The Israeli Law Professors' Forum for Democracy

Summary of Position Paper No.43: Appointment of Judges to the Supreme Court in New Zealand

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The Israeli Law Professors' Forum for Democracy, an ad hoc and voluntary group of experts on Israeli law and specifically Israeli public law, expresses its grave concern over the apparent intention to abolish the independence of the judiciary, to subordinate it to the government and to the partisan political considerations of the executive branch, to undermine the independent status of the attorney general and civil service legal counsels, and to violate human rights. **In this position paper we examine the claim made by proponents of the regime changes in Israel according to which the appointment of judges to the New Zealand Supreme Court is determined exclusively by the politicians from the governing parties.**

Our findings: The claim that the procedure for appointing supreme court judges in New Zealand is controlled exclusively by politicians, let alone politicians from the governing coalition parties, is mistaken and misleading.

In Israel, the government is currently trying to advance a reform in the judicial appointment procedure that would diminish the influence of professionals (i.e., the Israeli bar and supreme court judges) on appointment decisions, and grant political players affiliated with the

* We, members of the Israeli Law Professors' Forum for Democracy, hold different academic views regarding the details of the various reforms proposed by Israel's 37th Government to change Israel's democratic regime. However, we are united in the opinion that the host of the government's proposals - which are an unprecedentedly severe attack on the independence of the judiciary, the Attorney General and government legal advisors, the police, the military, and public broadcasting - will seriously damage the rule of law and Israel's democratic character. Therefore, we joined this forum to make our professional opinion available to the public at this fateful time. The position papers or other professional materials produced by us reflect the prevailing position among the members, even if they are not unanimous. The list of Forum's members and all position papers on our behalf are available at https://lawprofsforum.org. Follow us on Twitter: https://twitter.com/lawprofsforum. Contact us: lawprofessorsforum@gmail.com.

government coalition absolute control over judicial appointments. Reform proponents often present the procedure for appointing supreme court judges in New Zealand as supportive comparative law. For example, PM Netanyahu stated in a press release that “publicly elected officials are the ones that nominate judges…[,for example, in] New Zealand…so… is it not a democracy? If the reform would pass [into law], Israel won’t be a dictatorship, [but rather] it would become resemblant to New Zealand. This [i.e., the reform] is not the end of democracy, it is the strengthening of democracy.” The trouble is that reform proponents’ account of New Zealand Supreme Court judicial appointment process is gravely incorrect. It ignores relevant laws. Furthermore, it acutely suffers from a lacking understanding of the legal and political culture in New Zealand. Notably, it fails to sufficiently take note of the highly significant place constitutional conventions in New Zealand’s constitutional fabric. Contrary to Israel, in New Zealand, constitutional conventions are commonly followed , even by politicians, including when such compliance contradicts their contingent interests. This compliance stems from a political and legal culture in which violating constitutional conventions is generally considered to be something that ‘is simply not done’.

The formal conditions required for being appointed a supreme court judge, chief justice included, are specified in articles 94-99 of the New Zealand Senior Courts Act of 2016. Art. 100 of the Act, then designates the Governor-General (the representative of the British Monarch in New Zealand, an a-political position) with the authority to appoint judges; and further instructs the Governor-General that “The Chief Justice is [to be] appointed on the recommendation of the Prime Minister”, while “every other Judge, and every Associate Judge, is [to be] appointed on the recommendation of the Attorney-General.” The (misguided) Israeli depiction of the nomination of New Zealand supreme court judges as being exclusively determined by politicians has likely developed on the combined basis of the content of Art. 100, and of a constitutional convention according to which the Governor General unequivocally appoints to the position of the supreme court chief justice whomever the Prime Minister recommends, and to any other judicial position whomever the Attorney General (a cabinet member politician) recommends. However, despite its reliance on an actual normative footing, the depiction made in Israel of the New Zealand judicial nomination process is, nonetheless, incorrect. The account’s defect stems from the fact that is gravely undercounts the immense influence of certain fundamental constitutional conventions on the nomination process; thus, exhibiting a gravely deficient understanding of New Zealand political and legal culture which, as mentioned, tends to take constitutional conventions very seriously.

Notably, the depiction made in Israel insufficiently takes into account the essential fact (as it is stated even in the official website of New Zealand Judiciary) that: “When recommending an

appointment [of judges] there is a constitutional convention in Aotearoa New Zealand that the Attorney-General [despite being a politician] acts independently of the Government and is not influenced by party politics."[1] And indeed, in New Zealand, not only "the theory…[but also] the practice of judicial appointments…[remains] non-political, even though the Attorney-General is a politician who sits in Cabinet".[2]

Additionally, the depiction made in Israel is further flawed, because it relies only on the aforementioned legislation (i.e. the 2016 Act), while disregarding another relevant legal norm, "The Judicial Appointments Protocol", the Attorney-General must publish according to Article 93 of the 2016 legislation. **The Judicial Appointment Protocol states, *inter alia*, that in the case of "[a]ppointments to the Supreme Court… The Attorney-General will…, with the agreement of the Chief Justice,… settle a shortlist of not more than three possible appointees…[and] then… cho[o]s[e] the most suitable candidate from th[at] shortlist".[3] Thus, since the Attorney-General can only chose the supreme court judge from a shortlist of nominees to whom Chief Justice's consent is required, it is not only the Attorney-General, but rather also the Chief Justice, who has veto power over the appointment of supreme court judges.** Note further that even though the Governor General appoints as chief justice whomever the Prime Minister recommends, the supreme court chief justice is not a political position, due to yet another constitutional convention which requires that this position would remain a-political in nature.

To conclude, the claim of proponents of the regime changes in Israel that comparison to New Zealand provides support for granting the government coalition control over judicial appointment is mistaken and misleading. It is based upon a selective and partial reading of New Zealand law which overlooks cardinal elements of the relevant law. Furthermore, the claim also reflects an acute misunderstanding of underlying characteristics of New Zealand's legal and political culture specifically regarding the importance of "constitutional convention".

[1] *How is a judge appointed?*, CTS. NEW ZEALAND, https://www.courtsofnz.govt.nz/learn-about-our-courts/how-is-a-judge-appointed/

[2] MATTHEW SR PALMER & DEAN R KNIGHT, THE CONSTITUTION OF NEW ZEALAND 153 (2022).

[3] Crown Law Office *Judicial Protocol* (April 2014).