From Illiberal Legislation to Intolerant Democracy

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Democracy is not just about free and fair elections. It requires at least some minimal substantial guarantees, such as freedom of speech and freedom of assembly, that formulate and enable free choice of autonomous and equal agents. These notions are well founded in Israeli constitutional law, but in recent years it seems that this basic understanding of the democratic process is weakening, especially as reflected in the actions of the Knesset. Several recent examples of Knesset legislation processes suggest that Israeli democratic culture is being eroded, as some of democracy’s fundamental notions are abandoned in favor of national-chauvinism and intolerance.

There is no one clear and universal definition of “democracy” (Fox and Nolte 1995: 1). Minimalist and procedural approaches emphasize the self-rule of the people, and find the source for democratic legitimacy in citizens’ participation in the political process (Przeworski 1999). Other approaches add several substantive elements to the participatory guarantees, such as freedom and equality for participants in legislative deliberations, protection of basic human rights, adherence to the rule of law, and separation of powers (Brettschneider 2005, 2006; Cohen 1989).

Even without agreeing on the precise scope or definition of democracy, it is quite clear that free elections alone are not enough to establish, maintain, and guarantee a democratic regime. For example, without freedom of assembly and speech it is very difficult to guarantee free choice and obtain free participation in the political process.

Moreover, as far back as the nineteenth century, Alexis de Tocqueville ([1889] 2002: 205) warned against the “tyranny of the majority.” Other philosophers and statesmen from Hobbes to Jefferson and Locke to Mill, have
also linked democracy with liberalism, and were instrumental in establishing a system of governance that acknowledges the existence of basic human rights and the obligation of governments to limit their own powers in order to secure those rights (Zakaria 1997: 26). Although it is legitimate for a democracy to defend itself against powers seeking to destroy it (Fox and Nolte 1995: 18), this should be reserved for extreme cases, "when it is necessary for preserving equal liberty itself" (Rawls 1971: 219).

These basic notions are well established in Israeli constitutional law. The inseparable link between Israeli democracy and the fundamental freedoms of speech and assembly has been rooted in Israeli law since the founding of the state. The Israeli Supreme Court stated in 1965 in the Yardor case that "The freedom of assembly is a foundation of the democratic regime, and one of the citizen's fundamental rights." A decade earlier, in the 1953 Kol Ha'am case, the Court emphasized that "the principle of freedom of expression is closely bound up with the democratic process," and that the democratic process is comprised of an "open debate and the free exchange of ideas on matters of public interest." These decisions are valid to this day, and have been enforced in numerous cases throughout the years.

But judicial guarantees and safeguards are not enough to protect democracy's fundamental principles. A democratic political regime is nourished, supported, and enhanced by the existence of a democratic culture. A democratic culture requires, among other things, the possibility of coexistence of different political views and tolerance toward unpopular opinions (Balkin 2004). Unfortunately, recent initiatives in the Knesset express antagonism to these core democratic concepts and threaten to undermine the existence of a democratic culture in Israel. Instead of promoting pluralism and tolerance toward different views, the dominant approach is one of intolerance, isolation, and silencing of opposing political views; instead of contributing to the creation of a democratic culture, the Knesset is becoming more susceptible to illiberal ideas. Proposals which limit the freedoms that are most fundamental to the democratic process—freedom of speech and assembly—are continually introduced, as well as bills that deviate from basic principles of equality before the law and from the rule of law. Following are a few recent examples demonstrating these dangerous developments in Israel.

**Restrictions on Freedom of Speech and Assembly**

*The Nakba Law*

Nakba (catastrophe) Day relates to the commemoration of Israel's Independence Day as a day of mourning for the Palestinian people. In March 2011, the Knesset adopted the Nakba law, enabling the Minister of Finance
to meaningfully reduce the governmental funding given to groups or institutions that commemorate the Palestinian Nakba (The Budget Foundations Law [Amendment 40: Reduction of budget or support as a result of activities against the principles of the state], 2011).

It is not difficult to understand the motivation behind the law: its supporters refuse to acknowledge the fact that the struggle to establish the state of Israel—a successful one from the state’s perspective—caused defeat, grave losses, and destruction from the Palestinian perspective. They seem to believe that, by using coercive measures, the Palestinian narrative can be changed and perhaps even erased. In reality, this only displays the insecurity of parts of the Jewish population of Israel, and their reluctance to compete with different historical and political ideas. This law blatantly undermines democratic culture by delegitimizing the expression of opinions and emotions.

The Associations’ Bill

In April 2010, more than twenty Knesset members submitted a bill forbidding the registration of a voluntary association when there is reasonable ground to believe that it is involved in war crime lawsuits abroad against Israeli politicians or army officers, or supplies information to foreign bodies regarding such lawsuits (Associations Bill [Amendment: Exceptions to the Registration and Activity of an Association], 2010). The bill applies to the transmission of true information as well, including information that was previously delivered to the Israeli authorities and ignored by them.

In principle, there is no justification for forbidding the transmission of true information regarding the commission of international crimes, or for the punishment of those who pass on such information. Moreover, this bill demonstrates hostility toward international criminal law as well as a double standard: although the state of Israel treats crimes that are committed against the state and its citizens very seriously, it does not treat crimes that are allegedly committed by its own citizens with the same seriousness. Finally, this bill presents a grave danger to the democratic culture of Israeli society: it limits accountability, contradicts the concept of the rule of law, tries to suppress civil engagement in politics, and restricts freedom of speech and assembly, all of which are vital for the existence of a democratic society.

The Prohibition of Boycott Bill

In July 2010, the Prohibition of Boycott Bill, 2010, was submitted. This bill proposes, inter alia, that the participation of an Israeli citizen or resident in
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a boycott against the state of Israel, including provision of information or
giving other aid to such a boycott, shall be considered a civil wrong, and
the individual shall be liable for all damages caused. A criminal penalty is
also prescribed for such participation. In February 2011, the Knesset Con-
stitution, Law, and Justice committee approved a revised version of this
bill, proposing that anyone who knowingly and publicly calls for a finan-
cial, cultural, or academic boycott on a person or entity “solely because of
their ties to the State of Israel, its institutions, or areas under its control” be
found as having committed a civil wrong and be punished by law.

This bill is yet another unconcealed effort to suppress criticism and
foil attempts to affect state policy. The freedom to protest—sometimes
fiercely—against the government is fundamental to democratic discourse.
This bill attempts to silence criticism instead of responding to it.

Undermining Equality

Impairing Equality before the Law: Patriots versus Traitors

Recent legislation processes display substantially different approaches
toward criminality originating from different sides of the political map.
The Revocation of Citizenship law, which was passed by the Knesset in
March 2011 (Citizenship law [Amendment 10: Revocation of Citizenship
of Persons Convicted of Terror or Espionage], 2011), substantially broad-
ens the existing provisions regarding citizenship revocation. According to
this law, the revocation of citizenship will become an additional criminal
punishment that courts can impose for various security-based offenses.
The law prescribes that any court that convicts an individual for commit-
ing various terrorism-related and other security-based offenses will be
authorized to revoke citizenship, in addition to the “ordinary” penalties,
including life imprisonment.

Revocation of citizenship is a severe and extreme measure. As was
emphasized by the US Supreme Court in the 1958 Trop case: “It is a form of
punishment more primitive than torture, for it destroys for the individual
the political existence that was centuries in the development ... In short,
the expatriate has lost the right to have rights.”

Despite the obvious fact that there are many heinous crimes that can
be committed against society, this law applies only to security-oriented
crimes. The singling out of these offenses negatively impacts the notion of
equality before the law. There is no threat to the citizenship of a murderer,
including a murderer of a prime minister, but he who transmitted informa-
tion with the intention to harm national security—even if the information
was not secret—may be deprived of his citizenship. This choice of offenses
is not neutral, but is motivated by the desire to exclude those few Arab citizens of Israel convicted of security-based offenses and to strip them of their citizenship rights, possibly even leading to their deportation.

On the other hand, the Israeli legislature has demonstrated a strikingly different approach with regard to other, "patriotic" offenses. The "Discontinuation of Proceedings and Deletion of Records with Regard to the Disengagement Plan, 2010" law, which was enacted by the Knesset in February 2010, adopted an ultra-compassionate approach with regard to offenses committed by Israeli right-wing extremists during the implementation of the disengagement from the Gaza Strip. This legislation grants complete amnesty to those who committed criminal offenses as part of the resistance to the disengagement plan (excluding those convicted of very serious crimes and those sentenced to imprisonment), as well as the deletion of all relevant criminal records.

This legislation violates the principles of rule of law and equality before the law. It prefers some social groups over others, allowing them to commit crimes—including assault in severe circumstances and assault on a police officer—without facing any consequences. The message conveyed by this law is a dangerous one: violence can be forgiven, overlooked, or even considered normative—if it supports the "right" cause. The law also sends the police the message that some groups are above the law, and the law should not be enforced on them. These messages are especially worrisome, considering the possibility that a need to evacuate settlements in the Judea and Samaria area will arise in the future.

This blatant preference for right-wing criminals, who are perceived as patriots and therefore forgiven, over those convicted of security-based offenses, who are unequivocally marked as traitors and are stripped of their citizenship, too closely resembles the discrimination between left and right that characterized Germany under the Weimar Republic.

**Diminishing Equality within the Law: Imposing Homogeneity of Thought**

An increasingly intolerant approach is being demonstrated toward views that deviate from the conservative nationalistic and Zionist viewpoint. In an effort to delegitimize these views, several recent bills have proposed the requirement of a pledge of loyalty to the state, with a prescribed wording that embodies a Zionist message, as a precondition for receiving various social and civil rights. For example, one bill requires a pledge of loyalty as a precondition to attaining citizenship (the loyalty declaration bill) (Gavison 2010); another requires loyalty pledges to be signed by producers, directors, editors, and actors in order to be eligible for governmental funding for cinema (Cinema Bill [Amendment: Loyalty Oath], 2010);
and an additional bill requires state officials to declare their loyalty to the “Jewish and democratic” state before they receive their nominations (The State Officials Bill [Amendment: Loyalty Oath], 2010).

These propositions are unnecessary and problematic for all citizens, but they are especially problematic for the Arab citizens in Israel, who have difficulty accepting the Jewish definition of the state. It seems that these bills are directed primarily toward them, and the message conveyed is that their citizenship and rights are questionable, and are dependent on their constantly proving their loyalty to the idea of the Jewish state.

In addition, in March 2011, the Knesset passed a discriminating law, whose purpose—although camouflaged in neutral terms—is to prevent Arab citizens from living in rural communities in the Negev and the Galil made up of less than 400 families, under the pretense that they do not blend in with the social makeup of the community (Khoury and Lis 2011).

Finally, a new bill that is now on the agenda of the ministerial committee on legislation demonstrates the trend toward delegitimization of ideas which deviate from the narrow nationalist dogma. The Safeguarding of Israeli Values bill (legislative amendments, 2009), forbids the registration of a company that “undermines the Jewish and democratic character of Israel,” inflicts economic sanctions on existing companies, and even authorizes their dismantlement.

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These legislative initiatives demonstrate grave disrespect for the basic concepts of democracy. When added together, they express an utter rejection of democratic culture. Instead of infusing Israeli society with a participatory and deliberative spirit, advancing pluralism, and enhancing the legitimacy of contradicting political views, these bills and the manner in which they are being enacted undermine democracy itself.

Moreover, all these legislative examples were submitted, advanced, or even approved by a relatively small number of Knesset members. Only half of the Knesset members participated in the votes on these laws and proposals. This reflects the weak commitment of the Knesset to democracy.

Step by step, a small group of extremist Knesset members are trying to make the rest of the Israeli society forget what democracy is all about and to create an alienated and intolerant society, with one voice, one opinion, and one narrative. We cannot—and must not—be indifferent to this dangerous path. All those committed to the democratic culture of Israeli society must act now, raise their voices, and resist these attempts to undermine the substantive values of Israeli democracy.
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NOTES


REFERENCES