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למען הדמוקרטיה | من أجل الديمقراطية
The Israeli Law Professors' Forum
for Democracy

The Israeli Law Professors' Forum for Democracy

Position Paper No. 8 Concerning The 37th Government's Proposals for Regime Transformation in Light of the Positions of the Venice Commission

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In this position paper we analyze the changes proposed by the 37th government in light of the positions of the Venice Commission.

The European Commission for Democracy through Law, better known as the **Venice Commission**, was established in 1990 in order to advise the Council of Europe on issues concerning the rule of law and strengthening democracy. The Commission's role is to provide information and advice to members of the Council of Europe in legal matters and to assist them in bringing their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. In 2002 the Commission's statute was amended so as to allow states that are not members of the Council of Europe to become members. Israel joined the Commission in 2008.

* 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.

Examination of the Commission's reports and shows that these steps are flagrantly incompatible with the best practices identified by the Commission in at least three respects: the system of appointing judges, the procedure for constitutional reform, and respect for the rule of law. **If these proposals are adopted Israel will stand alongside countries like Poland, Hungary and Turkey in relation to which the Commission has published negative reports in recent years.**

This brief review shows that the measures being furthered by the Government of Israel in order to change the constitutional regime of the country, amount to a clear violation of the fundamental values that lie at the heart of the legal principles identified by the Venice Commission. The measures are a manifest breach of the minimal standards that the Venice Commission set out regarding appointment of judges, the proper process for constitutional reform, and the principles of rule of law in modern democratic countries.

It must be stressed that the Venice Commission holds that constitutional changes must be seen in their entirety and in the particular political context. When seen in this light the government's proposals are particularly problematic.

Adoption of the proposals will make Israel a member of a dubious "club" of member states, whose constitutional and legal structure departs from that accepted in modern democracies.

Introduction

The European Commission for Democracy through Law, better known as the **Venice Commission**, was established in 1990 in order to advise the Council of Europe on issues concerning the rule of law and strengthening democracy. The Commission's role is to provide information and advice to members of the Council of Europe in legal matters and to assist them in bringing their legal and institutional structures into line with European standards and international experience in the fields of democracy, human rights and the rule of law. In 2002 the Commission's statute was amended so as to allow states that are not members of the Council of Europe to become members. Israel joined the Commission in 2008.

The individual members of the Commission are experts in constitutional law, the social sciences, or in other areas that are relevant in promoting the functioning of democratic

institutions, law and political sciences. Every member state appoints one member of the Commission (and one deputy member), but once appointed members of the Commission act as independent experts who do not represent their state.

The Commission may initiate research papers and guidelines in matters that are covered by its mandate. It may also draw up opinions on specific questions. Such opinions may be requested by bodies listed in the Commission's statute, most specifically by organs of the Council of Europe, or by states that take part in the Commission's work. In appropriate cases, the Commission may publish urgent opinions or statements by the Commission's president.

In some cases, the states themselves request opinions on their own issues, in order to assist them in carrying out reforms; or in contending with constitutional crises. An example is the case of Romania. A request to the Commission by the President of the State, or the Minister of Justice, is a step that should be considered in relation to the measures that the Government of Israel is promoting. There are precedents of domestic courts requesting *amicus curiae* legal opinions in cases pending before them.

The Commission's opinions and research reports are not formally binding. However, they reflect the accepted international standards of best practices in the relevant matters. As such they are an important instrument of soft law that establishes the expectations for the conduct of member states. Through their adoption by states and reliance on them by courts in different countries the Commission's opinions and reports may even contribute to the development of customary international law. Thus the reports and opinions may influence political and legal developments in the states themselves. They may also influence the states' international standing, and whether they are perceived as democratic states that respect the rule of law. The state's standing and the way it is perceived may in turn affect the domestic and international legitimacy of the state, and its ability to perform effectively in various international fora.

Examination of the Commission's reports and opinions that are relevant in assessing the steps being taken now by the Government of Israel to change the constitutional and political regime of the country shows that these steps are flagrantly incompatible with the best practices identified by the Commission. In this short document we show that at this stage, the government's proposals clash with the Commission's positions in three respects: the system of

appointing judges, the procedure for constitutional reform, and respect for the rule of law. **If these proposals are adopted Israel will stand alongside countries like Poland, Hungary and Turkey in relation to which the Commission has published negative reports in recent years.**

We stress that the issues discussed here must be seen in the wide context that includes other proposed measures, such as the override clause, which will allow the Knesset, by a simple coalition majority, to re-enact any law that the Supreme Court has declared to be unconstitutional; the requirement for a majority of 80% of the judges to declare a law unconstitutional; and the proposal that basic laws will not be subject to judicial review. When taken together, all the proposed measures result in weakening, if not in effect abolishing, judicial review of legislation. To this must be added weakening judicial review of administrative action by abolishing the grounds of non-reasonableness. The rule of law will also be undermined by the proposal to abolish the binding nature of government lawyer's legal opinions, and turning the position of ministry legal advisers into positions of trust, which means that they may be appointed and dismissed at will by government ministers. All these measures, each on their own, and together, involve serious erosion of the rule of law. In its [opinion](#) on the matter of Poland (2017) the Commission held that measures such as those proposed by the Government of Israel, must be assessed in their entirety and in the context in which they are adopted.

Venice Commission's Position on Appointment of Judges

In 2007 the Venice Commission adopted a report on the systems of appointing judges. The report shows that in certain states, political involvement in the selection of judges endangers the independence of the courts, whereas in other states such involvement may not be dangerous, since it is well entrenched in a political culture that prevents illegitimate politicisation of the process. At the same time, the report states that the widespread modern tendency is depoliticization of the process of selecting judges, so as to ensure respect for the separation of powers and independence of the judiciary. Thus, for example, the position of the Council of Ministers of the Council of Europe is that the arrangement for selecting judges should be independent of the government, and that one way of ensuring this is to provide for judicial

participation in their selection. In those cases in which the existing arrangements and traditions place selection of judges in the hands of the government, there must be mechanisms for ensuring the independence of the selection process, in order to ensure that judicial appointments and promotions should be based solely on “objective criteria.”

The Commission’s view is that significant government involvement in selection of judges is not advisable in those states in which there is not a well-entrenched political culture and tradition that lead to restraint of the political echelons. The Commission is also of the opinion that significant involvement of the parliament in selection of judges may lead to politicisation of the process, which will result in appointment of judges on the basis of criteria that should be irrelevant. The Commission’s position is that when judges are appointed by the head of state, the appointment should be based on the recommendation of an independent committee. The Commission therefore recommends that such committees should have the decisive role in appointment and promotion of judges.

As to the composition of committees for the appointment of judges the Commission takes the view that there must be a balance between judicial independence and accountability of the judicial system. Thus, involvement of members of the legislature and the executive cannot be excluded *a priori*, so long as such involvement does not undermine the principle of judicial independence. One way of ensuring this is by providing that many or most of the members of the selection committee will be appointed by the judiciary itself. In any event, the Commission takes the unequivocal position that the government and its supporters should not constitute the majority in committees for the selection of judges.

The Commission repeated these principles in the 2010 [Report on Judicial Independence](#). Accordingly, in its 2017 [opinion](#) regarding Poland, the Venice Commission held that the change in the system of appointing judges in Poland into a system in which there will be an automatic political majority, and this as part of additional extensive changes in the judicial system in the country, presents a serious threat to judicial independence and the rule of law.

It must be stressed that while in various documents the Commission accepts that it may be acceptable for the government to appoint judges in states in which the system is based on a long-standing tradition that is entrenched in that states’ political culture, **it clearly does not**

support the position that when a professional body for appointment of judges already exists, the state may move to a political appointments process.

It is indeed true that the Commission mentions that in the case of constitutional courts there may be good reason for a different system of selecting judges, in which elected politicians have a larger role that bolsters the “democratic legitimacy” when it comes to judicial review of legislation. But this does not mean that judges may be elected to such courts under a system that gives total control to the prevailing political majority. Thus, the Commission has held time and again – for instance [in relation to the constitutional crisis in Poland](#) – that the system for electing judges of constitutional courts must ensure a balanced and independent body of judges on these courts. A system in which the prevailing political majority has total control over the appointment of judges to constitutional courts does not meet this standard. As the Commission held when it criticized the system in Poland of electing judges to the constitutional court:

“Th[e] view of the Constitutional Tribunal with judges ‘belonging’ to one party and other judges ‘belonging’ to the other party seems to equate the Tribunal with another chamber of Parliament...The Venice Commission cannot subscribe to such an approach and it has difficulty understanding the aim of establishing ‘pluralism’ in the Constitutional Tribunal if this just means appointing a sufficient number of one’s own ‘representatives’ to the Tribunal. This logic seems to assume that a lack of such party pluralism is legally relevant, but there is no constitutional basis for such a concept.”

In [Position Paper no. 7](#) of the Forum we showed that the proposed bills of the Minister of Justice and Chair of the Knesset Constitution and Law Committee concentrate total power in the selection of judges in the hands of the executive for **all courts**, and not only for the court that may be regarded as the equivalent of a constitutional court. **It must be stressed that Israel does not have a constitutional court.** The main function of the Supreme Court is hearing appeals in civil and criminal matters. Furthermore, even if one were to regard the Supreme Court as a sort of constitutional court, giving total control to the government in appointment of judges would

totally undermine its standing as an independent institution. **Thus the above-mentioned proposals are clearly incompatible with the view of the Venice Commission, in which Israel is a member. While the Commission accepts that in appointment of judges representatives of the political branches may play a role, it stresses that politicians not be in the majority, and certainly that the representatives of the government should not constitute the majority.**

The process for constitutional amendments

In 2010 the Commission published a [report](#) concerning constitutional amendments. The report stressed that constitutional arrangements that restrict the use of governmental power and that provide protection for the rights of the individual must be stable and foreseeable, and that the way to amend them should not be too easy. The Commission held that when the procedure for making changes is too flexible, the results will be instability, uncertainty and conflicts. Even more seriously, such a flexible procedure will lead to flawed protection of fundamental values and rights of the minorities. Even though most of the conclusions in the report are not relevant in the case of Israel, since it does not have a full formal constitution, the points in the report relating to the proper procedure for constitutional amendments are certainly relevant in our case.

Thus, the report takes the view that when a constitutional amendment is required in a state, a special parliamentary majority should be demanded. Furthermore, the consideration of the proposal should be spread over a considerable period, which will permit serious analysis and discussion of the proposal. Most importantly, a free and open public discussion of the proposal must be possible and there should be adequate time to allow the public to examine the meaning of the proposed changes and their possible implications. **In this context, the report emphasizes that constitutional amendments the purpose of which is to increase the power of the executive must be subject to special scrutiny.**

In a [Position Paper no. 3](#) of the Forum on the proper process to be followed in adopting a constitutional amendment, members of the Forum pointed out that the process being followed now in the Knesset is being carried out in an unusually hasty fashion, ignoring accepted regular

procedures. This process, which aims to effect far-reaching changes in the constitutional regime of the country, and does not allow adequate time for thorough discussion, hearing different views, and deep public consideration, is clearly incompatible with the position of the Venice Commission.

Rule of Law

In 2011 the Commission published a [report](#) on the rule of law. The meaning of the concept “rule of law” raises many questions. The Commission therefore proposed a definition that includes a number of elements which it believes reflect “consensus” according to various traditions. One of the essential elements is judicial independence, and courts that are not prone to bias. The rule of law requires a judiciary that is free from political pressure, especially by the executive.

Granting absolute control to the executive in selection and promotion of judges is likely to allow the executive branch of government to subject judges to political pressure, and to influence the composition of the judiciary in a manner that would be amenable to the position of the executive, thus depriving the independence of the courts of any meaning, and thereby undermining the rule of law.

Summary

This brief review shows that the measures being furthered by the Government of Israel in order to change the constitutional regime of the country, amount to a clear violation of the fundamental values that lie at the heart of the legal principles identified by the Venice Commission. The measures are a manifest breach of the minimal standards that the Venice Commission set out regarding appointment of judges, the proper process for constitutional reform, and the principles of rule of law in modern democratic countries.

It must be stressed that the Venice Commission holds that constitutional changes must be seen in their entirety and in the particular political context. When seen in this light the government’s proposals are particularly problematic, since they must be considered together

with the other proposals mentioned in the introduction. Adoption of the proposals will make Israel a member of a dubious “club” of member states, whose constitutional and legal structure departs from that accepted in modern democracies.

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