

Is Israeli Democracy at Risk?

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Various measures taken under the current government are perceived by part of the public as threatening the robustness of Israeli democracy. These include the Basic Law: Israel – the Nation State of the Jewish People; the Judea and Samaria Settlement Regularization Law; the so-called “Loyalty in Culture” bill; the bill on the override clause; and attacks on the Supreme Court and human rights organizations. On the other hand, some argue that Israeli democracy is stronger than ever, and that those mourning the state of Israeli democracy do so because the people in power do not share their views. With each side convinced that it is right, the question arises whether Israeli democracy is truly at risk. This article maps the opposing arguments regarding many of the said government measures and analyzes the ramifications for Israeli democracy. It also proposes guidelines for maintaining a healthy democracy, particularly in the face of these challenges.

Some of the divergent views brought below result from different definitions of a “democratic state.” Israel has a democratic regime: the government is elected in free elections, and the results are determined at the ballot box with no external intervention. Many cite this as sufficient proof that Israel is democratic. It is also asserted that the attempt to restrict majority rule in the name of “democratic values” is actually anti-democratic, because it ignores the elections results and imposes specific outlooks that are nothing other than the political views of the liberal left. These views conflict with the majority view, which leans to the right and attaches importance to enhancement of the national identity of the state.

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Labeling any position seeking to promote national interests as essentially anti-democratic is a misrepresentation of democracy. The attitude that regards majority rule as the fulfillment of the democratic idea, however, is misguided; it ignores essential elements in the definition of a democratic state. The focus of the debate, therefore, concerns the question of what those essential elements are, and what degree of protection they require.

The discussion below refers to four spheres in which controversial measures have been taken. The first concerns the scope of protection accorded to human rights and minority rights, and the implementation of the principle of equality. Directly related are the implications of Israeli policy in the West Bank for Israeli democracy.¹ The third sphere concerns the attitude toward opposition groups, and the extent of freedom of speech and the possibility of criticizing the government freely. The fourth sphere concerns the existence of checks and balances, the rule of law, and effective gatekeepers. Following an examination of the four spheres, the effect of the global trend toward erosion of democratic values will be discussed briefly, and insights and conclusions presented.

The First Sphere: Protection of Human Rights in Israel

An essential component of a democracy is the respect for human rights. In this context, difficult questions arise about the relationship between governmental and national interests and the status of individual and minority rights in Israel.

One of the key issues concerns the definition of Israel's Jewish identity and the implications for the approach to minorities in the country. This question arose in full force following the passage by the Knesset on July 18, 2018 of the Basic Law: Israel – the Nation State of the Jewish People (hereafter: the Nation State Law), with 62 in favor and 55 opposed. The law states that Israel is the nation state of the Jewish people, and that exercise of the right to self-determination in Israel belongs exclusively to the Jewish people. It stipulates that Hebrew is the state language – in contrast to the situation before the law was enacted, when both Hebrew and Arabic were defined as the official languages.² A clause in the law states explicitly that development of Jewish settlement is a national value that should be encouraged and promoted.

The way the Arab minority is treated is an issue that also arose following statements by public figures, among them members of the government, that included labeling Arab citizens of Israel in general as traitors or a danger to the security of the state.³ In addition, there were members of the government who failed to condemn racially-based violence against Arabs and their property.

Other questions about the extent of protection of human rights in Israel concern treatment of anyone perceived as threatening national security or safety. Various members of the current government and the coalition have promoted ideas to the effect that there is no obligation to consider the human rights of those perceived as a threat to the state, be they terrorists and their families, enemy civilians, or asylum seekers/infiltrators, and that absolute priority should be given to state interests over the rights of these individuals.⁴

Principal Divergent Arguments

Israel's Jewish and Democratic Identity

It is argued that Israel is undergoing a process of prioritizing its national Jewish component over its democratic component, and this diverts the state from its definition as a state that is both Jewish and democratic, as stipulated in the Israeli Declaration of Independence and basic laws enacted in the past. This is reflected in the Nation State Law, which emphasizes the special status of Jews in the state without including the principle of equality, and without referring to Israel as a democratic state. The Nation State Law wields concrete influence, not just rhetorical, because it can constitute a basis for discriminatory policy and infringement of civil rights, based on arguments of realizing the Jewish national interest. It is also argued that the law was designed to pave the way for annexation of the West Bank or parts therein, involving continued control over Palestinians without giving them full rights. The constitutional anchoring of the national value, without any explicit anchoring of the principle of equality in the basic laws,⁵ can be used to thwart judicial intervention in discriminatory policy. This concern is heightened by the overt intention to influence the composition of the court through the appointment of right wing and conservative judges, as explained below.

Counter arguments contend that the Nation State Law merely provides a constitutional anchor for the essence of Israel as the state of the Jewish people, as determined when it was founded. Since the basic laws were designed to be chapters in Israel's constitution, due to the difficulty in drafting a comprehensive constitution, it is necessary to add to the constitutional matrix a series of provisions dealing with the fundamental characteristics of the state as a Jewish state (as written in the explanatory memorandum to the draft bill). The law does not infringe upon individual rights or include a disavowal of the principles of democracy. It is necessary because the Supreme Court, relying on the basic laws that concern human rights, has given priority to the democratic component over the state's national Jewish component. The value of equality was not included in the law due to the concern that the Court would cite it as grounds for striking down arrangements necessary for actualizing the Jewish dimension of the state. For example, the principle of equality can conflict with the Law of Return or the prioritizing of Jewish communities in land allocations, and with arrangements subjecting certain matters to religious law, e.g. marriage and divorce. It is argued that some of the criticism of the Nation State Law reflects the more fundamental disapproval of promoting national interests in general, typical of those holding liberal cosmopolitan opinions. Acceptance of such perceptions is liable to culminate in the portrayal of Zionism as a colonial movement, while casting doubt on the right of Israel to exist as a Jewish state.

Approach to Minorities

It is argued that the Nation State Law, which anchors the status of Jews in the state without mentioning non-Jews at all, makes non-Jews second class citizens. The combination of this law with statements by figures in the government about minorities excludes non-Jews from the general community and portrays them as less than full partners in the state. This applies particularly to Arab citizens, who are not infrequently portrayed as a threat to the state. This stance constitutes a shift from a legitimate national concept to a dangerous ultra-nationalistic concept. National concepts accommodate expressions of the state's Jewish identity, while also recognizing the rights of minorities. Ultra-nationalism emphasizes opposition to anyone not belonging to the Jewish nation and sanctions deprivation of rights on the sole basis

of not belonging to this nationality. It supplies fertile ground for racism, discrimination, and even violence against minorities. Furthermore, denial of collective minority rights, as in the Nation State Law, is incompatible with a democratic regime.

Counter arguments contend that there is a liberal trend in Israel to emphasize the rights of minorities to self-determination and preservation of their particular culture and identity, while protection of the unique cultural identity of the Jewish majority is not given similar weight. The campaign for absolute civil equality leads to the adoption of ideas of a binational state or a state of all its citizens; the Nation State Law is designed to counter these ideas. Citizens of Israel enjoy full rights, and the Nation State Law neither eliminates these rights, nor detracts from the existing minority rights (except for a lowering of the status of the Arabic language, which is a purely declarative measure). Israel is engrossed in a fundamental national conflict against those challenging its existence as the state of the Jewish people in an effort to ultimately transform it into a Muslim Arab state in which the Jews will be a minority. Therefore, there is no room to recognize the national rights of the Arab minority. This does not constitute ultra-nationalism, because the motives for it are not racist; it constitutes recognition of an ongoing national struggle between the peoples.

Approach to Enemies and Foreigners

It is argued that the government has disavowed its obligation to respect the human rights of enemies and those associated with them, and of those who entered the country illegally. In this context the government has undertaken collective punishment of Palestinians, used excessive force against pro-Palestinian demonstrators, and violated the rights of those seeking asylum. This policy clashes with democratic values that consecrate the right to life, freedom, due process, and relief of the suffering of others, including non-citizens, and even when they are residents of a hostile entity.

Counter arguments contend that as a matter of principle, the security of the state and its residents should not be jeopardized in the name of democratic values. Democracies all over the world signal weakness, and are therefore unable to defeat the terrorist threat. Israel, which faces concrete threats more acutely than most democracies, should not follow their example. The

enemy does not respect the rules of war or the inviolability of innocent civilians, and uses its civilians as human shields. Israel cannot restrict the use of security measures and methods of combat in order to avoid harming civilians, because that means it will be unable to defeat the enemy. The IDF and other security forces should therefore be allowed freedom of action, and not abdicate the security of the state's residents out of concern about enemy civilians. Israel has no obligation toward the residents of the Gaza Strip who elected Hamas. The same is true of infiltrators, who entered Israel illegally, and who jeopardize internal security. Lessons should be drawn from the mistakes made by European countries, which suffer from the results of uncurbed immigration in the name of democratic values and liberalism, including severe damage to their internal fabric of life.

Observations

First, equality between the nation's citizens is an essential element of democracy. Even if a majority of the people were to support a violation of equality, the will of the majority should be rejected in order to maintain the essence of democracy. On the other hand, the principle of equality should not be interpreted to prevent the advancement of national values. The Law of Return, for example, refers to the immigration policy of the State of Israel, giving precedence to Jewish immigrants, and should not therefore be viewed as discriminating between the state's citizens.⁶ When there is tension between national values and the principle of equality, for example, in the allocation of land to Jewish communities in the state, a balance must be found that keeps the deviation from the principle of equality to a minimum. The national struggle facing the State of Israel has not ended, but its continuation must not justify unnecessary discrimination.

Second, respect of minority rights is likewise an essential element of democracy. Strengthening the national dimension of the state is not illegitimate in principle, but only if it is done in a way that does not exclude minorities and with full regard for their rights, including the right to preserve their culture, language, and heritage.⁷ Furthermore, care should be taken that the national dimension does not become an ultra-nationalist dimension, and that determined action is taken against expressions of racism. Responsible leadership is expected to disavow racist statements and deeds, and should

certainly itself refrain from expressing racism, including generalizations against Arabs in Israel. Likewise, extremist statements by Arabs against Israel and Jews should also be rejected. Some of the Arab Knesset members and Arab leaders cause significant damage to Israel's Arab citizens, most of whom want to integrate into the country, by aligning themselves with the enemy and not identifying with Israel,⁸ thereby exacerbating ultra-nationalism among the Jewish population.

Third, there is not necessarily a contradiction between the state's Jewish and democratic identity. Thus, a basic law defining the state's national essence, such as the Nation State Law, should also address the democratic essence, preferably using the wording of the Israeli Declaration of Independence, which reflects the balance set by the founding fathers. This was already done in the basic laws dealing with human rights, such as the Basic Law: Human Dignity and Liberty, which refer to anchoring the state's values as "Jewish and democratic."

A fourth point concerns the use of force and security measures. It is necessary to allow states sufficient freedom of action to wage an effective war against terrorism, and not impose unwarranted restrictions, as is sometimes demanded. However, it should not therefore be concluded that dealing with security threats justifies the removal of all restrictions on the use of force and means of defense. Such license contravenes the norms expected of a democracy. This is therefore a case in which victory in battle will actually be a defeat in the war for the continued existence of the state as Jewish and democratic. The correct way is to observe the rules seeking to minimize harm to civilians in warfare, taking into account the challenges of modern warfare, while not ignoring the needs of the fighting army. The same is true about other security measures, where utility should be balanced against the consequential harm to civilians. Indeed, the demand to remove restrictions is not infrequently motivated by feelings of revenge, and does not serve operational and strategic interests.

Finally, concerning the extent of the obligation to care for non-citizens, such as the Palestinians in the West Bank and Gaza Strip and the infiltrators/asylum seekers, the state can take into account its interests and the need to protect its citizens, but this does not mean that these people's plight can be

ignored entirely. A democratic state is obligated to consider the basic rights of every person under its control or liable to suffer damage from its actions.

The Second Sphere: Control over the West Bank

A discussion of the state of democracy in Israel cannot ignore the consequences of prolonged Israeli control over the West Bank (and in some eyes, the Gaza Strip as well), especially given the fact that there is no foreseeable end to this reality. This situation is not new, but related concerns about its impact on Israel's democracy have increased under the current government, given the lack of a significant political process for ending the conflict and the emerging trend toward abandonment of the idea of two states. Another factor concerns the measures taken to strengthen the Jewish settlements in the West Bank, including regularization of their legal status. In this context, proposals have been made by government figures and coalition parties to consider applying Israeli law to parts of the West Bank, namely to annex these areas to Israel.

One prominent measure in the legislative sphere is the Judea and Samaria Settlement Regularization Law (hereafter: Regularization Law), enacted on February 6, 2017. The law was designed to legalize retroactively Israeli settlements in the West Bank constructed or expanded without legal authorization, while giving precedence to Jewish residents over Palestinians claiming rights to the land who are offered compensation.⁹ Petitions to the Supreme Court against the law are still pending and the law has not yet been implemented. The opinion of the Attorney General is that the law is unconstitutional, and he has therefore filed a submission with the Court opposing the law. The government is represented in the hearing by a private lawyer.

Principal Divergent Arguments

It is argued that Israeli democracy cannot be reconciled with prolonged occupation of the West Bank and the Gaza Strip. Control over the Palestinians violates their right to self-determination. Furthermore, the occupation leads Israel to adopt measures that seriously violate the Palestinians' human rights, such as freedom of movement, property rights, family rights, and the right to due process. As prolonging the occupation generates a growing challenge

to the state's democratic nature, a genuine endeavor to end the occupation should therefore be made. The current Israeli government has shunned any moves in this direction; furthermore, its policy in practice leads to a one-state reality as the only outcome to the current conundrum. Since it does not appear that there is an intention of granting full civil rights to the Palestinians in a one-state reality, this entails the creation of a non-egalitarian state, which means an end to Israeli democracy.

It is also argued that the existence of the Jewish settlements in the West Bank damages the foundations of democracy. First of all, their very existence is a violation of international law, and a democratic state must obey the law, including the international law applicable to it. Furthermore, the Jewish settlements, especially those deep within Palestinian territory, exist at the expense of the Palestinian residents of the area; restrictions on movement and other constraints are imposed on the Palestinians because of the Jewish settlements. In the event of inter-community clashes, the Israeli government does not provide the Palestinians with adequate protection. The current government makes no attempt to limit the harm to the Palestinians, and in fact ignores this harm entirely, and measures have been taken that seem designed deliberately to burden their lives. Furthermore, it is argued that a state of apartheid is forming in the West Bank with two classes of residents in separate jurisdictions, with a policy that gives precedence to the Jewish residents.¹⁰ The Regularization Law illustrates this. The direct application of Israeli law in the territories is a kind of legal annexation in itself, and the law establishes an arrangement that appears unequal by explicitly giving rights only to the Jewish residents, while violating the Palestinians' property rights. Ideas to annex parts of the West Bank, in addition to being in violation of international law, will further aggravate the inherent discrimination, particularly if the Palestinian residents in the annexed territory do not benefit from full rights in Israel.

Counter arguments contend that this perspective is incorrect. First of all, the West Bank should not be regarded as occupied, because it was not conquered from another state. No national rights should be attributed to the Palestinians, because they are part of the Arab nation, which has realized its national rights in the Arab countries. Israel, on the other hand, has good claim to rights in the Land of Israel, the historic homeland of the Jewish people.

There are no grounds for prioritizing the national interest of the Palestinian people over the national interest of the Jewish people. Furthermore, Israel is not responsible for prolonging the conflict, because there is no partner for peace on the Palestinian side, and there is no way of reaching a negotiated solution without substantially jeopardizing Israel's security. Violation of the Palestinians' rights is not due to the occupation itself; it results from the Palestinians' violent campaign against Israel, which threatens the security of its citizens. The two-state solution entails major concessions by Israel, exposes it to security risks, and in any case is impractical. It is also argued that in a single state with autonomy for the Palestinians, a democratic regime can be maintained even without giving the Palestinians full political rights.

In addition, the argument that the settlement policy jeopardizes Israeli democracy is rebuffed. Building Israeli communities in the West Bank is a Zionist act equivalent to the building of Jewish communities during the period before and after the state was established. The dispute over land lies at the heart of the conflict between Jews and Palestinians, and is therefore a political issue. International law is irrelevant because the circumstances are unique, and in any case it is subordinate to Israeli domestic law so that it cannot tie the state's hands. The dispute is in essence between right and left, with the left trying to portray all right wing national views supporting the settlements as subverting the foundations of democracy. The allegation of apartheid is groundless, because law is not applied on a discriminatory basis, but is rather the result of the existence of two different governmental systems in the territory based on citizenship. The Israelis in the Jewish communities are Israeli citizens, while the Palestinians are residents of the Palestinian Authority. Any existing distortion is actually discrimination against the Jews in the area, in comparison with Israeli citizens living within the country's official borders, and the government is merely trying to reduce this discrimination. The Regularization Law is designed to legalize building conducted in good faith, with the state's consent and in pursuance of its policy on land that Palestinians could not be utilize in any case. This eliminates the need to uproot people from their homes with no real justification. Palestinian landowners are offered appropriate compensation. Furthermore, Israeli law should be fully applied to the communities in Judea and Samaria and

the territory between them in order to provide a proper solution for Israeli citizens living in these communities.

Observations

First, the overall conflict is ongoing since the state was founded, and control of the territories has continued for over 50 years. Therefore the continued control over the territories in and of itself does not mean that Israeli democracy is undermined, especially since an end to the conflict also depends on the good will of the Palestinians, who have previously thwarted attempts to resolve it. At the same time, the continued control over the Palestinian people, especially in the tense security environment, leads to measures detrimental to Palestinians' human rights, and impacts negatively on the preservation of democracy in Israel. Insofar as Israel adopts a policy that perpetuates control and does not aim at settling the conflict, there may be a long term cumulative negative effect on Israeli democracy. Ensuring Israel's democratic existence in the future requires an effort to find a solution that takes into account the rights and needs of the Palestinians.

Second, the Jewish settlements in the West Bank are indeed a political issue at the heart of the political dispute in Israel, and not every measure seeking to promote or support them should be portrayed as endangering democracy. At the same time, the settlement policy should be implemented with due consideration of the consequences for the Palestinians and their rights, and a balance should be struck in each individual case. A blanket preference for Jews over Palestinians in the West Bank is inconsistent with a democratic regime. There is also an obligation to foster the welfare of the Palestinians in matters in which they are subject to Israel's control, including the allocation of resources and enabling development to improve their living conditions.

Third, annexing the West Bank or parts therein to Israel without giving the Palestinian population in the annexed area full residency rights, including freedom of movement and social rights, as well as the right to request Israeli citizenship (subject to the conditions required by law), will indeed directly clash with democratic values. Furthermore, if, following annexation, the rights of the Palestinians who do not reside in the annexed territory are compromised (for example, if their freedom of movement is substantially

curtailed) this will likewise challenge democracy in Israel. A one-state reality in which Palestinian residents do not enjoy full civil rights will not allow the preservation of Israel's democratic character.

The Third Sphere: Critics of the Government and Civilian Activists

One of the key principles underlying a democratic regime is the ability to express opinions opposed by the government, to criticize the government freely, and to try to replace it by democratic means. A democratic government allows freedom of conscience, freedom of speech, freedom of association and assembly, the right to demonstrate, and other liberties, all of which are designed to allow free and open discourse and the existence of an effective opposition to the government.

A number of measures taken by the current government and Knesset have aroused allegations about violation of these freedoms, from narrowing the room to criticize the government, to delegitimization of critics of the government, including in the media, human rights organizations, and political groups, to measures taken against them for their very expressions of criticism.

Among the legislative measures criticized are those designed to restrict or impede activity by organizations critical of Israel's activity, for example legislation restricting activity in educational institutions of groups such as Breaking the Silence;¹¹ restricting entry to Israel by a foreign citizen who calls for boycotting Israel, including a boycott of the settlements;¹² and demanding disclosure in an open publication or Knesset debate of any financing received from foreign countries.¹³ Also worthy of note is the "Loyalty in Culture" bill, whereby state funding will be denied to cultural institutions attacking or degrading the state's symbols, treating Israeli Independence Day as a day of mourning, or decrying Israel's existence as a Jewish and democratic state.

In addition to these legislative acts, members of the government have taken measures and made caustic statements against those voicing critical views. Examples include the Minister of Science, Technology, and Space, who vetoed the appointment of a scientist to a professional committee because she previously signed a petition supporting those who refused to serve in the territories; an order by the Minister of Education to employees in his ministry to refrain from participating in a conference on workers' rights that

included the Association for Civil Rights in Israel, because it “consistently defends terrorists who murdered Israelis”; decisions in the education system against including content not consistent with the government’s outlook, either in curricula or cultural excursions;¹⁴ and the portrayal of left wing and human rights groups as anti-Zionist and traitors endangering the country.¹⁵ There are also contentions about measures designed to restrain the power of the media.¹⁶

Principal Divergent Arguments

It is argued that there is an attempt under the current government to silence critical voices and restrict freedom of speech. Steps are taken to censor content and exclude any opinion, person, or activity that does not agree with the government’s political views. In the contemporary public discourse, anyone who criticizes Israel, and sometimes even when the criticism focuses solely on governmental policy, is portrayed as a traitor undermining the country. Instead of condemning this extreme discourse, the political leadership has supported it, and even taken an active part. These actions can lead to intimidation and silencing, and can damage freedom of speech and freedom of conscience, which are an essential element of democracy. There is also concern that they will culminate in violence. If the attempt to gain control over the media and staff it with government supporters while excluding critical voices succeeds, it will weaken an important watchdog of democracy. Furthermore, attacking civil society organizations weakens groups that play an important role in preserving democracy by protecting the human rights of disadvantaged groups and exposing questionable practices by the government.

Counter arguments contend that in a democratic state, it is legitimate to impose limits on criticism when it involves groups slandering Israel abroad and making common cause with its enemies in the international diplomatic arena, including by assisting in initiating proceedings against IDF soldiers outside of Israel and promoting boycotts against Israel. Acts such as denying public funding, depriving access to school students, and barring entry into Israel of foreigners who act against Israel are merely a deprivation of privileges. No punitive measures were taken and no civil society groups were denied essential rights, nor were they barred from continuing

to operate. Regarding freedom of speech and freedom to demonstrate, a lively public debate that includes harsh criticism of the government and its policy takes place in Israel with no government restrictions – in the media, in demonstrations, and through other platforms. This highlights the strength of Israeli democracy. As for harsh language used against leftist groups, the discourse directed against the right, which is portrayed as fascist and ultra-nationalistic, is no less extreme.

Observations

First, it is essential in a democratic state to allow criticism of the government, which is a critical tool for influencing government policy and enabling the overturn of the ruling parties. Labeling any criticism as treason is unacceptable, because it is liable to become a tool enabling the ruling parties to silence opposition. In Israel, the government can be freely criticized, and freedom of speech is maintained. At the same time, there is an alarming trend among groups in the ruling parties toward adoption of scathing and even violent language against critics of the government. This could generate an atmosphere of fear and timidity about speaking against the government, and can even be interpreted as authorizing violence against critics of the government. Freedom of speech is the lifeblood of democracy, and leaders should emphasize this and respect their critics. Public servants should refrain from using extreme and violent language against people with different views, and from expressing support for such language.

Second, it is legitimate in the framework of a democratic regime to impose certain restrictions on those acting against the state in the international arena, for example, those calling for a boycott against the state (in contrast to calling for a boycott only against Jewish settlements in the West Bank). The Supreme Court has recognized this.¹⁷ Such restrictions must not lead to a ban on the existence or activity of such organizations and critics, or to limitations on their ability to express their views, but it is permissible to consider depriving them of privileges, such as restricting the entry into Israel of foreigners promoting an agenda of this sort. Denying access to schools for those expressing views deviating widely from the national consensus does not constitute an attack on democracy, as long as this restriction applies to both sides, not just to critics of the government. Those opposing these

measures should distinguish between not agreeing with such measures and asserting that they undermine democracy in Israel.

Third, showing suspicion and hostility toward anyone working on behalf of human rights should be avoided. Debate over the proper balance between protecting human rights and promoting national or security interests is legitimate. It is best for those speaking about this question, especially political leaders, to frame the discourse in this way, which will help limit the disputes and focus the discussion. Continuing the trend toward portraying human rights as a “leftist” issue and terming defense of human rights “anti-Zionist” is dangerous in the long term, because it might undermine the defense of human rights against acts by the government and detract from the activity of human rights organizations, which play an important role in protecting disadvantaged groups in society and preserving democracy in Israel.

The Fourth Sphere: Checks and Balances and the Status of Gatekeepers

One of the important elements in a democratic regime is a system of checks and balances, in which the government is subject to law and to an effective system of external supervision, including judicial oversight. Over the years, there has been an ongoing debate about the proper extent of judicial review, especially the extent and nature of intervention in the government’s acts and Knesset legislation. The criticism of judicial intervention, however, has intensified and today there is an attempt to restrict such intervention, reflected in a number of measures and actions.

Some of these measures consist of efforts to introduce legislative changes. One of the most prominent is adding an override clause, allowing the re-passage of legislation struck down by the Supreme Court on constitutional grounds by a majority of 61 Knesset members. This will enable the Knesset to bypass human rights anchored in the basic laws by using the effective majority commanded by the governing coalition. Another example is a bill designed to augment the influence of the political echelon (the ministers) on the appointment of legal advisors in government ministries. Thus far, these bills have not been translated into legislation.

At the same time, there is a quantum leap in the force and style of criticism of the Supreme Court, which is portrayed as a political power enforcing

an elitist outlook impeding the fulfillment of the national interest and the implementation of policies supported by a majority of the people.¹⁸ Some of the critics in the government even accused the Supreme Court of preferring protection of the enemy over protection of the state's citizens.¹⁹ In addition, there is an open effort to affect the composition of court judges, especially Supreme Court justices, by appointing conservative judges and those with a right wing outlook.²⁰

These measures have sparked a debate about whether they constitute deliberate weakening of the gatekeepers, while severely damaging the foundations of Israeli democracy, or whether they are measures designed to halt excessive judicial intervention and enable the government and the Knesset to implement the policies for which they were elected.

Principal Divergent Arguments

It is argued that it is essential for Israeli democracy to preserve the Supreme Court's power as a body overseeing the government and the Knesset in order to ensure that human and minority rights are maintained against the tyranny of the majority. The override clause is designed to paralyze this oversight and give the government unrestrained power. Statements directed against the legal system, the courts, and the legal advisors in the civil service accusing them of sabotaging the government's work delegitimize them and erode the public trust in the legal system. The combination of the public atmosphere and political intervention in the appointment of judges and legal advisors can have a chilling effect that is liable to have an impact on the way they fulfill their roles, which should be free of extraneous considerations; detract from the independence of the gatekeepers in the country; and severely undermine democracy. It is also argued that in the framework of the campaign against the Supreme Court, a distorted image of the Court has been created, portraying it as a body with a political bias that prevents the government from ruling according to its policy. In actuality, there are very few cases in which the Court struck down Knesset legislation, compared with many cases in which it refrained from intervening and allowed the government to carry out its policy, even when it contradicted left wing stances and aroused strong resistance among opposition groups and critics of the government. Notable here are the Supreme Court's non-intervention on the subject of the

legality of Jewish settlements in the West Bank and its approval of legally controversial security measures, such as demolition of homes of terrorists' families.²¹

Counter arguments contend that a process of “judicialization” has taken place in Israel, with a takeover of government actions by the legal advisors and the courts, whereby government processes are torpedoed because they do not match the political outlook of the lawyers and judges in the system. These parties represent an elitist-leftist outlook that does not correspond to a majority of the people’s views, which are right wing. One of the tools for doing this is striking down lawful policy decisions on the ground of unreasonableness, which is flexible and facilitates interpretation according to the court’s will. The court thereby plays an anti-democratic role by preventing the government and the Knesset from carrying out the policy for which they were elected. This is particularly true when the court strikes down laws passed by the Knesset by appropriating this authority with no constitutional basis as part of the “constitutional revolution” carried out by former Supreme Court President Justice Aharon Barak. Appointment of legal advisors to government ministries and of judges to the court based on their political leanings is a legitimate step that occurs in other democratic countries. It is necessary to eliminate the current political imbalance in the judicial system resulting from the existing appointment method, which has allowed the emergence of a self-perpetuating club and the addition of judges belonging to the same group and sharing the same outlooks as the serving judges.

Observations

First, the subordination of the governing authorities to law and judicial oversight is one of the foundations of a democratic regime, reflected in the principle of checks and balances. Measures that attempt to prevent such oversight or to subject jurists to political considerations can jeopardize democracy. In this context, it is regrettable that members of the government voice general criticism of the legal advisors and the court, and statements that undermine their status should be avoided. Particularly alarming is the extreme language used against the Supreme Court by public figures and the lack of condemnation of such language by government members. On

the other hand, not every allegation that legal advisors or courts intervene excessively poses a threat to democracy, and there can be legitimate criticism of their decisions.

Second, there is indeed a trend towards excessive judicialization in Israel. Public discussions transform readily into legal discussions and are decided by legal advisors and courts making extensive use of the legal tool of the “reasonableness” of governmental action. The result is legal intervention in matters that concern only policy. At the same time, this trend results in part from the actions of government members. In more than a few cases, decision makers have preferred to make populist suggestions and pass the decision on to the legal sphere, so that they can blame the jurists for thwarting the measure. Ideas of different kinds of collective punishment raised in the wake of terrorist attacks are a common example. On the other hand, opposition groups also contribute to the situation by choosing to wage their struggle on the legal front instead of in the public arena, as is reflected in the petition to the Supreme Court filed against the Nation State Law by some members of the Knesset. This trend should be halted, and a professional discussion of policy matters should be held in the public arena, not the legal one.

Third, the court’s intervention in government decisions is proper when these contradict the relevant legal framework or constitute unjustified violations of fundamental rights and freedoms. In such cases, the court is indeed tying the government’s hands, but this does not necessarily reflect the enforcement of a political outlook, because ensuring the subordination of the government to the law and protection of human rights is not a political interest of the left; it is an element in democracy that every government in a democratic regime must implement. Even if a majority of the people support measures that constitute excessive violation of human rights, this does not mean that the court is obligated, or entitled, to refrain from intervention in such cases. This reflects the fact that democracy is not merely an expression of the majority opinion; it is also a regime that respects essential human rights. There is no unequivocal answer about when judicial intervention is justified, and different opinions are possible in each case. An objective and in-depth discussion of each case on its merits should be conducted, in place of the tumultuous exchange that takes issue with the general idea of legal intervention.

Fourth, the court's prerogative to strike down legislative acts should be preserved. Otherwise, there is a danger that the tyranny of the majority will gain control and severely undercut human rights, while eroding the foundations of democracy. At the same time, judicial restraint should be maintained concerning intervention in legislation. The override clause, under which the Knesset will be able to re-pass laws struck down by the Supreme Court under certain conditions, is not necessarily a critical blow to democracy. On the other hand, if the majority of 61 Knesset members, available to every coalition, is enough to override a judicial veto, this clause will detract from the basic idea of judicial constitutional oversight.

Finally, the method of appointing judges in Israel by a committee containing both representatives from the legal system and political representatives is a solid method that allows the formation of an independent, strong, and professional judiciary.²² In the framework of the selection process, it is legitimate to take into account the outlooks of the judicial candidates in order to guarantee a variety of opinions among the judges. However, care should be taken to avoid making the court a system of political appointees or yes-sayers seeking to appease the politicians. Political control of the court is one of the practices of a non-democratic government, as in the examples of Poland, Hungary, and Turkey.

Conclusion

The democratic and liberal principles that gained momentum in recent decades in Western countries are currently under attack throughout the world. The Trump administration in the US is viewed by many as an example of this trend, as is the significant strengthening of right wing parties all over Europe. In this short article it is impossible to comment on the complex reasons behind this phenomenon, although some of them are also relevant to Israel.

As such, the weakening of liberal democracy around the world heightens anxiety about the fate of Israeli democracy. One of the reasons for maintaining respect for human rights and democratic values in Israel is concern about damage to Israel's international legitimacy, which might well affect important alliances, especially the strategic alliance with the United States, as well as economic and other ties with European countries. This concern affects the government no less, and sometimes even more, than the substantive concerns

about the fate of Israeli democracy. It is also easier to justify decisions that are unpopular in internal politics on this basis. If the global situation makes democratic values less prominent, international pressure on Israel to respect these values will wane, and the weight of internal political considerations that could lead to more harmful and ultra-nationalistic steps will increase.

The question whether democracy in Israel is in jeopardy depends on the observer's perspective. Various groups in Israeli society will give different and even contrary answers to this question, largely due to different definitions of "democracy." The main dispute concerns the extent to which Israel should take the rights and needs of groups and individuals not belonging to the Jewish majority into account in order to be considered democratic, especially when the groups involved threaten the state, decry its Jewish substance, or attack it in other ways. There are clear differences on this matter between those with a liberal world view, who mostly belong to the Israeli elite, and large sections of the Israeli public.

Maintaining a democratic regime that also enables Israel to preserve its Jewish character and its role as the national home of the Jewish people requires recognition that it is legitimate to lend a certain priority to interests that maintain this essence of the state. On the other hand, maintaining an essential democracy is impossible without recognizing equality between all of the state's citizens, respecting individual rights, and protecting the rights of minorities. As such, these rights must be upheld as much as possible, but they are not necessarily granted absolute protection. In order to achieve a proper balance, pursuit of mutually exclusive extreme national and democratic values should be avoided. Flexible definitions enabling the coexistence of both components should be adopted. In this context, the majority's need to preserve its interests and anchor its identity in the state should be recognized, without detracting from the protection of minority rights.

There is an inherent tension between the democratic character of the state and continued rule over the Palestinians. Since no end to the Israeli-Palestinian conflict is likely in the near future, it is necessary to find a proper balance between preservation of the state's political and security interests and limitations on Palestinians' rights, taking their concerns into consideration. At the same time, an effort should be made to achieve a solution facilitating separation from the Palestinians and an end to ruling over them. Proposed

solutions to the conflict in which Israel retains rule over another people indefinitely, while discriminating against them in comparison with the Jewish citizens, will culminate in untenable challenges to democratic values and in turn, the collapse of democracy in Israel.

Israel is marked by a culture of heated debate and free expression, including vocal criticism of the government. It is important to maintain this situation. Actions and language by officials designed to silence and intimidate critics, constrict them, or limit their freedom of action are liable to damage freedom of speech and make it difficult to conduct an effective opposition, which are essential elements for the preservation of democracy. On the other hand, not every denial of privileges to groups taking action to damage Israel's status is an improper breach of democracy.

A system of checks and balances and external oversight of the government and the Knesset is an essential element in maintaining a democratic regime. The legal system, including the courts and the government legal advisors, fulfills this function. It is very important to preserve the power and independence of this system. At the same time, it is legitimate to influence the composition of the judges so that they will reflect a range of opinions, and to require legal advisors and judges to restrain their intervention in governmental measures, especially legislation, and not substitute their outlook for the judgment of decision makers. The boundary between justified and excessive legal intervention is not unequivocal, and an objective and respectful discourse should be conducted on this point. Extreme statements against the legal system prevent such a discourse, generate a threatening atmosphere that stands to arouse fear to intervene even in justifiable cases, and erode public confidence in the legal system. This constitutes a threat to the long term resilience of democracy.

At the bottom line, it appears that Israeli democracy remains strong and rests on solid foundations. At the same time, democracy is a fragile regime. It is susceptible to elements seeking to misuse and hijack it to take control of the government, after which they will eliminate the democratic framework. Such events occurred in the past and are taking place today (for example in Hungary, Poland, and Turkey). Destabilizing processes usually take place gradually, with the critical blow to democracy often discovered after it is already too late.²³ For this reason, one cannot be complacent, and

steps aimed at eroding democratic values should be countered. It is also important to strengthen the understanding among the general public in Israel of the importance of preserving democracy through education and other means. On the other hand, the tendency on the part of some critics to portray any view contrary to their political position as undemocratic is dangerous in itself, because crying “wolf” makes it difficult to distinguish between legitimate, albeit politically controversial measures and measures that are truly undemocratic by nature.

One of the key insights from this paper is that more attention and respect is necessary from those engaged in the debate to the positions and outlooks of those holding opposing views. It is a good idea for readers of *Haaretz* to be exposed to the views in *Makor Rishon*, and vice versa. It is important to try to understand the other side’s viewpoint in the debate, instead of merely focusing on counter arguments. This would enable a more fruitful and constructive dialogue that can forge a way to protect and preserve the essence of Israel as a Jewish and democratic country in the spirit of the founding Zionist vision.

Notes

- 1 Dilemmas concerning the clash between religious considerations and demands for equal rights, for example, women’s rights or the demand for freedom of religion, will not be discussed here.
- 2 Section 4 of the law states that nothing in it shall affect the status given to the Arabic language before the Basic Law went into effect.
- 3 For example, former Minister of Defense Avigdor Liberman called Joint Arab List chairman MK Ayman Odeh a “fifth column,” and said that Odeh and his colleagues should be outlawed, after Odeh and his party took part in demonstrations against government policy in the Gaza Strip and Odeh’s criticism of how Arab demonstrators were treated by the police. Arik Bender, “Make Ayman Odeh and His Friends Illegal; They are a Fifth Column,” *Maariv*, May 21, 2018, <https://www.maariv.co.il/news/politics/Article-639066>.
- 4 For example, the decision to deny lifesaving medical treatment in Israel to Gaza Strip residents whose relatives are members of Hamas (overruled by the Supreme Court); criticism of investigations against soldiers suspected of unjustifiably attacking civilians on the other side or injured terrorists not posing a danger.

- 5 The right to equality is not mentioned in the existing basic laws. However, the Supreme Court ruled that it is derived from the Basic Law: Human Dignity and Liberty.
- 6 As also indicated by remarks by Supreme Court President Aharon Barak in High Court of Justice 6698/75 Qadan vs. Israel Land Administration (March 8, 2000), paragraph 31, <http://elyon1.court.gov.il/files/95/980/066/a14/95066980.a14.HTM>.
- 7 This principle was also important to Jabotinsky and Begin. See “Menachem Begin: Nationalism or Ultra-nationalism,” *Maariv*, April 7, 1972, <https://bit.ly/2GEXoGw>.
- 8 For example, in response to the suicide terrorist attack on an Israeli tourist bus in Burgas, Bulgaria in 2012, MK Haneen Zoabi said, “Israel is not a victim and even when civilians are killed it’s the Israeli occupation policy that is to blame. If there hadn’t been occupation, oppression, and a blockade, this would not have happened,” Guy Katsovich, “Zoabi: Attack in Bulgaria Caused by the Occupation; Israel is not a Victim,” *Globes*, July 26, 2012, <https://www.globes.co.il/news/article.aspx?did=1000769468>; former MK Mohammad Barakeh, head of the Higher Arab Monitoring Committee, said in a radio interview, “Israel is an imperialist invention of Balfour,” *Galei Tzahal*, May 2, 2018, <https://bit.ly/2HHwkX1>.
- 9 The law applies to communities built with no proper planning proceedings on land whose usage rights are not in the hands of the state authorities, if this was done in good faith or with state consent. State consent is given a broad meaning that includes, for example, the providing of an incentive by a local authority or settlement institution.
- 10 Examples include the claim that Palestinians rarely receive permits for construction in open areas, even if these are adjacent to their communities, and illegal structures are often demolished, while Jewish communities are encouraged and legalized, even in places where no permits were granted in advance. In addition, residents of Jewish communities are under the jurisdiction of courts in Israel, while Palestinians are under the jurisdiction of military courts in the West Bank.
- 11 Amendment No. 17 of the State Education Law (1953), passed on July 16, 2018, refers to someone who advances the institution of legal or political proceedings outside Israel against IDF soldiers or against Israel.
- 12 Amendment No. 28 of the Entry into Israel Law, passed on March 6, 2017.
- 13 An amendment to Duty of Disclosure for Those Supported by a Foreign Political Entity Law (2011), passed on July 11, 2016. It is argued that this duty applies mainly to human rights organizations receiving funding from the European Union and the UN, while most of the funding for right wing organizations comes from private overseas donors to whom the law does not apply.
- 14 For example, changes in the new civics textbook, removal of the book *All the Rivers* by Dorit Rabinyan from the curriculum for expanded matriculation in literature,

and removal of the play *A Parallel Time* staged by the al-Midan Theater from the educational system's "culture basket."

- 15 For example, the Prime Minister wrote about the New Israel Fund on Facebook, "The overarching goal of the New Israel Fund is to erase the Jewish character of Israel and turn it into a state of all of its citizens," and that the Fund "endangers the security and future of the State of Israel as the nation-state of the Jewish people," <https://www.facebook.com/Netanyahu/posts/10155501254537076>. According to its website, the Fund by definition does not support organizations that deny the Jewish people's right to sovereignty in Israel, or that call for a general boycott of Israel, <http://nif.org.il>.
- 16 One example is the attempt to promote a bill to consolidate the regulators of the media, designed to eliminate and subject statutory independent regulatory authorities to an agency controlled by the Ministry of Communications. See Omri Milman, "Netanyahu Taking over Media in 65 Pages," *Calcalist*, March 12, 2017, <https://www.calcalist.co.il/local/articles/0,7340,L-3709379,00.html>.
- 17 See Paragraph 18 of the ruling by Justice Hendel, Request for Permission for an Administrative Appeal 7216/18 Alqasem vs. Ministry of Interior – Population and Immigration Authority (October 18, 2018).
- 18 For example, Minister of Justice Ayelet Shaked stated, "The court sees the other-worldly Jerusalem and not the south Tel Aviv of this world," and that the Supreme Court revolution caused "Israeli democracy to run away from the nation." See Ahiya Ravad and Tova Zimuki, "Shaked against the Justices: "Democracy is Running away from the Nation"; Hayut: "Embarrassing Language against Justices," *Ynet*, December 21, 2017, <https://www.ynet.co.il/articles/0,7340,L-5060242,00.html>.
- 19 Minister of Tourism Yariv Levin said, "It's about time for the Supreme Court justices to realize that their job is to protect Israeli citizens, not those seeking to murder us." Minister of Culture and Sport Miri Regev said, "The Supreme Court is neutralizing Israel's citizens," Hezki Baruch, *Arutz 7*, October 22, 2015, <https://www.inn.co.il/News/News.aspx/308417>. Minister of Education Naftali Bennett charged that IDF soldiers fear the Military Advocate General more than they do Yihya Sinwar (the leader of Hamas). See Yoav Zeitun, Tova Zimuki, and Shahar Hai, "Bennett: Fighters Fear the MAG More Than They Fear Sinwar; Chief of Staff: This is Part of the IDF's Strength," *Ynet*, November 19, 2018, <https://www.ynet.co.il/articles/0,7340,L-5409165,00.html>.
- 20 Minister of Justice Ayelet Shaked declared that she wanted to appoint judges "to divert the ship from the liberal-activist direction that Barak led to a conservative direction," Nahum Barnea and Tova Zimuki, "Democracy Has not Been Weakened; It Has only Become Stronger," *Yediot Ahronot*, September 5, 2018, <https://www.yediot.co.il/articles/0,7340,L-5342031,00.html>.

- 21 In addition, regarding most of the petitions filed on the subject of Jewish settlements, for example, concerning the removal of outposts, the Supreme Court's intervention relied on the state's position, which recognized the illegality of the outpost and undertook to remove it.
- 22 In contrast, for example, to the method of appointing judges in the United States, which is very political, although the government there changes between rival political camps, so presidents from both parties have a chance of appointing judges if seats are vacated during their presidency.
- 23 A good manifestation of this kind of process is the example of "the boiling frog syndrome." As the story goes, if you place a frog in a pot of boiling water, it will immediately try to jump out. But if you place the frog in a pot of room temperature water and slowly turn up the heat, the frog will not do anything at all. Oblivious of the impending danger, it will become sleepy and eventually will not be able to hop out of the pot before it is boiled.