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Presented by the Central Headquarters of the Pro-Democracy Resistance in Israel, for the international media:

An Explainer of the "Reasonableness Standard"

The following is offered in order to place in context the law passed by the Knesset's on July 25 broadly annulling the use of "reasonableness" in judicial review of actions by the government.

The text of the law:

Basic Law: Judiciary (Amendment no. 4)

> "In Basic Law: Judiciary, in Section 15, after subsection (D) shall follow:
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> "(D1) Notwithstanding the provisions of this Basic Law, whomever holds judicial authority according to law, including the Supreme Court sitting as the High Court of Justice, will not adjudicate regarding the reasonableness of a decision of the Government, of the Prime Minister or of another Minister, nor shall it issue an order regarding the aforesaid; in this Section, "Decision" – any decision, including with respect to appointments or a decision to refrain from exercising any authority."

What it means:

- This concise and simple amendment goes much farther than even the Court's harshest critics had hoped. **It says that ANY decision by a minister, the prime minister, or the Cabinet, of ANY type, is no longer subject to review by the Court on the basis of its reasonableness.**
- That's a staggering range of matters: not just appointment of Ministers, or dismissal of key gatekeepers such as the Attorney General or Legal Advisors in the various ministries, which have gotten most of the attention. It applies to hiring and firing of any civil servant; allocation of budgets, government-controlled land and the like; granting licenses of all sorts, from broadcast media to doctors to security-related industries and so on; education and welfare programs for the needy; funding of educational institutions; and on and on. **The list includes powers granted in *literally hundreds* of laws.**
- In Israeli legislation, most powers of the various ministries are defined as powers of the Minister, even if in practice they are handled and decided by the professional echelon. Under Israeli law the **Minister can "reclaim" any power given to the professional echelon** in his/her Ministry. As a result, a huge swath

of decisions – covering much of the activity of all the ministries – can now be exempt from any judicial review for reasonableness.

What is the "Reasonableness Standard", and does it exist in other countries besides Israel?

- It is a standard developed by the courts since at least the 19th century in "Common Law" countries, including England, the United States, Canada, Australia, New Zealand, South Africa, India, Singapore, and others aside from Israel. In those countries the rules developed over time by the courts are an important, accepted part of the legal system.
- The "Reasonableness Standard" at issue is a specific set of rules in Administrative Law – the law regarding the actions of government authorities. It is different from other types of "reasonableness" in the law – such as the "reasonable man" standard in torts law, "reasonable doubt" in criminal proceedings, or "unreasonable search and seizure" in US constitutional law. It deals specifically with whether actions made by government officials or bodies at all levels were made rationally, weighing the proper considerations, and not based on illegitimate, arbitrary or corrupt factors. It is thus critical to ensuring the government acts responsibly and rationally, without corruption or bizarre, absurd results.
- Israel's courts inherited this principle from British law during the time of British Mandate over Palestine, and developed it over time, as occurred in other countries. Contrary to some claims, it is *not* an Israeli invention.
- The idea behind the reasonableness standard is that in a democracy, government is given power to act in order to promote the public good in accordance with law. Democratic systems allow some oversight of government decisions by the courts or other agencies, to ensure this. The exact method to measure reasonableness varies among countries, but the principle is the same.
- Key point: **Israeli Courts, like those in the other Common Law countries, do not substitute their own judgment of what's reasonable** for that of the government entity involved. But apply specific tests:
  - Did the government give weight to the relevant purposes and considerations?
  - Was the decision motivated by improper or irrelevant purposes and considerations?
  - Did it give far too much weight to minor or trivial considerations at the expense of the primary purposes and considerations?

How has it been applied?

- In practice, the Courts invalidate government actions based on the "reasonableness standard" very sparingly (see examples at bottom of document). But the main function of the "reasonableness standard" is ***that it's there***: it instills a culture of governmental competence and responsibility, and deters corruption or self-dealing. The civil service knows it is bound to this standard and the various bodies legal advisors (an established function in Israel) ensure compliance, making the setup critical in maintaining the rule of law, and ensuring that the government responsibly uses the powers entrusted to it by the public.

- While there are other administrative grounds to challenge government action, such as "proportionality", "extraneous reasons", and others, **the "reasonableness standard" is often the only way in practice to redress blatant injustices or corrupt administrative decisions of all types,** from the smallest individual cases to events of fundamental national import. Cases of corruption, in particular, are often hard to prove, so the ability to show "extreme unreasonableness" can prevent an abuse of justice.
- In some other countries, citizens can find recourse in alternative venues, such as transnational human rights courts, or administrative tribunals.

What about the critics?

- Critics of the Israeli Supreme Court claim that over the past 30-40 years it has expanded its use of the reasonableness standard too far, intervening in specific types of matters that should be left to the Cabinet, such as matters of national policy, or internal conduct of the Cabinet (e.g., the decision to go to war). It is a separation of powers argument.
- Others claim more broadly that the Court interjects its own subjective value choices on all sorts of issues in the guise of judicial review, and that those value choices are an illegitimate usurpation of the power that should be exercised by elected representatives. Such claims touch on a common academic debate about the limits of judicial interpretation – can any interpretation be 'objective'?

What are the counter-arguments?

- The critics tend to ignore a fundamental point: in a liberal, rule-of-law democracy, the people are sovereign, but their sovereign will is expressed, first and foremost, in the system of laws – the legal and constitutional system – that maintains order, protects human liberty, allows government limited powers, and that applies to all, including the government. In this case, the legal system, in Israel as in the other common-law democracies, clearly accepts and prefers that judges, even though they are not directly elected by the public, should have oversight power over government action; and that to discharge that role, judges need to be independent from government control, and bound by the law alone. The fact that judges, like all human beings, are unable, as a philosophical matter, to be 100% value-neutral when making decisions, does not mean that cautious review of government actions for reasonableness is impossible. And by its very nature, the common-law tradition of case-by-case development of rules enables the law to change course, carefully, over time.
- **A blanket prohibition such as has now passed in the Knesset is truly unprecedented**, not only in Israel. Both in its scope, and because the Knesset is wiping out an entire area of judicial oversight that was always left to the courts to develop on their own through individual cases, in the tradition of the common law (and Jewish law, by the way).
- **Massive harm to average citizen; hollowing out of civil service.** First and foremost, this law will affect the average citizen in his/her affairs with government authorities. It will almost certainly hasten the deterioration of the professional civil service, as jobs are filled by party hacks and political loyalty will

become the main – or only – criterion for success and promotion. In particular, it will make it easy to ignore – or fire -- any legal advisor who prefers responsible government and compliance with the law against the wishes of the Minister and those around him.

- **It declares open season for government corruption and lawlessness.** It is highly likely to **spawn a culture of bribery** of government officials.
- **It will further harm foreign investment.** Foreign companies invest in places where there is a settled legal system, where the costs of doing business can be reasonably predicted, where there is fair recourse, from the courts or elsewhere, when decisions are not made properly. The robust legal system and independent courts were a key factor in Israel's hi-tech boom over the last 30 years. Companies investing or doing business themselves in Israel, will likely need all sorts of ministerial licenses or approvals: zoning, tax treatment, specialized industry licenses, import/export, employee arrangements, and more. Where bribery may be rampant, and legal recourse for administrative decisions minimized *by law*, all those business acts become risky and unpredictable.

What's next?

The larger context is of a massive effort to remove all checks on government power and move to dictatorship; this is first significant domino to fall. The government has submitted nearly 190 proposed laws that roll back basic democratic freedoms and institutions. It is closely following the authoritarian playbook for undoing democracy used in Poland, Turkey, Hungary and elsewhere. That playbook includes:

- Depicting the opposition as illegitimate & disloyal
- Attacking the courts' independence
- Weakening the effectiveness of independent media and capturing effective control of public media
- Intimidating civil society organizations that oppose you, while creating government-friendly NGOs
- Begin politicizing the civil service, law enforcement and the security services – in appointments and in policies pursued
- Spread patronage, jobs and spoils for party supporters
- Capture control over the administration of elections
- Begin to chip away at the freedom of assembly, speech and press
- Pursue sovereigntist policies and rhetoric towards supranational institutions

Those 190 laws proposed by the government all relate to the above. Examples:

- Main judicial overhaul laws: government control of judicial appointments and firing; legislative override of judicial decisions
- Communications Minister's proposal to take all private licenses, eliminate independent regulator for broadcast media, replacing with structure controlled by government; efforts to control or shut down the public broadcaster.
- Law to impose prison sentence on person who "insults" ultra-Orthodox
- Laws restricting right to protest
- Law creating independent militia for Min. of National Security, with broad powers of administrative detention, seizure of passport, etc.

Examples:

When has the Supreme Court invalidated government actions for "extreme unreasonableness"?

- **Decision by State Attorney NOT to indict for serious crime –** very rare. In the 1980s, the court sought legal action related to the bank share manipulation scandal that caused national financial crisis
- **Political appointments:** very rare. The court invalidated the appointments of Aryeh Deri and Raphael Pinhasi as government ministers despite being under indictment (1993); the appointment of Yossi Ginosar as Dir. Gen. of Building & Construction Ministry; and of Ehud Yatom as head of the HQ for Fighting Terrorism, due to involvement in the "Bus 300" scandal in the 1980s in which a captured terrorist was executed. **However: I**n other cases the Supreme Court **rejected** petitions to annul political appointments,
- **Ministerial policy decisions deemed "unreasonable in the extreme":**

  - Defense Minister's decision not to protect classrooms in Sderot from missile fire, but to suffice with the "safe space" method (running to a shelter), despite the imminent danger.

  - Blanket refusal to recognize doctoral degrees from foreign universities, ignoring earlier Education Ministry decisions on which many students relied when beginning their studies (2005)

  - Annulment of Finance Minister's decision to cancel discounts for day care given to children of ultra-orthodox students, immediately before beginning of school year, with no time to find alternative arrangements

  - Decision not to erect a ritual bath (Mikveh) for women in Kfar Vradim (2014)