The Israeli Law Professors' Forum

For Democracy

Senior British Experts' Response Concerning the Comparison between Israel and the United Kingdom

Published February 19, 2023*

As a part of their campaign, supporters of the regime change compare the legal systems of the United Kingdom and Israel, in a way that is mistaken and misleading. The following position paper, written and signed by some of the leading experts on UK public law, provides accurate information on the British legal system.

Among the signatories of the position paper are former President of the UK Supreme Court (2012-2017) Lord David Neuberger, former Minister of State for Justice (2013-2016) Lord Edward Faulks KC, senior barrister and member of the House of Lords Constitution Committee (2008-2021) Lord David Pannick KC, and two professors from UCL, a leading university in Britain.

The writers of the attached position paper clearly contradict the claims made by supporters of the regime change, and demonstrate the role of the House of Lords as an active second

*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.wixsite.com/home. Follow us on Twitter: https://twitter.com/lawprofsforum. Contact us: lawprofessorsforum@gmail.com.

legislative body that initiates legislation and routinely supervises the actions of Parliament. Furthermore, recent proposals for reform in the UK have left unscathed the role of the House of Lords as a primary constitutional protector.

The position paper examines and rejects the claim that since the United Kingdom's courts affirm the legal doctrine of legislative supremacy of the Parliament, the judiciary cannot affect the design and execution of public policy. The Human Rights Act 1998 provides courts with two powers in this regard—to interpret legislation in a way that protects human rights, including by departing from the legislature's intended meaning (section 3), and by issuing a declaration of incompatibility (section 4), which under the legal culture of the UK it is ultimately followed by parliamentary/governmental action that removes the incompatibility. The power to declare incompatibility is often mistakenly considered the only power the UK judiciary possesses; however, while this power has been employed by courts about 30 times, courts have read down statutes that violate human rights in nearly 60 cases.

Beyond the Human Rights Act, the UK courts have exercised their historical role under the common law to provide a potent restraint on executive power. For example, the Supreme Court intervened in the processes of the UK's departure from the European Union. Even following Brexit, the writers of the position paper stress, the UK parliament and nearly all its governments affirmed the crucial importance of observing its international legal commitments, including by remaining a state party to the European Convention on Human Rights and continuing to abide by the judgements of the European Court of Human Rights. Membership of this system of human rights imposes further noteworthy constraints on legislative processes.

The Constitution of the United Kingdom: A Response to Some Claims Made by Proponents of Current Constitutional Change in Israel

We, the undersigned, have had it brought to our attention that persons interested in current Israeli constitutional reform efforts have prayed in aid certain alleged features of the United Kingdom's constitutional arrangements. To the extent that these features are seen as material to legislative deliberations in the Knesset, we believe it important to clarify how these constitutional arrangements operate in both law and practice.

The House of Lords is sometimes misunderstood to be a "toothless" chamber. In fact it plays an indispensable role as both a revising chamber and constitutional guardian, and one where members can introduce bills. The Government enjoys no majority there and the chamber passes hundreds of amendments to Government bills each year. It has also inflicted many defeats on the Government, often in high profile cases which result in acute accountability in the media. While the House of Commons enjoys the legal power to (eventually) prevail over the Lords, the latter's delaying power and the impact of adverse media exposure often result in the Lords holding de facto power to influence the Government's legislation. The House of Lords can and does force changes to the Government's legislative program. An appointed chamber, it tends to exercise these powers particularly on issues reflecting important constitutional principles. The reports of its select committees on delegated powers, the constitution, on the scrutiny of secondary legislation, and previously on the European Union, are highly influential across both Houses of Parliament. All proposals to reform the House of Lords have sought to preserve its character as a constitutional guardian.

It is frequently believed abroad that since the United Kingdom's courts affirm the legal doctrine of the legislative supremacy of Parliament, the power and role of the law courts is irrelevant to public policy making. This claim does not reflect the true structure of the British constitution. The Human Rights Act 1998 imposes two major constraints on the effect of legislation. Section 3 is an interpretative obligation which imposes a strong duty upon courts (and others) to do what they can to interpret all legislation in a way which protects human rights, including by giving it a meaning that is a clear departure from the meaning Parliament intended when enacting it. Under Section 4, a court can, if it is unable to interpret primary legislation in a way which is human rights compatible, issue a declaration of incompatibility. Though such a declaration does not affect the validity of that legislation, under the legal culture of the UK it is ultimately followed by parliamentary/governmental action that removes the incompatibility. To date, there have been approximately 30 statutes subject to declarations of incompatibility and on best estimates nearly 60 statutes read down under section 3 of that Act, in a manner at odds with the traditional understanding of parliamentary sovereignty. Over a dozen statutory instruments (regulations) have also been declared unlawful and quashed during the two decades of its operation. The Human Rights Act 1998 therefore has a concrete

effect in restricting the wishes of the Government to act in a way which is not human rights compliant and even on a Parliament that wishes to do so in any but the most unambiguous of ways.

Beyond the Human Rights Act, the law courts have exercised their historical role under the common law to provide a potent restraint on executive power. Such can be seen in recent Supreme Court judgments relating to Brexit and in the application of a very strong principle of legality, under which statutes will not be read to authorise executive power to infringe human rights or the rule of law, absent the clearest possible wording to that effect. Furthermore, the Government recently held two independent inquiries, one into the judicial review of administrative action and the other into the functioning of the Human Rights Act 1998. Each was established to address the question of whether the judiciary had assumed too much power. Both reviews rejected the general proposition that they had, and both affirmed the crucial importance of the rule of law in the UK constitutional landscape. Hence, allegations that courts in the UK have no review power in the constitutional sphere are false.

It is furthermore noteworthy that although the UK has left the European Union, both the UK Parliament and nearly all its Governments have historically affirmed the crucial importance of observing its international legal commitments. The United Kingdom took a leading role in authoring the European Convention on Human Rights. It remains a state party to that Convention and it continues to abide by the judgments of the European Court of Human Rights. Under the Human Rights Act 1998, ministers must lay a statement before Parliament certifying that any bill introduced either does or does not comply with the European Convention, reflecting stringent internal legal assessments. Therefore, membership of this system of human rights imposes further noteworthy constraints on the legislative process.

Signed by:

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