because they don't even want them to be brought for discussion…The assumption, I assume, is that the collective body known as a committee will not create such extreme messages**, or is less likely to create them, so perhaps that was the rationale.
>
> (Transcript of the 183rd sitting of the 18th Knesset, pages 7-8 (May 31, 2011) https://fs.knesset.gov.il//18/Committees/18_ptv_172646..doc).

250. Thus, there are two reasons underlying the unique arrangement of Section 80 of the Rules of Procedure: (a) it is intended for draft laws by the committee that deal mainly with "internal" matters of the Knesset, as well as Knesset election laws, the Basic Law: The Knesset, legislation pertaining to election campaigning, and so forth, i.e., matters on which the government is less likely to initiate laws; (b) the assumption (that in this case is completely shattered) that if the draft law is formulated by one of three main committees of the Knesset and not by a single MK, it will not be extreme and "severe." This position is based on the fact that all the pieces of legislation that have been submitted by the committees since the establishment of the State were by consensus (except for one draft law).[21]

[21] 2016 amendment to the Basic Law: The Knesset (known as the "Expulsion Law")

251. These are also the reasons why it is customary for the executive branch to refrain from intervening in the formulation of a draft law by the committee. On these subjects, there is a basis for the argument that the executive branch (in this case, the government) must take a step back in its involvement in legislation by a committee, both compared to government legislation and compared to a private draft law, which we will discuss below. However, this does not apply to the law that is the subject of this Petition.

H(2) <u>The legislation process in a government draft law</u>

252. The process of enacting a governmental draft law requires an in-depth process aimed at formulating understandings and an examination within the executive branch itself, along with negotiations and an extensive examination of the implications of the legislation.

253. Thus, by virtue of the government regulations, governmental decisions, attorney general guidelines, procedures of the Ministry of Justice and existing customs, a minister who wants to initiate legislation within the sphere of his authority draws up a draft law memorandum as a preliminary draft of the draft law that his government ministry wishes to advance. The law is drafted by the attorney general or the legal department of the governmental ministry.

254. The memorandum is drawn up in order to be disseminated for comments by the public and the governmental ministries before the draft law is formulated. In general, draft law memoranda are disseminated for a period of 21 days. Disseminating the draft law memoranda allows the general public to take part in the governmental legislation process.

255. The memorandum must contain the name of the proposed law, the objective of the proposed law and the need for it, the key points of the proposed law, the impact of the proposed law on the state budget and additional administrative aspects, the impact of the proposed law on the existing law, the full wording of the proposed law and detailed explanatory notes.

256. After the end of the period for public comments, if the decision is made to advance the draft law, the ministry prepares the draft law. The draft is brought for a hearing by the Ministerial Committee for Legislation, headed by the justice minister. The committee discusses the draft law and decides whether to approve it, sometimes with amendments and changes.

257. After the committee approves the draft law and its decision receives the force of a governmental decision, the Legislation Preparation Unit of the Ministry of Justice prepares the draft law for publication in the records as a governmental draft law. The draft law is placed on the table of the Knesset in preparation for the hearing and vote in the first reading.

258. It is easy to understand that the entire process is much longer and more thorough than the process in this case, and, unlike the process in this case, it allows a thorough examination of all the implications of the legislation and its impact. The foregoing shows that, inconceivably, the dramatic constitutional amendment that is the subject of the Petition was approved in a process that does not include the oversight and examination mechanisms that are required in an ordinary

governmental draft law, *a fortiori* in a Basic Law proposal that creates an unprecedented constitutional change.

H(3) <u>Formulation of the governmental position in a private draft law</u>

259. The government is also required to formulate its position with respect to a private draft law. The formulation of the government's position with respect to a private draft law is governed by the government regulations and by internal governmental procedures. The Ministerial Legislation Committee is required to formulate the government's position with respect to every single proposal, following professional internal governmental work and presentation of the positions of the relevant governmental ministries. The rules of procedure for the 36th Government states as follows with respect to the actions required by the executive branch when a private draft law is submitted:

> 66 (a) If the Knesset secretariat transfers a draft law of an MK (hereinafter: "Private Draft Law") to the government secretariat, the cabinet secretary will transfer it, shortly after receiving it and before it is heard by the Ministerial Legislation Committee, to the minister whose field of activity deals with the Private Draft Law in order to receive his comments, and he will transfer a copy of it to the rest of the ministers.
>
> (b) The ministers will transfer written comments to the government secretariat within 31 days from the day on which the Private Draft Law was transferred to them for review, except for draft laws that the Knesset committee or the government decides to exempt from the 45-day waiting period, as established in Section 76 of the Knesset Rules of Procedure; copies of the comments will be transferred to the minister of justice.
>
> (d) The Ministerial Legislation Committee will discuss Private Draft Laws with respect to which a date for hearing in the Knesset plenum has been scheduled and will establish the governmental position with respect thereto.
>
> (e) If a Private Draft Law is brought for a hearing in the Knesset plenum before the ministerial committee has established a position with respect thereto as required, the government's position will be to oppose it. If there is an equal number of votes for and against in the ministerial committee, the government's position will be to oppose it…
>
> (f) The relevant minister or deputy minister will bring before the Knesset the governmental position with respect to the private draft law. The governmental position will be binding on the governmental representatives at the time of the hearings in the Knesset committees.

- Approval of the 36th Governmental Work Rules of Procedure of June 17, 2021 is attached as **Appendix 36**.

260. The 45-day period from the date the draft law is submitted is intended to allow the governmental ministries sufficient time to formulate their position with respect to the draft law, allow the general public to peruse the proposal before it is brought for a vote, and allow the government to formulate its position in the Ministerial Legislation Committee.

H(4) <u>There was no basis for using Section 80 of the Knesset Rules of Procedure</u>

261. The Abolition of Reasonableness Draft Law did not fulfill the two conditions listed in Section 80 of the Knesset Rules of Procedure. Therefore, a serious flaw occurred in the use thereof, and it should be determined that the amendment to the Basic Law is improper since it used an exceptional legislation mechanism that is not designed for it, thus "bypassing" the enactment processes required by law. For this reason as well, this is abuse of constituent power and a flaw in the enactment process itself. Ultimately, it is a material amendment to Israeli constitutional law that was enacted through improper use of an inadequate examination and public discussion mechanism that is only intended for the special cases listed therein, none of which come close to being suitable for this law.

262. **First**, as stated above, Section 80 of the Knesset Rules of Procedure is meant to apply to "internal" matters pertaining to the Knesset, members of Knesset, broadcasts by the Knesset Channel, and so forth. This explicitly emerges from the transcript of the Knesset committee hearing cited above. There is no dispute as to the foregoing, and the Knesset website even contains a document by the Knesset legal department that describes the stages of enactment:

> **<u>A draft law by a committee is not required to undergo the stage of a preliminary hearing, but such a proposal can deal only with Basic Laws and laws pertaining to the Knesset, members of Knesset, Knesset elections, political parties or the state comptroller</u>.**

- A document from the Knesset website explaining the stages of enactment is attached hereto as **Appendix 37**.

263. The law in this case is clearly not connected to the matters with respect to which Section 80 was enacted and to the matters suitable for enactment through a draft law by the committee, and this is pursuant to a publication by the Knesset legal department itself. The law deals with abolishing the grounds for judicial review of the executive branch, the rule of law, separation of powers, the right of access to the courts, and the rights of the individual and the private sector. These are not the matters that were intended for a draft law by a committee. They do not deal with "the Knesset, members of Knesset, Knesset elections, political parties or the state comptroller." They deal with the basic issues of the constitutional regime in Israel.

264. As set forth above, the principle of separation of powers is intended to restrict the strength of each of the branches of power, in order to prevent them from exploiting their power and violating the rights of the individual and the public. Therefore, there are "checks and balances" among them with each branch being subject to oversight by the other branches, with the tools at its disposal.

265. As part of those checks and balances, the judicial branch conducts judicial review of the governance activities of the executive branch, including decisions by public officials. "Judicial review is the shield and refuge of the individual, and also of the public, when it fears that it has been unlawfully harmed by the activity of the executive branch." (Deputy Attorney General Dr. Gil Limon in a hearing of the draft law in the constitutional committee of [date]___. Meirav Arad "Significance of the Amendment: Exempting the government from the obligation to act reasonably towards the country's residents," **News1** (July 16, 2023)). The law changes the obligations applying specifically to the executive branch, and not to the Knesset. It comprehensively prevents judicial intervention in unreasonable decisions by the government and the ministers, as untenable and extreme as they may be, even if they are individual decisions and clearly regulatory-bureaucratic subjects, all while preventing access to the courts.

266. The law essentially abolishes the reasonableness standard in the executive branch on the merits, thus transforming the work of the public administrative branches. Therefore, in addition to harming the system of balances between the executive branch and the judicial branch, the law profoundly disrupts internal governmental work. This was discussed by Deputy Attorney General Dr. Gil Limon in the hearing of the Constitution, Law and Justice Committee:

> If the proposed legislation is passed, the attorney general will not be able to fulfill this role, and, without judicial review, there will be no way to block decisions that deviate from the reasonableness standard in an extreme manner, i.e., decisions that ignore material considerations or that give excess weight to a negligible consideration.
>
> (Amir Kurz, "Deputy Attorney General: The changes to the Reasonableness Standard Law only exacerbate the difficulties that we have raised" ***Calcalist*** (July 16, 2023))

267. The committee's legal adviser, Dr. Gur Bligh, also emphasized to the committee the implications of the amendment for the government's work:

> …Limiting the reasonableness standard with respect to certain decision makers may be perceived as also exempting them from the reasonableness standard, the obligation to act reasonably while weighing and striking the appropriate balance among the relevant considerations. In other words, there is a situation in which an official in the executive branch knows that no one will check the reasonableness of his activity, the balances of his *modus operandi*.
>
> (Transcript of Hearing No. 105 of the Constitution, Law and Justice Committee, 25th Knesset, 115 (June 25, 2023) https://fs.knesset.gov.il/25/Committees/25_ptv_2857017.doc).

268. This is all without a single internal governmental hearing having been held for the purpose of examining the draft law and its implications. As emphasized by the legal adviser to the Ministry of Finance, Adv. Assi Messing:

> **There is no governmental position in this case, and to the best of my knowledge the draft law and its aspects were not discussed in any governmental forum and naturally it has also not been discussed in this ministry as at the time when the draft law is being brought for discussion in the ministerial committee.**
>
> **(*ibid.*)**

Unbelievable. The constitutional amendment that is the spearhead of a profound governmental transformation in Israel was approved without any governmental position, without a hearing in any governmental forum and without legal counsel from the government or a hearing in the Ministerial Legislation Committee, all due to the use of an enactment track that is not designed for the law that is the subject of the Petition and is designed to bypass the exact examination track required for legislation of this type.

269. Furthermore, we will also mention the opposition by the chairman of the Constitution, Law and Justice Committee, MK Rothman, to the presentation of positions by the legal advisers of the government in the committee hearings. In fact, the appearance of Adv. Messing was imposed on him by the Knesset's legal adviser. Positions of other legal advisers, and certainly of entities in the government itself and those responsible for the country's security, health, education, economy and so forth, were not heard.

270. Furthermore, changing the wording of the draft law after the first reading further exacerbated the difficulties that had existed prior. The outcome of using the exceptional enactment process is a complete exemption of the government, governmental ministers and other public officials from the obligation to exercise their authority, and mainly the nullification of the thorough examination process required for such legislation (see Chapter D(4) above).

H(5) <u>The committee chairman made improper use of the authority of the constitutional committee</u>

271. In the improper choice to use Section 80 of the Knesset Rules of Procedure and present the amendment to the Basic Law under the guise of a draft law by the Constitution, Law and Justice Committee, both the processes required by a private draft law and those required in a governmental draft law were nullified. This is no trivial matter. It is a clear legal flaw both in the formal aspect of the enactment process itself and in the harm to public discussion, listening to the public and professional examination of the law itself.

272. **First**, due to the use of Section 80, the law is not required to pass the stage of the preliminary reading as required for a private draft law, and the plenum did not hold a hearing on the draft law before the stage of the first reading. **Second,** the move drastically shortened the timetables for advancing the draft law, without the requirement for a 45-day waiting period during which

positions will be formulated with respect thereto. This obviously has no justification and there was no legal basis for such haste anyway. **Third**, the government itself, including the professional entities therein, did not formulate any orderly position with respect thereto, and the hearings were therefore not based on a proper professional framework. The foregoing is also consistent with the efforts of the committee chairman to prevent legal entities in the government from presenting their comments on the draft law to the committee plenum.

273. This was discussed by MK Gilad Kariv in the Knesset plenum sitting in preparation for the vote in the first reading:

> Instead of presenting a private draft law that is subject to a waiting period, approval in a preliminary reading, and a preliminary hearing in the committee, or instead of advancing a governmental draft law, MK Rothman exploited, yet again, the Knesset Rules of Procedure to advance a draft law on behalf of the committee, all in order to shorten the process. And why do this? Because, as time passes, the general public gains a deeper understanding of the legislation's destructive impact and extreme nature; because, as time passes, they discover the half-truths, falsifications and the fake reliance on higher authorities.
>
> (Transcript of the 91st sitting of the 25th Knesset, 252 (July 10, 2023) https://fs.knesset.gov.il/25/Plenum/25_ptm_2866316.doc)

274. The legal advisor to the Knesset also addressed the issue. In a letter of July 2, 2023, further to the inquiry by the committee members to the Knesset's legal adviser, the legal adviser, Adv. Sagit Afik, wrote as follows:

> The process for a draft law by a committee in general, and for advancing a proposal to amend a Basic Law as a proposal by a committee in particular, does not occur frequently. **However, in the appropriate cases, it can be done, provided that the proposal meets two preliminary conditions. First, the draft law must fall within the areas of interest of the committee proposing it, and second, the subject discussed by the draft law must appear in the closed list of subjects established in Section 80 of the Rules of Procedure.**
>
> …The provision of Section 80 of the Rules of Procedure that governs the manner of enacting the draft law by the committee does not require a preliminary committee hearing on the question of whether to advance the draft law as a proposal by a committee, and this has not been done in the past, including in the various cases in which a draft law was brought by the constitutional committee in the present Knesset. **Naturally, if the committee approves, by majority, the wording of the draft law as a proposal by it, this will constitute confirmation of its desire to advance it as a proposal by the committee.**

- The letter by the Knesset's legal adviser of July 2, 2023 is attached hereto as **Appendix 38**.

275. With all due respect, the Knesset's legal adviser made two mistakes here. **First**, as set forth above at length, abolishing the reasonableness standard fundamentally changes the system of government in Israel, contradicts its values as a Jewish and democratic country, deals a fatal blow to the rule of law and separation of powers, and radically changes the nature of the executive branch. None of this can be done with the support of Section 80 of the Knesset Rules of Procedure. **Second**, and most importantly, the question as to whether the subject of the law meets Section 80 of the Knesset Rules of Procedure is clearly a legal question. The fact that the members of the coalition voted in favor of the wording of a law that was advanced in a bypassing and expedited track makes absolutely no difference. That is actually the very reason why the Honorable Court's intervention is required.

276. We will say this without any embellishment. The members of the coalition sought to change the system of balances in the democratic regime, while extracting unprecedented power for the executive branch. Instead of conducting an appropriate enactment process allowing public discussion and an examination of the position of bodies of the State itself, the members of the coalition in the Constitution, Law and Justice Committee chose a destructive and expedited track that prevents thorough public discussion and makes it difficult for the public and the members of the opposition to voice their opinions. A majority is not a basis for denying human rights. It is also not a replacement for fulfilling the Knesset Rules of Procedure. The role of the Honorable Court is to protect all of these, as a derivative of the rule of law in the legislature.

277. However, furthermore, the legal adviser referred to a previous letter of hers of January, 2023, in which the following was written:

> In view of the nature of the relevant subjects, the process of preparing the draft law for the first reading **must be conducted while allowing all the positions to be expressed and while considering all of those positions, so that a significant discussion can be held on all the issues and their implications as raised by all participants in the discussions, all in a way that will allow the members of Knesset to carefully consider the subjects of the proposal, be precise about the wording and the content thereof and receive the factual and legal picture with respect thereto.** This is so that **the final product that is placed on the Knesset table for the first reading is a product that is similar to a product of a governmental draft law that, before being placed on the Knesset table, undergoes a prolonged process in the government.**

- The letter by the Knesset's legal adviser of January 25, 2023 is attached hereto as **Appendix 39**.

278. In this case, as will be described below, the enactment process was the diametric opposite of a process involving the voicing and consideration of all the positions, in the framework of a significant discussion of all the issues, the implications of the amendment for Israeli society and all the governmental ministries, including the Ministry of Finance, the Ministry of Defense, and so

forth. The members of Knesset did not consider, were not precise about, and certainly did not produce "a product similar to the product of a governmental draft law."

H(6) <u>The enactment process in the committee was conducted with haste, negligence and bias</u>

279. The process that was conducted in the Constitutional Law Committee is not similar and does not come close to being a replacement for the process carried out for any governmental draft law or even to the one existing for a private draft law.

280. The hearing on the draft law started, as stated, without any explanatory notes. After just a few days of the hearing, the draft law was approved for a first reading, without the committee chairman allowing the deputy attorney general to present his closing remarks before the voting, notwithstanding the protest of the members of the opposition. After the first reading, the committee held a very brief hearing lasting several hours and moved on to hear the objections, which were rejected in groups of twenty in each vote, without a hearing and without the voting members of Knesset having any awareness of the content of the objections.

281. The committee chairman even refused to allow the legal adviser to the Ministry of Finance to present his remarks before the committee. As stated, when he finally spoke, the legal adviser stated that no hearing had been conducted in the Ministry of Justice with respect to the impact of the proposed law. Furthermore, a survey of comparative law prepared by the Knesset Research and Information Center of July 16, 2023, entitled "Mechanisms of Approval, Oversight and Judicial Review of Appointments by the Government" was not raised at all for discussion in the committee. Representatives of other governmental offices were not even summoned to present their professional position.

282. The hearings and voting were filled with defects and flaws, in continuous violation of the Knesset Rules of Procedure and abuse of the authority of the chairman of the committee. For example, the counting of votes on the objections were filled with numerical errors due to the speed and indifference with which the chairman acted. In the absence of published transcripts we will make do with the fact that a letter by committee members to the Knesset's legal adviser shows that in a mere eleven-minute examination of the vote photographs, sixteen erroneous votes were found, including twelve cases of MKs voting twice, both for and against the objections. On one occasion, the director of the committee stated that nine MKs had voted against the objection when in reality only five members of Knesset had voted against it.

283. At the end of the hearing of July 19, 2023, the Constitution, Law and Justice Committee approved the wording of the draft law for a second and third reading, and on July 24, 2023 the proposal was approved in the Knesset plenum in a second and third reading. In between, members of the Foreign Affairs and Defense Committee of the opposition requested that the committee convene in order to discuss the implications of the law. This request was ignored. It was also published that the chief of staff had requested to meet with the prime minister prior to the second and third readings, but this request was also not granted.

284. The outcome of the defective process conducted by the committee and the use of Section 80 of the Knesset Rules of Procedure profoundly contravenes the fundamental principles of the processes of enactment itself. This is especially true when it comes to a constitutional amendment that violates the right of access to the courts and harms the rule of law, the separation of powers, and the work of the public sector. The grave flaw in the enactment process should be deemed additional grounds for invalidating the law.

I. In the alternative, the legislation that is the subject of the Petition should be subject to the principle of delayed applicability

285. This is a tumultuous time for the State of Israel. this cannot be concealed. The government-sponsored legal reform overcoming the country troubles many of its citizens. The public is leading a widespread protest, the likes of which has not been seen since the founding of the State. On the other hand, representatives of the coalition (which contains 64 members of Knesset) are making a series of decisions (*inter alia* in their capacity as members of the government) that cast a shadow on the discretion underlying them. Among other things, these decisions harm the independent judgment of the legal advisers. Almost ironically, there is an attempt to turn the legal advisers into holders of positions of trust.

286. Against this background, and against the background of the clear positions in connection with the legal reform (and other additional reasons), governmental representatives are openly calling (already now) for the dismissal of the attorney general. In this context (as we saw in Section 205 above), we will mention that the reasonableness standard is practically the only instrument for exercising judicial review of the appointment and dismissal of the attorney general.

287. Abolishing the reasonableness standard means, *inter alia*, destructive and irreversible harm to the professional echelon of the public service. Abolishing the reasonableness standard means that any minister will be able to dismiss any professional functionary without limits. It means that any professional functionary will also be subject to the authority of the minister and will not dare disobey him even if the minister acts unlawfully, since his fate is in the minister's hands.

288. As discussed above at length, the Petitioners emphatically claim that the legislative amendment that is the subject of this Petition deals a hard blow to the Jewish and democratic nature of the country and therefore should be deemed null and void. In the alternative only, if the Petitioners' main claim is rejected, it should be ruled that the legislative amendment will take effect after the election of the 26th Knesset, for the reasons set forth below.

289. A constitutional amendment that changes the democratic rules of the game is fundamentally "suspicious" as an amendment designed to work in favor of the parliamentary majority that enacts it, and therefore must be examined pursuant to the test of generality mentioned in Section 227 above. If such an amendment is allowed, its entry into force should at least be delayed.

290. Indeed, the above-mentioned test of generality is not only limited to the question of whether a personal or general norm is involved and whether it is suitable for enactment in a Basic Law and

not in an ordinary law. When it comes to a constitutional change with immediate applicability, **the test of generality also examines whether it significantly changes the "rules of the game" of the existing legal system.** When this is the situation, it indicates a **lack of generality** and **abuse** of constituent power. This is true *a fortiori* when, in the unique case of the State of Israel, the government – as the ruling coalition in the Knesset – has a decisive impact both in its capacity as the constituent power and in its capacity as the legislative power. We have discussed above the fact that a political takeover of the judicial branch allows the Knesset to enact laws that change the system of government and essentially cancels the protection of the opposition, which is requesting that the Court issue a protective remedy. A political takeover of the judicial branch therefore constitutes a regime change.

291. This Honorable Court referred to the uniqueness of the provisions establishing the system of government as establishing the institutional "rules of the game," and the importance of those provisions being established behind the "veil of ignorance," in High Court of Justice File 2905/20 **The Movement for Quality Government in Israel v. The Knesset**, paragraph 122 of the judgment by the Honorable Deputy Chief Justice H. Melcer (published in the Nevo database, July 12, 2021) (hereinafter: the **"Rotation Government Case"**):

> **The arrangements establishing the Knesset system of elections and the system of government are institutional constitutional norms whose uniqueness lies in the fact that they establish principles intended to ensure that government decisions are fair and appropriate.** Therefore, these institutional norms mostly reflect the appropriate and customary rules of decision, i.e., the **type of considerations** that should be made and the manner in which they should be considered, and to a lesser degree the content of those decisions (Barak Medina and Asur Weizmann, "The Constitutional Revolution or the Human Rights Revolution," *the Tel Aviv University Law Review* 40 595, 604 (5778) hereinafter: Medina and Weizmann). **Protection of the institutional rules of decision, or "rules of the game," is intended, *inter alia*, to prevent public representatives from acting to promote their personal interests, or the interests of their political parties, instead of the general public interest or the interests of their voters** (Ruth Gavison, "The Constitutional Revolution – Description of Reality or Self-Fulfilling Prophecy?" *Hebrew University Law Review* 28 21, 65 (1997)). **Institutional norms also must be established as separately as possible from the personal interests of those who establish them; or as defined by scholars, behind the "veil of ignorance"** (Barak Medina, "The Limits of The Knesset's Power to Set Supra-Majority Rules," *Mishpat Umimshal* 6 509 (2003); Medina and Weizmann, page 602). The "veil of ignorance" is a concept coined by the political philosopher John Rawls in the framework of the development of a more important and broader theory known as "justice as fairness." Rawls dealt with political liberalism and attempted to discuss the fundamental rules required for the existence of a liberal, egalitarian and just democracy. For this purpose, he represented the thought experiment of the

> "original position," in which **the representatives of the nation must agree to the democratic rules of the game "behind a veil of ignorance," i.e., without them knowing anything about the citizen that they represent, including their age, gender, social status, beliefs, income and talents. This veil is designed to ensure that decisions are made free of partiality, narrow selfish interests and preconceptions** (John Rawls, *Political Liberalism*, 24-25 (2005)).

292. Subsequently (***ibid.***, paragraph 140), the Honorable Deputy Chief Justice Melcer addressed the possibility that political considerations of a personal nature will tip the scales towards abuse of constituent power, due to the failure to pass the test of generality, in a reference to the judgment by the Honorable Justice Hendel in **High Court of Justice College of Law & Business**:

> **As we know, any law or amendment to a law, *a fortiori* a Basic Law or constitutional amendments, must be general** [reference documents]. **These requirements are designed to ensure that, as stated, to the extent possible the normative arrangement is established behind the "veil of ignorance," under conditions in which there is no certainty as to the question of who the relevant law will benefit** [reference documents]. In the aforementioned context, I believe that the remarks made by our colleague, Justice N. Hendel, in the College of Business & Law Case, also apply to this case: **"Political convenience and skipping over political hurdles may be part of the rules of the game. And it is still a game. However, the special status of a Basic Law should be recognized. A norm designed to allow Player A (i.e., the ruling government) to skip over a political hurdle also establishes a higher threshold for Player B (a future government that will not benefit from the temporary order and will be required to contend with stringent parliamentary oversight), in a certain sense bears a personal nature. It therefore gives rise to difficulty, and a constitutional nature and status cannot be attributed to it…This difficulty is even somewhat exacerbated in view of the two hats worn by the Knesset and give rise to an interesting issue of conflicts of interest: the 34th Knesset, in its capacity as the constituent power, is establishing for itself a designated norm that will exclusively govern its relationship, in its capacity as the legislative branch, with the government…We will clarify that the pertinent criticism inherent in the term 'personal legislation' can apply not only to the personal (legislation directed towards a private individual) but also to the legal entity. Not only personal, but also that which deals with an institutional 'persona'…"** (The College of Business & Law Case, paragraph 6 of his opinion there, and see also paragraph 10 of my opinion there…). **As we have seen, personal legislation and personal Basic Laws harm the rule of law and the principle of the separation of powers. This is because the legislative branch enters the territory of the executive branch, whose role it is to implement a general norm for individual cases.**

See also: the **Shaffir Case**, paragraph 40; the opinion by the Knesset's legal adviser of January 27, 2023, Appendix 3 above, page 4.

293. Therefore, it is customary to recognize constitutional limitations with respect to the power to "legislate for oneself" – limitations that are also consistent with reasons pertaining to the rule of law, separation of powers and conflicts of interest (Yoav Dotan, "The Knesset as 'Legislating for Itself' in the Jurisprudence of the Supreme Court" ***Hebrew University Law Review*** 31 771 (2001); Eyal Gabbai "Retrospective Change to the Basic Law: The Government, and its constitutionality" ***Hapraklit*** 44 151, 170-172 (1998)).

294. In other words, when the constitutional amendment subject to judicial review constitutes a fundamental change to the "rules of the democratic game," and even if the amendment does not itself contravene the fundamental values of the system, its immediate applicability still has a "personal" element. In order to prevent a situation in which any majority abuses its power in order to fundamentally change the system of government, while removing hurdles that restrain its incidental power and establishing facts on the ground, the applicability of the amendment should be delayed so that it only takes effect starting from the election of the next Knesset. This was discussed by the Deputy Chief Justice (*ret.*) Melcer in the **Rotation Government Case**, paragraph 18 of his judgement:

> In summary, in my opinion **there is no basis in customary law for approving the constitutional status of a government amendment with immediate applicability, unless the delay of applicability is required by its objective, as occurred in the context of the latest government Basic Laws**. Amendment No. 8, just like many governmental amendments that have been applied in the course of the life of the Knesset that enacted them, indeed entails constitutional innovation, but the existence of such innovation itself does not require delayed applicability. Please note that **changing the rules of the game in a way that goes against the reasonable expectations of voters and violates the right to vote and be elected, may create difficulty. Thus, it can be said that an amendment stating that direct elections will be held to elect the prime minister after general elections for the same Knesset have already been held is not appropriate, given that recent history supports the hypothesis that splitting the ballots may significantly impact the considerations of the voter…In this case, the immediate applicability of the amendment therefore violates the citizen's right to vote and to be elected, and it may entail problematic personal and retrospective characteristics.**

295. The nature and relevancy of the doctrine regarding "abuse of constituent power" to this case were summarized by Amnon Reichman, Uri Aharonson and Barak Medina in a position paper published by the Israeli Law Professors' Forum for Democracy "Position Paper No. 10: The date of applicability during this time of regime changes on the agenda" (Appendix 14 to this Petition, page 2):

> The second aspect examines two questions: first, **is the Knesset enacting a Basic Law that pertains to subjects that are not suitable for Basic Law legislation, but for ordinary legislation, and perhaps even for secondary legislation?** Second, **is the Knesset entitled to amend a Basic Law in a way that changes the rules of the game, with the change taking immediate effect? Or perhaps the amendment must only apply starting from the next Knesset, in order to prevent a situation in which the Knesset that changed the rules is also the first Knesset that will play by the new rules? <u>These two questions are asked under a track called "abuse of constituent power</u>."** Pursuant to this track, there may be situations in which the Knesset makes improper use of its power to enact Basic Laws. **<u>The starting point of the discussion is that one of the fundamental things a constitutional arrangement is designed to achieve is preventing a situation in which an incidental or random majority changes the basic rules of the game, and then, after changing the rules, uses the new rules to take over fundamental components of the system, or to obtain an inherent advantage in any future contention with the minority</u>. Therefore, the most basic insight in constitutional law is based on two complementary elements: (1) a material change to the rules of the game requires broad consent by the parts of the house, not only consent by the coalitionary majority; (2) changing rules of the game that are relevant to a majority-minority relationship or to the removal of limits on majority power will only apply starting from the next Knesset. In legal jargon, <u>such a change will apply with delayed applicability, starting from the next elections</u>.**

296. The "reform" is a fundamental and material change to our system. This is true for each of the components of the "reform" themselves, and *a fortiori* considering their cumulative weight. Under these circumstances, establishing immediate applicability for each of the components of the reform constitutes abuse of constituent power. This conclusion applies *a fortiori* given the lack of a broad consensus between the opposition and the coalition with respect to the "reform" and given the clear and immediate implications of cancelling the reasonableness standard.

297. Under these circumstances, even if it is ruled that the validity of the piece of legislation that is the subject of the Petition should be recognized, it should at least be ruled that its applicability will be delayed until the term of the next Knesset commences:

> **…<u>The aforementioned changes have direct implications for the power of the coalition, and as a result, for the power of the opposition in the current Knesset, while at the same time pertaining, for good reason, to the basic structure of the mechanisms that balance the power of the coalitional majority</u>. Therefore, they are subject to the fundamental constitutional rule, designed to protect against profound regime change by a majority (which may only be incidental) in a way that releases the majority from the limits on its power, whereby such an amendment must be approved behind a veil of ignorance in order to neutralize**

> **the inherent conflicts of interest between majority rule in the constitutional process and the power of the statutory or executive structure to implement the aforementioned amendment…<u>The other side of the conflicts of interest argument focuses on the personal element inherent in immediate applicability: the proposed amendments grant well-known officers the power to take up positions that will turn them into gatekeepers of themselves. In other words, MK Yariv Levin and Committee Chairman Simcha Rothman "legislate for themselves" in the sense that they are the ones leading a process that will grant them significant power in appointing judges</u>. Similarly…granting unlimited power to the Knesset to establish, without a special process requirement or majority requirement, any arrangement whatsoever in a Basic Law, means that the majority is entitled to change the basic rules of the game at any time and exempt itself from judicial review of any arrangement by using the term "Basic Law"…It should be determined that, even if the amendments are deemed not to constitute an unconstitutional constitutional amendment, and even if they are moderated during the enactment process so that their harm to the principle of separation of powers is not so flagrant, they will apply starting from the next Knesset. This is a clear case in which the rationale underlying the constitutional idea requires delayed applicability, so that the weakening of the limits on majority power, assuming that it. Itself. is constitutional, will apply from the swearing-in of the next Knesset.**
>
> (Appendix 14 above, pages 4-5)

298. At a time of such a deep national divide surrounding the judicial reforms, and against the background of the hasty enactment process described above, postponing the entry into force of the Abolishment of Reasonableness Law will at least provide time for public discussion, for healing and for adaptation, and ordering at least as much is correct both by the letter of the law and based on common sense and the aspiration to unify the nation.

J. <u>Conclusion</u>

299. We opened this Petition with the judgment of the Honorable Justice M. Cheshin, in his imaginative and special language, in the **Kendall Case**, in which he wrote straight from the heart about the reasonableness standard, which he identified as having accompanied the Israeli legal system from its very beginning and having been used by justices, including the founding fathers of the Supreme Court, in its scrutiny of government actions. His logical remarks warning against attempts to obstruct scrutiny of administrative activity should be considered by us and by all those involved in this work.

300. This Petition is being filed at a difficult time that is not a time for celebration, not for the legal world nor for Israeli nationalism. Nonetheless, there is no better time to uphold our choice of

democracy and our commitment to protect it, so that it will continue to protect us and all of Israel. It is therefore correct to order as requested at the beginning of this Petition.

301. This Petition is based on an affidavit by Petitioner No. 2.

302. In view of the foregoing, the Honorable Court is requested to issue an order *nisi*, as stated at the beginning of this Petition, and after receiving the Respondents' Response, to turn the order into an order absolute.

303. The Honorable Court is also requested to charge the Respondents with the costs of the Petitioners in respect of this Petition and attorneys' fees and VAT as required by law.