

Yaacov Ben-Shemesh

The Extreme Unreasonableness of the Reasonableness Case

Previous rulings of the Supreme Court have established an extremely strict standard for judicial intervention in Basic Laws. It has been determined that such judicial review – which in itself is controversial and raises severe conceptual and legal difficulties – will only be used in exceptional cases, concerning provisions that may cause fatal and irreversible damage to the Jewish or democratic character of the state, and only in the absence of any other alternative.

In this Article, I argue that the repeal, by majority opinion, of the amendment to Basic Law: The Judiciary (“the reasonableness amendment”) enacted in July 2023 did not meet the strict threshold that was set, nor did it even come close to it. First, I will argue that the position of the majority judges, according to which the reasonableness amendment is fatally harmful to Israeli democracy, is not sufficiently substantiated, especially in view of the existence of many other administrative and constitutional grounds for judicial review, and certainly not considering the early stage at which the question was examined, even before the amendment’s consequences for the legal reality became clear.

Furthermore, I argue that there was an alternative way to eliminate the main damage, this through an interpretation of the amendment in a way that reduces the scope of its applicability. I will argue that the majority judges’ attempts to explain their choice of the precedential and far-reaching remedy, i.e., striking down the amendment, over the interpretive alternative are not convincing.