

22 June 2023

To: MK Simcha Rotman, Chairman of Constitution, Law and Justice Committee
Members of Constitution, Law and Justice Committee

Subject: Amendment of Basic Law: The Judiciary (Reasonableness Standard)

The Importance of Judicial Review of Government Decisions' Reasonableness for the Protection of Health

This paper is submitted to the committee to present the response of **public health doctors** and **Zulat for Equality and Human Rights** to the bill introduced by the committee's chairman on 20 June 2023 to amend Article 15 of Basic Law: The Judiciary with regard to the reasonableness standard. The proposed amendment heralds the resumption of the discussions in the Constitution, Law and Justice Committee on various laws promoted by the government aimed at weakening the justice system as part of a comprehensive plan declared upon its establishment six months ago.

The proposed amendment: "Notwithstanding what is stated in this Basic Law, whoever is authorized by law to adjudicate, including the Supreme Court, will not discuss or issue an order against the government, the prime minister, a minister, or any other elected official as determined by law, regarding the reasonableness of their decisions."

We, the undersigned, oppose the bill due to its inherent danger to public health, for the following reasons.

Health in Every Policy

Every individual in Israel has the right to health, which is affected by public policy in many areas: the economy, planning and construction, transportation, environment, and housing. In all their decisions, it is the duty of policy-makers to factor health considerations. **Decisions by elected officials that ignore health considerations or fail to give them due weight are unreasonable and must withstand judicial review.**

We should emphasize that judicial review of the decisions of the professional level is insufficient, given that there are cases where the opinion of health experts does not at all feature among the considerations of elected officials. We are talking about a few extremely unreasonable decisions, where health considerations were ignored.

Take for example the Finance Minister's decision in 2018 not to raise the tax on rolling tobacco as part of the policy not to raise taxes, which ignored the effect of the low price of such products on the increase in consumption. A petition to the Supreme Court submitted by the non-profit Smoke Free Israel Initiative and the Israel Cancer Association (joined by the Israel Medical Association as a friend of the court) argued that the reduced tax on rolling tobacco harms public health. The Supreme Court intervened, ruled that the executive branch (the Finance Ministry) must review the consequences of its decisions on health, and instructed the Finance Minister to immediately make the purchase tax on rolling tobacco products equal to the tax imposed on regular cigarettes.¹

"We accept the position that the policy on tax rates should be set by state authorities, the Finance Minister in this case.... However, "policy" is not a magic word that relieves the executive branch from the obligation to act equitably or to examine weighty claims about the negative impact of its decisions on rights, in this case the right to health. Broad discretion is not exempt from the obligations imposed by public law.... The Finance Minister's stand on the matter, as presented to us, referred solely to a higher burden on low-income populations, a consideration that we do not take lightly. On the other hand, it made no mention at all of other relevant considerations that ought to have been addressed: the fact that the volume of rolling tobacco consumption is not a solid figure but one that is affected by tax rates, as well as the concern that a low tax rate on certain smoking products actually contributes to encouraging smoking, and in any case has a negative effect on public health. As is known, the judicial review of administrative decisions gives extra weight to those where the authorities ignored relevant considerations".

Nota bene: A decision to raise taxes on rolling tobacco is not up to the professional level, but is a decision made by a government minister. Were it not for the judicial review, it would have gone through unimpeded and would have ended up inflicting fatal damage on health.

Another example is the Education Ministry's decision in 2008 not to find an alternate venue for the Shuafat Boys School in East Jerusalem despite being located next to a polluting metal factory. A petition to the Supreme Court submitted by the Association for Civil Rights

¹ [Supreme Court Ruling 4862/18 Smoke Free Israel Initiative et al v. Finance Minister et al](#), *Toledano*, 27 January 2019 (Hebrew).

in Israel, *Adam Teva V'Din*, and others claimed that the metal factory harmed the health of the children. In this case as well, the Supreme Court intervened in the decision, affirming that the Education Ministry's willingness to continue to expose children to harmful substances even for just one day was unreasonable and ordered it to find an immediate solution.²

"The willingness to continue to expose children to the risks associated with inhaling harmful substances, even for one day, is an unreasonable decision and should be revoked." Only the intervention of the court and invalidation of the government's decision due to unreasonableness protected the children's health.

Decline in Status of Experts

The proposal to limit judicial review of decisions by elected officials should be viewed as part of the totality of the government's mindset and moves. The growing tendency of elected officials to ignore the expert opinions in the health field reinforces the need to preserve judicial review over their decisions.

We shall mention two recent decisions that ignored expert positions: one is Finance Minister Smotrich's decision to cancel the tax on sugary drinks. Despite the unanimous stance of Israel's Association of Public Health Physicians, Association of Pediatricians, and Association of Family Physicians that the consumption of sugary beverages is harmful to health vis-à-vis the scourges of diabetes, obesity, and other diseases and that taxation is a sensible means of reducing their consumption, the Finance Minister ignored their expert opinion. Another decision has to do with the distribution of food stamps to the needy according to the criteria for eligibility to a discount in municipal tax. Public health, nutrition, and welfare experts all agree that the format chosen by the government will not solve the problem of nutrition insecurity, but the government is ignoring their opinion in this case as well.

As mentioned above, decisions by elected officials that ignore health considerations are unreasonable. Abolishing the judicial authority to review these decisions will end up harming public health.

² [Supreme Court Ruling 5634/09 Husein Jallal v. Jerusalem Municipality, *Takdin*, 25 August 2009 \(Hebrew\).](#)

The Right to Health

In response to the claim that the authority of the courts to review decisions that are disproportional is more than enough, we would like to clarify: The proportionality standard as a tool of judicial review is relevant in cases where the decision of elected officials violates basic rights. Given the fact that the right to health is not explicitly specified in Basic Laws, it is unlikely to win judicial protection in cases where it is overruled by other policy considerations. Therefore, it is doubly important to examine not only the proportionality of the decisions of elected officials but also whether health considerations were factored in, which is where the reasonableness standard comes into play.

When the government adopts decisions that ignore health factors due to populist, arbitrary, or sectoral reasons, a petition to the Supreme Court is the only tool available to the affected citizens. If the court does not retain its authority to review the reasonableness of government decisions, public health will suffer.

We therefore oppose the bill to abolish judicial review of the reasonableness of decisions by elected officials. Given that the right to health and the obligation to examine the health consequences of the decisions of the executive branch are not anchored in law and in light of the risk of interference in the autonomy of health professionals, public health and the environment will be particularly affected if the reasonableness standard is eliminated or reduced.

Signatories:

Dr. Adv. Shelly Kamin-Friedman, expert in medical law and public health law, Zulat research associate

Prof. Hagai Levine, Chairman of the Association of Public Health Physicians in Israel

Prof. Nadav Davidovitch, Director of the School of Public Health, Ben-Gurion University of the Negev