

# The New York Times Loves judicial activism, Hence, it yells at Israel – and is mum on America



by Lev Tsitrin

The title of *New York Times'* editorial board's expression of its collective apprehension – if not horror – at the political process in Israel says it all: [\*The Ideal of Democracy in a Jewish State Is in Jeopardy.\*](#)

Why so? Needless to say, democracy has many components – free speech being the main one (one can in fact argue that democracy itself is secondary, it being a mere mechanism for free people to organize and govern themselves, while freedom

is primary – without it, democracy loses its meaning). To safeguard freedom from a would-be tyrant, governments in free societies are split into independent branches, so they could keep each other in check; the party system insures further competition, not letting politicians forget that they serve the public: they are in office not just to enjoy the perks, but to work for public good. Legislative, executive, and judicial branches are supposed to hold each others' feet to fire, with contenders for office from the opposing parties keeping a watchful eye for any chink in incumbents' armor that could allow booting them. Those "checks and balances" are intended to ensure that tyranny does not take root. And the key to this arrangement is the press – without it, how would the public know about malfeasance (or incompetence) among those who govern, so the corrupt and incompetent could be replaced?

This is how American system is supposed to work – and Israeli, too. The *New York Times* worries that in Israel, that system of checks and balances is about to get out of whack – mainly because of what may happen to the country's judiciary, this worry being amplified by legal troubles of some in the new cabinet (Netanyahu – the incoming prime minister – is himself under a legal indictment). What would such people do – when put in charge of the police, for instance, the paper asks. But more importantly, what if the Israeli Knesset adopts a law that allows it to override the decisions of Israel's Supreme Court, making it much more difficult for judges to legislate from the bench?

Should we hyperventilate about this, as the *New York Times* does? As to the legal troubles of people now in the coalition, it may indicate two totally different things: one is, that Israeli politicians are uncommonly corrupt in comparison to, say, American ones – or perhaps that Israeli legal system makes it much easier than the American one to stick charges to a politician, and so more politicians are charged.

And clearly, the latter is the case. A few years ago I attended a lecture by a retired Israeli justice of the Supreme Court (Israel has a mandatory retirement age for judges – you turn 70, and you are out: ageism in action). The gist of what he said was, that unlike the US, in Israel the Supreme Court has original jurisdiction – it does not simply consider appeals from decisions of lower courts, but also takes brand-new cases. As importantly, in the US one needs to have standing in order to sue (that is, one has to have actually suffered damages); but not in Israel – there, if you are unhappy with a law or regulation (whether it touches you personally, or not), you can sue – in the Supreme Court, at that! Besides, there are plenty of weird-sounding laws and rights (right to dignity, for instance) or laws against “breach of public trust” (that’s what Netanyahu is in for, I think). Thus in Israel, reasons for suing are much more plentiful, and venues to do so are far more readily available than in the US.

Hence, in bemoaning the shadiness of characters in the incoming Israeli government, the *New York Times* does not engage in an apples-to-apples comparison. Israeli politicians are likely just about as corrupt as the American ones – but Israeli legal system is much more prone to indict them. If we lived under the Israeli system, a lot more politicians would have walked under the legal cloud (if not actually served time). The resulting implied comparison between Israeli and American democracies – in which the emotional force of the editorial is rooted – is really a comparison between American apples and Israeli oranges, a comparison that is utterly misleading, if not deliberately ingenuousness.

This said, in one respect the legal systems of two countries are not that dissimilar. I asked the above-mentioned Israeli judge during Q&A about comparative judicial procedure – whether there was a notion of “due process” in Israel, and whether Israeli judges allow themselves to replace parties’

argument in their decisions with argument of judges' concoction – as is routinely done by federal judges in America, so as to decide cases the way they want to (and they defend such practice, when sued for fraud, by the self-given in *Pierson v Ray* right to act from the bench “maliciously and corruptly” which obviates “due process”). His answer was, that at the level of the Supreme Court judges should think as politicians (the lecture hall being filled with law students, there was an audible collective intake of breath – no American judge would admit that) – and so yes, it was permissible to use judges' argument rather than parties'!

Simply put, both in Israel and the US legislating from the bench is OK (the *New York Times*' editorial, writing of Israel, put it more obliquely: “in the absence of a national constitution [Israel's Supreme Court] has served to weigh government actions against international law and the Israeli state's own traditions and values”) – a pretty subjective “procedure”; in other words, just in the US, the court is not bound by any enforceable process.

(As somewhat an aside, it is interesting to observe that Israel's present right-leaning incoming government which the *New York Times* deplores is due precisely to Israel's self-righteousness in legal matters which the paper lauds to the skies. It is only because of this legal (some would perhaps argue, “moral”) self-righteousness that the far-right parties are in the coalition at all: other parties refuse to sit in a government headed by Netanyahu because he is under a legal indictment. This indictment barred formation of the government in prior elections (of which there were four in that many years; this one being the fifth), too. Way back when, I [suggested a simple solution](#) – that given the folly of overzealous purity that blocks the formation of Israel's government, Israel's president should have, for the country's sake, examined the charges against Netanyahu, and proactively pardoned him, thus removing any excuses for other parties'

joining his government. But this takes courage – and none was to be found in Israel’s presidents, Rivlin and Herzog.)

However it may be, my main takeaway from the *New York Times*’ editorial is that that the paper’s editors love judicial activism, they love legislation from the bench, they love arbitrary judging, and don’t mind the accompanying judicial fraud that is a necessary accompaniment of those – both in Israel, and in the US. Hence, the paper yells at Israel in fear that the Knesset would put an end to the rule of judges there, and is mum on American judiciary to help it get away with its own violation of the “due process of the law,” ensuring the rule of judges here. This is why the “paper of record” (and all its MSM ilk, for that matter) closes its eyes and shuts its ears to the sight and sound of judicial fraud. It works for their agenda, and they love it. Thus, the judiciary is off the hook of public scrutiny, the absentee – if not corrupt – press corrupting the entire democratic order, be it in Israel, or here in the US.

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