

## The Juristocracy's Constitution: A Critique of the IDI Proposal

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### Who decides?

A constitution provides the answer to one question: who decides what. All the rest is commentary.

In a democracy, ultimately the people – through their representatives – decide. Of course, the people's representatives are liable to make unjust decisions. Thus constitutions set rules in place that establish certain basic principles that may not be violated. However, this merely begs the question: who will decide when these principles have been violated. If it is anyone other than the very majority against whom we seek protection, the problem becomes more acute. Who will protect us from them?

There is no solution to this problem. Ultimately, every question will need to be decided by somebody and that somebody, whoever he might be, is capable of injustice. The best that democratic societies have managed is to establish balancing mechanisms that distribute decision-making among varied interdependent bodies. In this way, it is likely that self-interested parties among them will at least need to find some modus vivendi with others with competing interests.

Thus, since ancient times, government has typically been divided among three separate but interdependent branches: the legislative, executive and judiciary. The judiciary, in addition to adjudicating disputes between individuals, is entrusted with adjudicating disputes between individuals and the state and hence effectively oversees the other branches of government. This returns us to our predicament: who shall oversee the courts?

Democracies have a variety of mechanisms at their disposal to prevent the courts from assuming too much power. Since the courts must adjudicate independently, the limitations involve the determination of who will do the judging and the issues regarding which their judgment is rendered.

1. Judges with the authority to decide constitutional matters are appointed by the other branches of government, so that ultimately judicial appointees reflect the sentiments of the people.
2. Rules of standing limit the court to resolving specific grievances rather than selectively addressing abstract questions of principle.
3. Rules of justiciability limit the cases the court can hear and, in particular, deny the court the power of the purse and the sword.
4. The standard of unreasonableness required to permit court intervention in acts of the other branches are extremely high in order to prevent the Court from simply substituting its judgment for that of the other branches.
5. The rights that the court can invoke as the basis for intervention are well-defined.
6. The court has no influence over the state prosecution and attorney general's office, which decide which cases to pursue.

7. The authority to overturn laws is often limited in a variety of ways. Ruling that a law is unconstitutional: is limited to an advisory opinion (England), can be done only during the legislative process by a parliamentary body (France), can be overturned or pre-empted by parliament (Canada), or can be done only by special constitutional courts with openly political character (most European countries).

### **Israel's Supreme Court**

In Israel not a single one of these safeguards against judicial over-reaching remains in place. Judges are appointed by a nine-person committee, dominated by sitting justices acting in collusion, with no public accountability. The Court intervenes in administrative matters by selectively hearing petitions by public interest groups with no actual standing. The Court hears petitions in matters involving the budget, national defense, foreign policy and other political questions within the legitimate authority of the elected branches. The Court has invented doctrines of “reasonableness” and “proportionality” that are no more than elegant means of substituting its own judgment for that of the elected branches. The court uses amorphous rights such as that to “dignity” to uphold any imaginable right, including the right to import a spouse from enemy territory, the right of children not to be spanked by their parents and the right to have one’s roof reinforced against rockets. The Attorney General, who is meant to be the government’s appointed lawyer, has become the Court’s representative in the government: he is appointed by a committee headed by a judge himself appointed by the Chief Justice, he is inevitably beholden to the Court if he wishes to be appointed to the Court himself, he has been told by the court (Pinchasi) that he is not obliged to defend the government and his decisions are now subject to second-guessing by the Court (Katzav). Finally, the Court has assumed the right to overturn laws without any mechanism in place for determining the conditions under which this is possible.

It is often argued that judicial activism serves to strengthen rights and to buttress democracy. This claim is not even coherent enough to be wrong because it responds to a question about structure – “what mechanisms of checks and balances are most likely to prevent any branch doing excessive harm?” – with an essentialist answer – “judges are more likely to be zealous in the pursuit of justice and democracy”.

The hallmark of a true democracy is that it does not confuse structural issues with essentialist ones. Essentialist claims of this sort can be made – and frequently have been made – in defense of enlightened despots just as well as in the name of hyper-active courts. In democratic thought, claims that checks and balances be damned, we’re more likely to get a satisfactory result by empowering so-and-so, are rightly understood as naked attempts to privilege so-and-so and its fellow travelers.

Thus, in the specific case of Israeli courts, I leave it to the reader’s judgment whether the courts are more reliable and impartial arbiters of the right and the good than others. The point is entirely irrelevant. The question that needs to be addressed is who should decide matters of public policy: unelected judges or elected officials.

## **Enshrining the status quo**

The elimination of all the usual safeguards against judicial hyper-activism, with the exception of the unusual appointments process, was carried out by the Court itself. The Court is well aware, however, that many of these safeguards could easily be put back in place by legislation. The threat of such legislation is the last remaining constraint on the Court.

The most effective way to eliminate this threat would be to enshrine the Court's self-assigned powers in a constitution that would be almost impossible to amend. The Israel Democracy Institute, in coordination with the Court, has invested a great deal of effort and resources to achieve precisely this goal.

The [constitution proposed by the IDI](#) covers the standard three central areas generally covered by constitutions: basic principles, rights and structure of government. . Overall, the document breaks little new ground and is surprisingly flabby, generally failing to distinguish between genuine constitutional material and niggling details best left to statute. The general thrust of the particularist (Jewish) elements in the principles section is (as we shall see below) reflective of a secular-left quasi-Zionist mindset, with a few bones tossed in the direction of the religious and the Arabs.

But all that is beside the point. The core of the proposal, indeed its purpose, is the power it grants to the judiciary. It does so in five ways:

1. The existing appointments process is enshrined in the constitution.
2. The Supreme Court is explicitly authorized to disqualify laws as unconstitutional with no restrictions.
3. The Supreme Court is explicitly authorized to issue writs against any public body with no restrictions.
4. A long list of rights, many of them amorphous and poorly defined, is enshrined in the constitution and serves as a basis for the above two court powers.
5. The constitution can be amended only with the support of 80 MKs.

In short, the IDI constitution gives a self-appointing court broad powers of unchecked judicial review of both legislation and executive action based on an infinitely malleable set of rights and with no mechanism for amending this system.

## **A Jewish State?**

One of the positive effects a constitution can have is to establish consensual guidelines on certain very contentious issues in order to limit the divisive impact of public debate regarding those issues. This is especially important with regard to issues best settled through compromise rather than judicial fiat.

Clearly the most divisive issue in the public sphere is the Jewish character of the State – both in the national sense and the religious sense. The very fundamentals of Zionism – that Israel is the national homeland of the Jewish people, that Israel strives for the welfare of Jews everywhere and for the preservation and advancement of

Jewish culture, that Israel encourages Jewish settlement – should be enshrined in the constitution as a matter of principle and education. But more than that: these values are directly threatened by provisions of the constitution and by the wide berth given to the Court to interpret those provisions. The only way to protect these values from constitutional attack is to confer upon them explicit constitutional protection. They do not appear in the IDI's proposal, either explicitly or implicitly.

One issue regarding which the IDI's constitution does take a firm stand is that of citizenship. It establishes that spouses of citizens (ineligible for the Law of Return) must be granted citizenship, a provision that explicitly contradicts both recent Knesset legislation designed to prevent hostile immigration and recently established policies of many European countries.

With regard to religious matters, the IDI proposes an interesting arrangement in which a small number of core issues are partially immune from constitutional review – the Court may not rule certain laws unconstitutional and “is not obligated” to interpret them in light of the constitution.

Ostensibly, the idea is to remove the Court from intervention in these sensitive matters so that the legislature could find solutions. The sentiment is a good one but the execution is lacking. First of all, it presumes the good will of the Court in respecting the spirit of the provision. The Court does not need to use the constitution to disqualify legislation on these matters since it can still use existing Basic Laws for that purpose if it so desires. And, of course, the mealy-mouthed phrase “is not obligated” does not in any way restrain a Court that does not seek to restrain itself.

In exchange for this dubious provision, regarded by the IDI as a major concession to the religious camp, the IDI constitution provides for a complete ban on religious legislation. Regardless of what one thinks of the dubious merits of religious legislation, the chilling effect of such a provision on public discourse must be appreciated. Every item of legislation will need to be defended against the charge that it is religiously motivated; it will have to be defended on grounds of socialism, feminism or any other quasi-religion, just so long as it isn't an actual religion.

## **Conclusion**

A constitution can serve a useful purpose in a fractured society. It can establish consensual ground rules and unifying principles that can blunt the acrimoniousness of public debates. This technique can only work effectively if the constitution creates mechanisms that encourage compromise and mutual trust and that encourage citizens to assume the burden of self-government rather than fobbing this responsibility off on self-styled experts happy to infantilize them.

Legislatures, not courts, are designed to reach compromises. Legislatures, not courts, are answerable to the people. A constitution that amplifies the power of the court, without including appropriate safeguards, discourages compromises and weakens public trust. Courts play a vital role in democratic society but if they assume authorities best vested in elected branches, they will break under the burden.

Each of the branches of government must assume authority in a manner that maximizes the effectiveness of checks and balances at achieving fair and sustainable arrangements. Those who wish to enhance the power of one branch of government at the expense of another branch simply because they believe that such a maneuver is likely to advance some particular political or ideological vision will neither achieve their goal nor strengthen democracy.

Democracy must be protected not only from tyrants but also from those who take its name in vain.