

## The Limits of the Law: How International Law Serves Judicial Activism

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*This paper analyzes the way international law is being used by the Israeli Supreme Court to overrule the Knesset. The expanded reliance on international law, taken together with other judicial activism trends such as the elimination of standing requirements and the rejection of the non-justiciability doctrine, escalates the transformation of Israel from a democratic regime into a juristocracy. The increasing reliance of Israeli courts on international law should be a matter of concern to anyone who cares about representative democracy.*

The **first chapter** introduces the topic of international law.

The **second chapter** expands on the democratic deficit inherent in international law, covering both its general ambiguity and the erosion of its proper place in Israeli domestic law.

The **third chapter** details the incorporation of international law in Israeli courts, explaining the formal stance on treaties, the status of international customs in domestic law, the conformity principle in statutory and constitutional interpretation, international law in administrative law and in the context of the war on terror, and finally, analyzing the use of international law as a "legal impediment" to the promotion of legislation.

The **fourth chapter** is a comparative study of the treatment of international law in the US, Canada, the UK, Australia, Germany and France.

The **fifth chapter** analyzes the findings and summarizes the conclusions.

### Summary:

Public international law traditionally includes treaties signed by countries, and legal norms or international obligations derived from the general practice around the world established over time, called customary law. International law suffers from an acute democratic deficit: despite not being created by the people and their representatives,

states are still obligated to comply. Jurists play a pivotal role in "recognizing", i.e., creating, international norms, thereby granting them the outsized power to create binding norms that would not necessarily stand the test of the ballot box.

The very existence of a given international custom, which serves as a primary source of international law, is extremely vague. Jurists "recognize" binding customs that often reflect a law they view favorably rather than the actual custom in practice.

Beyond treaty and customary law, there has been an expansion of "soft law"- UN declarations and resolutions, and other international organizations' guidelines and policy papers. Although soft law has no binding authority, and despite the fact that these organizations are not accountable to the citizens of any state, countries tend to fall in line and courts to adopt its content.

As do most other states, Israel has a dualistic system, which separates domestic and international law. And as in other common-law states, customs are automatically absorbed into Israeli law. In contrast, international treaties have no legislative validity in Israel until they have been ratified by the Knesset. In recent years, the Supreme Court has interpreted laws according to the principle of a "presumption of conformity"; in other words, in a way that is consistent with international law, thus eroding the dualistic system. Furthermore, Justices in many cases invoke vague non-binding sources as valid legal sources, in order to create new laws disguised as an incorporation of international law.

This rule of conformity with international law exists in most judicial systems, but it is utilized excessively in Israel, where courts reference international law to change existing legislation. Worse, the Court relies on the presumption of conformity to intervene in budgetary considerations and security and immigration issues.

The comparative review demonstrates that international law can be used with much greater moderation. In the United States, for example, the Court looks for a declaration or action indicating the government's or legislature's willingness to adopt a custom in the absence of legislation. In other countries, such as the UK and Australia, the Court gives the state's interpretation dominant if not decisive consideration. Courts seek a high level of certainty to identify customs, and are not willing to adopt human rights practices that have developed only a few years ago, without any evidence that the state considers itself subject to them. Israel should align itself with such approaches, and rely on international law only as a last resort, in cases of ambiguity. If the language of a law is clear, the Court should not apply the presumption of conformity and baselessly place international law above Israeli domestic law.

Traditionally, explicit legislation by the Knesset does indeed supersede international law; however, in practice, this supremacy is contested. Supreme Court Justices hold

that any legislation contravening international law does not align with the State of Israel's "principles". International law has similarly been invoked by the legal counsel apparatus as a form of "legal impediment" to promoting legislation in the first place.

Based on various sources of international law, including some of extremely dubious legal validity, fundamental questions at the core of political disputes are transferred from democratically elected officials to the Court's decision, especially in matters of security and immigration. Judges can legitimize their personal and ideological preferences by presenting them as necessary or imperative according to international law. For example, when the Supreme Court interprets an international treaty to mean that the State of Israel is obligated to grant asylum to all women facing the danger of female genital mutilation, it uses an alleged universal obligation with constitutional status to halt all public discussion and supersede the state's sovereignty in determining who can cross its borders.

The expanding reliance on international law is thus a primary tool in accelerating Israel's transition from a democratic regime into one ruled over by a dictatorial Supreme Court.

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