UK ASSOCIATION OF JEWISH LAWYERS & JURISTS

Petition to the Supreme Court of Israel to Annul the Law Abolishing the Reasonableness Standard

Background Note by the Chairman

On July 24, the Knesset passed the *Basic Law: The Judiciary (Amendment No 4) (The Reasonableness Standard) Law*. This amendment to the Basic Law on the Judiciary is the subject of a petition to the Supreme Court of Israel by the Israel Bar Association ("IBA") seeking the annulment of the legislation. The case (along with other petitions) is due to be heard by the full Court on September 12. The Board of the International Association of Jewish Lawyers & Jurists ("IJL") (to which we are affiliated) voted unanimously on August 3 to support the IBA's petition.

The amendment in effect abolishes unreasonableness as a basis for reviewing decisions of the government or Ministers.

Reasonableness is one of several heads by which any public decision can be challenged. The method of challenge is known as judicial review. A public decision is the exercise of any power or discharge of any duty by any public body. This includes Ministers. The premise is quite simply that the power entrusted to Ministers, officials and public bodies must be exercised in accordance with the law. Any discretion conferred is not absolute, unfettered or unqualified. If the power conferred on the decision-maker is exceeded, the decision is therefore *ultra vires* and unlawful.

Reasonableness has been a part of English public law for a century. Like nearly all of the grounds for challenging the decisions of government (in its widest sense), it is judge-made. The judicial creation of these grounds, starting centuries ago but gathering pace in the second half of the 20th century, is generally acknowledged to be one of the greatest achievements of the common law. It forms the bedrock of our public law and a fundamental component of the rule of law.

The reasonableness standard originated in an English decision involving Wednesbury Corporation, a local authority. The court held that an executive decision was not lawful

if it was a decision that could not have been made by a rational decision-maker, the rationale being that Parliament could never have intended to confer a power to make irrational decisions; therefore an irrational decision is outwith the scope of the power. It is known in English law as "*Wednesbury* unreasonableness". Such a decision is also described as irrational.

It must be emphasised that in judicial review the judges do not review the decision on its merits and substitute their view for that of the decision-maker just because they would have reached a different decision. Review is not an appeal on the merits. For the decision to be vulnerable to challenge and be pronounced unlawful, it must, for example, be outside the legal power conferred, taken in a procedurally improper way, have disregarded relevant considerations, had regard to irrelevant considerations, used for an improper purpose, or be so irrational that no reasonable decision-maker could have taken it. Other possible heads that have emerged in recent years, derived chiefly from European law and still developing, are proportionality and necessity. Another head that sometimes arises is a duty to give reasons for a decision. Failure to give reasons, or adequate reasons, when they are required may invalidate the decision; and where given they may expose infirmities in the decision-making that render it unlawful.

It is certainly arguable that the Israeli judges have expanded the boundaries of the English concept of unreasonableness in judicial review well beyond the limits recognised in the courts of the UK. But the answer to that, if it is true, is to impose by legislation a modified definition, not simply to sweep it away entirely.

Governments invariably object to the quashing of their decisions by the courts and there is a long history of Ministers in the UK railing against the judges, sometimes accompanied by threats to reform the law of judicial review and to limit the scope of the courts. It is therefore not surprising that similar complaints have surfaced in Israel nor even that a Government has decided to take legislative action.

But why is it that this reform has provoked an unprecedented reaction? The first is that this is not a measured and balanced attempt at reform, such as modification of the definition of reasonableness applied by the Court, but outright abolition.

That alone, however, does not account for the current unrest and disquiet and what has become a political (if not yet a constitutional) crisis, for if this Law stood alone, the rule of law and the principle of legality in Israel would largely survive. Many decisions struck down as unreasonable could be struck down on other grounds and doubtless the Court would be able to fashion new heads of challenge, or develop existing ones, to contain most, if not all, ministerial decisions within proper limits.

The explanation for the explosion of opposition rests on the fact that this Law is merely the first in a programme of proposals designed to rebalance the delicate Israeli constitutional arrangements by materially downgrading the role played by the Supreme Court sitting as the High Court of Justice and correspondingly enhancing the power of the government by profoundly emasculating the only significant check on the executive. Indeed, the reasonableness law is the least objectionable of the several proposals.

It has to be remembered that Israel (like only two other nations, the UK and New Zealand) has no written constitution. It has no fundamental or entrenched Bill of Rights. It has a unicameral legislature, with no second chamber to moderate the activities of the Knesset, which by definition is dominated and controlled by the Government, and its electoral system is defective. Democracy is not simply, as some current Israeli Ministers are asserting, rule by the democratically elected majority. No self-respecting lawyer could subscribe to that view. Democracy requires checks and balances so that majoritarian rule is moderated and exercised in accordance with democratic constitutional norms. In this connection the courts play an indispensable role.

The other ingredients in the reform package would alter the arrangements for the appointment of judges, giving politicians decisive power, limiting the circumstances in which the Court could reach certain decisions requiring much more than a simple majority, enabling the Knesset to overrule decisions of the Court and altering the status and role of government legal advisers. These taken together are not features of a mature democracy.

It is these measures that threaten the constitutional balance and the rule of law in Israel and have brought thousands onto the streets and attracted criticism from across the spectrum of Israeli life. All this has been chronicled in the Jewish, Israeli and international media.

Those advancing the judicial reform programme complain that the judiciary has overreached itself and the power it has arrogated to itself needs to be curbed. It is not necessary for those adopting a critical view of the proposals to enter into the heated politics of this issue. The vice of the reform programme is that it is wholly disproportionate, goes well beyond what might be justified, and seeks to eviscerate the judiciary's role in upholding constitutional and democratic norms.

The judicial reform proposals are of course "political" in the sense that they emanate from a government and politicians and are strenuously opposed by the opposition parties, but policies and laws can be measured by non-political standards. The IBA is a non-political body, as is our parent body, the IJL, but they denounce the

reasonableness Law, as part of a package which is widely seen as an assault on the rule of law in Israel. Jurists can and must assess such matters by non-political standards and principles, just as courts evaluate the legality of highly charged political issues in a wholly juridical and entirely non-political way. It cannot be the case that proposals are immunised from criticism and challenge by non-political actors because they come from politicians or are the subject of political debate, however intense. Nor does a non-political body have to be unanimous in its view before it may pronounce.

Even if passed, the package would, one hopes, not mark the end of democracy in Israel, as some have suggested, but it would seriously compromise its democratic credentials; it would represent a subversion of the finely balanced separation of powers which has evolved over the lifetime of the State, however imperfectly; it would cause notable damage to many Israeli interests – commercial, economic, security; it would play into the hands of Israel's critics and enemies and fuel anti-Israel sentiment and antisemitism (a very strong consideration for the IJL Board); and it would open the door to poor decision-making and oppressive or discriminatory policies.

Constitutional change of this magnitude usually emerges from thoughtful and careful debate which has attracted, if not consensus, at least widespread support. This is not the case here, where all the evidence is that it is opposed by a large majority of the population and by nearly every sector of Israeli life. There is also deep concern throughout the Jewish Diaspora.

Criticism of the reform package does not imply opposition to any amendments to the current law and arrangements. There may be a case for revising the definition of reasonableness; there may be valid arguments for reviewing the powers of departmental legal advisors; and improvements in the process for selecting judges are not difficult to imagine that would not lead to a grotesque politicisation and degradation of the judiciary.

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The above Note represent the personal views of the Chairman of the Association, Professor Graham Zellick CBE KC, and should not be attributed to the Association, its Committee, officers or members. It was written in order to assist the Committee in addressing the subject.