

Israel on its Way to a Majoritarian System? The Current Government's Fight against principles of Liberal Democracy, the "Constitutional Revolution" and the Supreme Court

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This paper analyses the attempts of the current Israeli government to undo the liberal principles of the so-called constitutional revolution, which are specified in the Basic Laws "Human Dignity and Freedom" and "Freedom of Occupation". The background to this endeavor is at least two-fold: On the one hand, the coalition parties are trying to strengthen Jewish nationalist and religious rights at the cost of individual and minority rights; on the other hand, it is combined with an attack on the Supreme Court's perceived role as a defender of those rights. Therefore, the paper argues that we can see the attempt to revoke the in any case limited constitutional anchorage of liberal democracy in favor of a majoritarian democracy, which gives collective values precedence over individual rights.¹ In its outlook, the paper refers to the repercussions of these developments for the European-Israel relations. This takes into account that the European Union traditionally frames itself as the defender of a liberal democracy, but sees at the same time developments similar to Israel in central and eastern European states.

The current Israeli government coalition, which was formed after the election in 2015, is often considered "the most right-winged government" in the history of Israel.² This notion is not unfounded: While the government is not monolithic, all parties of the coalition Likud, Jewish Home, Yisrael Beiteinu (which joined the government only several months after) Shas, Torah Judaism and Kulanu can be considered to be right of the center. This

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¹ Note: The distinction here made does not refer to the more common distinction made originally by Arend Lijphart between majoritarian and consensus political systems (in which Great Britain would adhere to the former and Israel to the latter), but to the distinction between liberal and majoritarian ideas of democracy: Liberal democracies see constitutions and checks and balances as safeguarding minorities from majorities, whereas majoritarian politicians will portray these liberal stances as an infringement of democracy.

Gargarella, Roberto. The Majoritarian Reading of the Rule of Law. In: Maravall, José Maria; Przeworski, Adam. Democracy and the Rule of Law. Cambridge University Press, 2003. S. 147-167.

² Beaumont, Peter. Israel coalition deal brings I its most hard-right government ever. The Guardian, 25.05.2016.

<https://www.theguardian.com/world/2016/may/25/israel-coalition-deal-hard-right-government-avidor-lieberman>

positioning is mostly defined through Israel's two most important political questions: A tendency to reject the idea of a two-state solution in the Israeli-Palestinian conflict and a positioning which rather supports a Jewish-collectivist/republican position (be it religious or nationalist) towards state-policies rather than liberal-democratic ones.³ From the start, observers were wondering, where this government would take Israel.

With three years of the government in, one can attest that the tone set, at least by several parties of the government, is clearly ethno-nationalist, often populist and decidedly anti-liberal in discourse and politics. This often means polarizing statements, bills or laws which were thought to clearly demarcate in-groups and out-groups, to limit discursive pluralism and attempt to marginalize or even delegitimize different political positions. That phenomenon displays in many different ways and is sometimes described as a process of "closing of civic spaces" or "shrinking spaces"⁴. It is important to note that this mechanism does not only refer to laws passed, but also to bills and public statements which are made in order to alter the public sentiment and set certain agendas.

This was already at display in the election campaign, when Netanyahu shifted – after he did very poorly in the polls – to a more aggressive and polarizing tone, warning that with the left, ISIS will march in in Jerusalem and, that the Arabs would be "voting in droves". These statements effectively rendered the Arab-Palestinian Israelis as a threat, not only to the right-winged government, but also to the security of the state as a whole. The insinuation found further expression in the claim only the right could guarantee the security of Israel, coupled with the argument that everyone who disagrees with this view is in the best case endangering Israel or in the worst case complicit in terrorism. Thus there is an attempt in wide parts of the government to equate political disagreement with enmity, which either casts shadows of doubt on at least the more radical critics in the opposition or put even a burden of proof of their loyalty to the state upon them, indicating that their political position is *a priori* suspicious.

This was visible in forays calling for proofs of loyalty by minister of culture Miri Regev addressing Arab-Palestinian citizens of Israel as well as left wing artists or Yisrael Beiteinu's demand to condition citizenship on a pledge of allegiance.⁵ Similarly, the so-called NGO Law demands public display of NGOs, which are overwhelmingly funded by foreign national or international institutions. As the law basically targets only left-winged NGOs and as the right-winged NGOs are mostly funded by foreign private donors, it seems tailor-made for publicly branding organisations that are critical of the government as being controlled from abroad and 'un-Israeli'. This is accompanied by right-winged

³ Lintl, Peter. The Dynamics of a Right-wing Coalition How the Failure of the Peace Processes Encourages Domestic Populism in Israel SWP Comment 2016/C 45, October 2016, 8 Pages https://www.swp-berlin.org/fileadmin/contents/products/comments/2016C45_t1.pdf

⁴ Asseburg, Muriel. »Shrinking spaces« in Israel Die Verengung demokratischer Spielräume, die Verfestigung der Besatzung und stete Menschenrechtsverletzungen erfordern einen europäischen Paradigmenwechsel SWP-Aktuell 2017/A 61, August 2017, 8 Seiten

⁵ Website Israel Beitenu <http://www.beytenu.org/no-citizenship-without-allegiance/>

organisations, who delegitimize left-winged NGOs. The nationalist NGO Im Tirtzu, for instance, has openly described several left-winged organisations as “foreign agents” and drawn a direct connection between their work, the funding from abroad and terrorist attacks.

In addition one can mention advances to infringe the rights of the Arab/Muslim minority, for example with the so-called “Muezzin Bill”, which passed its first reading, or attempts to limit times and volume for the Muslim call to prayer; or the attempt by Yisrael Beitanu to expand the so-called “Nakba Law”, penalizing universities or other educational institutions for hosting events in this regard.⁶ Similar attempts are to limit the visibility of Arab-Palestinian culture in Israel. Education minister Naftali Bennett (Jewish Home) deleted the short story “Borderlife” from the stateschool syllabus because it revolves around the romantic relationship between a Jewish Israeli woman and a Palestinian man. Defense Minister Lieberman summoned the head of programming of Galei Tzahal, the army radio, and demanded that poems by the prize-winning Palestinian poet Mahmoud Darwish – which had previously (and remarkably) been broadcast by the network – should be categorised as seditious. A different aspect of the narrowing of discursive spaces is the attempt to have more influence and closer control of the media, the fact that Israel has a plural and lively media scene notwithstanding. This found probably the most famous expression in Miri Regev’s statement concerning the new Israeli Public Broadcasting Corporation KAN: “It’s inconceivable that we’ll establish a corporation that we won’t control. What’s the point?”⁷ Also Prime Minister Benjamin Netanyahu’s engagement with the Israeli media has meanwhile become proverbial. In his view, the Israeli media landscape is monopolized by leftists with the goal of overthrowing him.⁸

However this paper turns to another, albeit related observable phenomenon, namely the attempts of wide parts of the current government to alter the very principles of Israel’s political system. At its core stands the attempt to weaken the state’s liberal de facto constitutional pillars and replace them with a more majoritarian structure, effectively allowing the current government for both: To give the state more collectivist, ethno-nationalist legal basis and strengthen at the same time the parliament at cost of the judiciary. In other

⁶ Lis, Jonathan. Israel Bill Seeks to Impose Sanctions on Institutions Marking Nakba. Haaretz, 09.05.2017.

<https://www.haaretz.com/israel-news/.premium-israeli-bill-seeks-to-sanction-on-institutions-marking-nakba-1.5469858>

⁷ Ravid, Barak. Miri Regev: Why Set up New Broadcasting Corporation if We Don’t Control it? Haaretz, 31.07.2016. <https://www.haaretz.com/israel-news/miri-regev-why-set-up-new-broadcasting-corporation-if-we-dont-control-it-1.5418699>

⁸ Verter, Yossi. Forget Iran, Netanyahu’s New No.1 Enemy Is the Israeli Media. Haaretz, 06.07.2016. <http://www.haaretz.com/israel-news/.premium-1.735358>

Muaem, Mazal. How Bibi is attempting to brainwash the Israeli public. Al Monitor, 10.09.2015. <http://www.al-monitor.com/pulse/en/originals/2015/09/israel-netanyahu-victim-strategy-media--left-public-image.html>

words it is an attempt to move Israel away from a more liberal political system to a more majoritarian system.⁹

At the core of this endeavor stands the attempt to reverse the so-called constitutional revolution of the 1992, which, according to its critics, established a liberal-left winged hegemony and bestowed the Supreme Court illegitimately with way to far reaching rights to interfere with actual politics. Especially the basic laws “Human Dignity and Liberty” and “Freedom of Occupation” are seen critically. These laws did not only anchor for the first time these principles within Israeli law and codified the state as “Jewish and democratic”, but they were the basis of Israel’s so-called “constitutional revolution”, which enabled judicial review. This rendered the Supreme Court into the highest instance of appeal and a constitutional court at the same time.

Consequently the court has been active in different fields. Since 1995 it has stroke down 18 laws¹⁰ – most notably in recent years were several decisions limiting the possibility of detention and deportation of refugees (“infiltrators”, in Israeli legal language) and the canceling of several laws regarding the exemption of Haredim from the military service. Additionally it has ruled on quite substantial matters in terms of minority rights: Civil status for homosexuals, a legal (not ceremonial) alternative to religious marriage, women’s rights, the recognition of non-orthodox conversions in terms of the “Right of Return”, and different cases regarding the rights of the Arab-Palestinian citizens of Israel, for example the requirement of Arabic street signs in mixed Arab-Jewish communities. Yet today, the constitutional and legal system and Supreme Court sees at least a twofold criticism: The first regards the activities of the Supreme Court itself: Especially right-wing and conservative critics see the courts adoption of judicial activism (“everything is judiciable”) as too far-reaching, they criticize the very liberal outlook of the judges and the court system in general and the composition of the judges, which do not mirror the

⁹ Liberal systems can be characterized in their structural core by two features: 1) first an organization of government with a system of checks and balances 2) the establishment of civil and political individual rights, mostly manifest and safeguarded through a constitution. This serves in liberal democracies to ensure to “tame the legislative power” and protect the rights of minorities and individuals from the state or majorities. In contrast, the majoritarian understanding of government is that these mechanisms limit the power of the parliament and are therefore an infringement of popular sovereignty. In this logic, individual and Human Rights would also need to be brought into accordance with the right of the majority to legislate contrary to these principles. Often this will be combined with a rejection of a “liberal elite”, allegedly being in control –especially through the media and the Supreme Court – and effectively hindering the parliamentary majority to execute its full power. See: Gargarella, Roberto. *The Majoritarian Reading of the Rule of Law*. In: Maravall, José Maria; Przeworski, Adam. *Democracy and the Rule of Law*. Cambridge University Press, 2003. S. 147-167.

¹⁰ Fuchs, Amir. *In the Shadow of the Storm of the Overriding Clause – How many Laws were disqualified by the Bagatz up until today?* Israeli Democracy Institute, 17.05.2018. <https://www.idi.org.il/articles/22273> [Hebrew]

different social, political and ethnic groups in Israel.¹¹ While it is beyond the scope of this article, there is something to be said about this – even liberal researchers as Menchem Mautner explain that this has problematic consequences for the standing of the court.¹² Linked to the first point, but going far beyond that, is a second criticism, which claims that there is not only a problem with the functioning of the judiciary in Israel, but with the idea of judicial review founded on principles like human and individual rights themselves, arguing that these principles infringe the democratic rights of the government. Especially with the current government, we see a development towards an understanding of democracy, which moves away from a liberal, rights-based approach, to a majoritarian system with fewer checks and balances, but rather a strengthening of a collectivist approach in government and state.

Indeed, representatives of the governing coalition are rather outspoken about this attempt: Minister of Justice Ayelet Shaked, one of the most elaborate persons in this regard, expresses this with exceptional clarity: „We need to protect the Jewish character of the state even if that means sacrificing human rights.”¹³ Similarly explains Israel Beitenu on its Hebrew website (not in the rather different English version), that “the significance that constitutes the State of Israel as a state of the Jewish people is that in case of a collision between democratic values and the preservation of Israel’s character as a Jewish state – the Jewish state will prevail.”¹⁴ Also Yariv Levin of the Likud argues “what should be understood to begin with [...] is that Judaism takes precedence in the Jewish state.”¹⁵ The Haredi parties Shas and Torah Judaism, finally, while coming from a very different, strictly religious angle, had never had any doubt, that Judaism must be superior to democratic and liberal principles.¹⁶

¹¹ See for example: Shaked, Ayelet. The Path to Governance. HaShiloach, 12.04.2017. [Hebrew] <https://hashiloach.org.il/מסילות-אל-המשילות/>

¹² Mautner, Menachem. Law and the Culture of Israel. Oxford, 2011. Pp. 160-181.

¹³ I24NEWS Editorial. Israeli minister says Israel to stay Jewish even at expense of human rights – I24NEWS, 12.02.2018. <https://www.i24news.tv/en/news/israel/167536-180212-israeli-minister-says-israel-to-stay-jewish-even-at-expenses-of-human-rights> Hovel, Revital. Shaked: There is Room to keep a Jewish Majority in the State, even for the Price of Violating Human Rights. Haaretz, 12.02.2018. <https://www.haaretz.co.il/news/politics/1.5810713> [Hebrew]

¹⁴ Party Platform of Israel Beitenu; Principles of Religion and State. <https://beytenu.org.il/המצע-המדיני/שלונו/דת-ומדינה/> [Hebrew]

¹⁵ Harkov, Lahav. Making the Jewish State a “Jewish State”. Commentary, 01.10.2013. <https://www.commentarymagazine.com/articles/making-the-jewish-state-a-jewish-state/>

¹⁶ Lintl, Peter. Israelische Charedim und Politische Moderne Eine zivilisationstheoretische Untersuchung einer jüdisch-religiösen Strömung in einem sich detraditionalisierendem Kontext. 2018. [Unpublished Dissertation]. Brown, Benjamin. Haredim me“Shilton haAm“: Bikoret Chareidit al haDemokratia haIsraelit. Israel Democracy Institute. Jerusalem, 2012. [Hebrew]

The consequence for those politicians is to undo the constitutional revolution and replace it with norms that strengthen the Jewish collective. This undertaking is one of the central pillars of the current government. As Shaked explains: “The constitutional revolution emptied the idea of a Jewish state of its content. [...] The legal system seeks to establish a utopian and universal world view, which sanctions individual rights radically.”¹⁷ Therefore her political aims are clearly outlined: “Only a moral and political revolution of the same size as the one we experienced in the 1990s, one that will reaffirm the achievements of Zionism and its central positions since its inception, can reverse this problematic trend.”¹⁸ Similarly, Yariv Levin attests: “Zionism will not continue bowing its head before a universalistic system of individual rights.”¹⁹

While there are several advances in this direction (e.g. the so-called legislation law (Hok HaHakika), the already passed suspension law, enabling the Knesset to suspend parliamentarians with a majority of 90 seats, or attempts to limit the “right of standing” before a court, which would make it more difficult for example for Human Rights organizations to sue in someone else’s name), two bills stand out in this regard: First, the proposed “nation-state law) (Hok HaLeom) and second the “Override Clause” (Piskat HaHitgabrut)

Nation-State Law (Hok HaLeom)

The most prestigious and ambitious undertaking of the government is the so called nation state law. Amir Ohana, chairman of the special committee for the Nation State bill calls it the “most important law in the history of the State of Israel”, Yariv Levin sees in it a “Zionist flagship bill, [...which] will bring order, clarify what is taken for granted and put Israel back on the right path.”²⁰

The discussion about a potential nation state law is now going on since the late 2000s with some 30 bills of different political actors. The majority of the bills – which were

¹⁷ Karsanti, Eliran. Minister Shaked: “The Justice System Emptied Zionism of Its Content”. Arutz 20, 29.08.2017.

<http://www.20il.co.il/כתבת-וידאו-השרה-שקד-מערכת-המשפט-רוקנה/> [Hebrew]

¹⁸ German, Aterah. Shaked: Zionism will not continue to bow its head before the Bagatz. Srugim, 29.08.2017.

<https://web.archive.org/web/20170829205235/https://www.srugim.co.il/212231--השרה-שקד-הצינות-לא-תמשיך-לכופף-את-ראש> [Hebrew]

¹⁹ Morag, Gilad; Tzimuki, Tovia. Shaked denounces HCJ illegal aliens ruling, calls for new constitutional revolution. Ynetnews. 29.08.2017. <https://www.ynetnews.com/articles/0,7340,L-5009369,00.html>

²⁰ Harkov, Lahav. Gutted Jewish Nation-State Bill Heads to First Reading in Knesset. Jerusalem Post, 13.03.2018.

<https://www.jpost.com/Israel-News/Politics-And-Diplomacy/Gutted-Jewish-nation-state-bill-heads-to-first-reading-in-Knesset-544957>

rather similar – was forwarded by politicians sitting in today’s government²¹. It is important to note, that the first bill drafted by Avi Dichter in 2011 enjoyed broad support of 37 co-initiators not only from the right, but also from MKs of the center and from the left. This support vanished in the upcoming years, when it became clear that there are major differences in interpretation of the clauses.²² Still, the majority of the center-left and the Arab parties were opposing the bill from the start and did offer alternatives drafts.²³ The overall idea of a nation-state law had several features.²⁴ First, it was to define the state of Israel as the nation state of the Jewish people and not for example as the “state of all its citizens”, which is the demand of Arab-Palestinian Israelis and a small part of the Jewish left.

Secondly, next to many rather declaratory paragraphs (anthem, calendar, flag) the bill is supposed to define the state as Jewish in a normative way. In its early phase the law was thought of “first principle” of the state, which would define the state and in its institutions as a whole. It stated that *any legislation* would have to be interpreted in consideration of the principle that Israel is the national home to the Jewish people and that national self-determination refers only to Jews. Democracy would have been secondary to that: While stating that the state has a democratic regime, this would be just a feature of its Jewish essence. As a consequence, also other basic laws would be legally subordinate to the principle of Jewishness of the state. In case of a contradiction of Human Rights and the Jewishness of the state, the later as a legal principle would prevail. Other elements of the basic law were the inclusion of Jewish religious law a source judges could turn to in case of legal unclarity, the declaration of Hebrew as official language with Arabic having a special status, and (in a late version of the bill) that it would be possible to set up ethnically homogenous (the obvious intention is Jewish only) communities.

²¹ among them Shaked (Jewish Home), Dichter, Levin, Elkin, Regev (Likud), Illatov (Yisrael Beitenu)

²² Einat Wilf, one of the Labor party’s signees, explained later for example, that she supported to split the phrase “Jewish and Democratic” in two paragraphs, not in order to subordinate democracy to Judaism, but to indicate that there is no tension between the two – as she thinks is indicated in conjunctive formulation “Jewish and democratic”. <http://www.wilf.org/English/2013/09/04/israel-jewish-democratic-state/>

²³ For example MK Hilik Bar’s demand to pass the Declaration of Independence and enshrine the principle of equality and the formula “Jewish and Democratic”.

<https://www.timesofisrael.com/the-idiots-guide-to-the-nation-state-controversy/>

Or the bill by several MKs of Joint List, to define Israel as “democratic and equal state” (omitting its Jewish character).<http://m.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=law-suggestionssearch&lawitemid=563196>

²⁴ I will subsume all bills sponsored by parties or politicians in the current coalition under this brief description and not go into the details or differences between them. For an overview and extensive commentary, see: Rabinovitch, Simon. Defining Israel: A Forum on Recent Attempts to Determine Israel’s Character. Marginalia, 26.12.2014. <http://marginalia.lareviewofbooks.org/defining-israel-forum-recent-attempts-determine-israels-character/>

Lastly, it is notable that the principle of equality – which is not codified in any Basic Law in Israel up until today – was omitted entirely. But this was very much on purpose. As opinion leaders Ayelet Shaked as well as Yair Levin argue, the inclusion of the principle of equality might be interpreted by the court system as collective value, not only as individual right. Therefore, they argued, it is better to omit it altogether than to run the risk, that the liberal court system grants the Palestinian Israelis collective rights.²⁵ Levin explicitly states, that an inclusion of a general principle of equality “is the exact opposite of what I want.”²⁶

After years of extensive discussion, a version of the law passed the first reading in May 2018.²⁷ Yet this version was already very much watered down, eliminating many of the controversial clauses. The two main controversial clauses left are the ones to subordinate Arabic to Hebrew and to the possibility to establish ethnically heterogeneous (which refers primarily to Jewish) communities.

The reasons for this are primarily explainable through the differences of opinion within the government itself. Whereas the main protagonists of passing the law were found in the Likud and the Jewish home party, the other coalition partners had very specific objections. The Haredi parties do in general object basic laws, as they don't want to empower the Supreme Court further, whom they deem hostile to their way of life. Especially, they did not want to pass a law, which would give the Supreme Court the possibility to interpret what the essence of the Jewishness of the state might be.²⁸ Additionally, and this is often overseen even in the Israeli media, the Haredi parties criticize the bill for its focus

²⁵ Hovel, Revital. Shaked: There is room to keep a Jewish Majority in the State, even for the Price of Violating Human Rights. Haaretz, 12.02.2018. <https://www.haaretz.co.il/news/politics/1.5810713> [Hebrew]

²⁶ Harkov, Lahav. Making the Jewish State a “Jewish State”. Commentary, 01.10.2013. <https://www.commentarymagazine.com/articles/making-the-jewish-state-a-jewish-state/>

This statement refers to an attempt of Ruth Calderon, a leading constitutional scholar in Israel, who is very critical of the “constitutional revolution”, to draft a nation state law which would build bridges to the center of the political spectrum. In order to do so, Calderon argues, it is necessary to include equality as a legal principle in the basic law. See also the lengthy interview with Ruth Calderon: <https://marginalia.lareviewofbooks.org/israel-nation-state-jewish-people/>

²⁷ Bill: Israel – The Nation State of the Jewish People. 13. 03.2018. http://fs.knesset.gov.il/20/law/20_Is1_491422.pdf [Hebrew]

²⁸ See the coverage on the Haredi website “BeChadrei Charedim” (Hebrew): Grodka, Yakov. Maklev: Lo roe toalet beShofet charedi. BeChadrei Charedim, 21.11.2017. www.bhol.co.il/126649/מקלב-לא-רואה-תועלת-בשופט-חרדי-צפן.html Or: Bitan, Eli. Why the “Nation State Bill” is so dangerous to the Haredi public in Israel. BeChadrei Charedim, 25.01. 2018. <http://www.bhol.co.il/129483/למה-חוק-הלאום-מסוכן-כל-כך-לציבור-החרדי-בישראל-דעה.html> [both in Hebrew]

on Jewish nationality²⁹, which is in their view a modern and not necessarily Jewish concept.

Furthermore the secular-nationalist Israel Beitanu rejected any inclusion of normative standing for religious law.³⁰ Finally, Kulanu rejected the subsumption of democracy under the principle of Jewishness, which led to the omission of democracy altogether.³¹ Thus the current bill says nothing about the proper way of governance at all, which leaves the bill mostly with declaratory clauses. In any case the bill is not likely to advance beyond the first reading, as Kulanu and the Haredi parties already declared, that they will not support it further.³²

Yet, what is important for our discussion here is, that the probable failure of the bill does not indicate, that this is a move away from the attempt to establish a political system based on majoritarian principles. All government parties with the exception of Kulanu were in favor of those steps – the failing of the bill must be attributed to the differences in opinion on how the principles of the majoritarian system should look like.

Which brings us to the second undertaking of the government, the so-called “override clause”, which is in some ways an externalization of one central aspect of the Nation State Law. It is an attempt to neutralize the liberal principles of the constitutional settings of 1990s and limit the powers of the Supreme Court, without specifying what kind of majoritarian outlook the state should have in the future.

Override Clause (Piskat HaHitgabrut)

The override clause is an attempt to enable the Knesset to take a vote, after the Supreme Court rendered a law non-valid on grounds of violation of a constitutional principle. It is meant to be an additional clause for the Basic Law “Human Dignity and Liberty”, which is the basis of judicial review today. Worldwide there are only two reference cases for such a clause. One is Great Britain – which does not have a constitution – and the other one is Canada. Nevertheless critics argue that the situation is not comparable: Neither

²⁹ This became visible for example in the Knesset discussion regarding the bill, when the MK Israel Eichler (Torah Judaism) frequently asked, why Israel needs to be defined in the bill as “the nation state of the Jewish people” and not just “the state of the Jewish people” Knesset Minutes, Sessions from 30.04.-02.05.2018. S. 135ff. http://fs.knesset.gov.il/20/Plenum/20_ptm_492846.doc [Hebrew]

³⁰ Newman, Marissa. Citing minority rights, Liberman opposes Jewish state bill. The Times Of Israel, 30.10.2017 <https://www.timesofisrael.com/citing-minority-rights-liberman-opposes-jewish-state-bill/>

³¹ Lis, Jonathan. Knesset Panel Backs Version of Nation-state Bill That Doesn't Mention 'Democracy'. Haaretz, 13.03.2018. <https://www.haaretz.com/israel-news/knesset-panel-backs-version-of-nation-state-bill-without-democracy-1.5905853>

³² Lis, Jonathan. Israel's Contentious 'Nation-state Bill' Passes First of Three Knesset Votes. Haaretz, 01.05.2018. <https://www.haaretz.com/israel-news/israel-s-nation-state-bill-wins-backing-in-first-of-three-knesset-votes-1.6045824>

does Israel have an encompassing legal code securing individual rights, nor a second chamber of parliament nor is it subject to international human rights treaties. Therefore such a clause will inherently harm the status of Human Rights. This is all the more important as Israel finds itself in a very different situation than Canada, being a country in a conflict, with highly polarized and at times antagonized sectors of society.³³

The advocates of this clause disagree today by which majority such an override would be possible. Opinions range from a regular majority to an absolute majority (61 of 120 seats) up to numbers of 70 or 80 Members of Knesset being necessary. The current bill, which passed by the time writing the ministerial committee and will now be advanced to the parliament, speaks of 61 seats necessary. That means any coalition government in Israel would be able to override the Supreme Court.

If the law passes in its current form, it effectively means the end of the Supreme Court's functioning as constitutional court, granting every government through its parliamentary majority de-facto unrestrained legislative power and a stop of the system of checks and balances – an attempt which defines exactly the core of a majoritarian understanding of democracy. As Education Minister Naftali Bennet (Jewish Home) has pointed out: The override clause will be the “beginning of the building of a separation wall between the three branches [of government]. [...] One branch cannot intervene in the affairs of the other.”³⁴

One likely consequence of this law will be that all political topics, in which the Supreme Court has so far intervened, can not only theoretically be passed, but will likely be part of every coalition agreement, if no party is explicitly objecting it. Due to Israel's political system, which obligates the parties to keep the coalition agreements, all parties will be forced to vote in favor of the particularities of respective political groups. That gives smaller groups - as long they are necessary for governmental majorities – much leverage to enforce their core concerns.

Thus, this is a self-enforcing mechanism. Not only will it enable to override considerations of Human Rights, it will also strengthen the particular interests of the parties in government, even if they are not shared by a majority – as long as it does not touch on explicit red lines of other coalition partners. Likely examples are even less restrictions on settlement buildings (consider the current case of the “regularization law” which is brought before the Supreme Court), only recognition of strict orthodox conversions,

³³ Fuchs, Amir. The Override Clause: The Canadian Model and its Adaptability to Israel – Extensions to the Original Article. Israel Democracy Institute, 24.11.2007. <https://www.idi.org.il/articles/7967>

Plessner, Jonathan; Fuchs, Amir. The British Model does not fit Israel. Israel Democracy Institute, 12.04.2018. <https://www.idi.org.il/ministerial-committee/22235> [Both in Hebrew]

³⁴ Hay, Shahar. Knesset committee approves override power over High Court. Ynetnews, 06.05.2018. <https://www.ynetnews.com/articles/0,7340,L-5252771,00.html>

which will have implications on the citizenship and immigration laws, further limitations for NGOs and Human Rights organizations and so on – the policies described at the beginning of the paper indicate the political direction of an ethno-nationalist/religious government.

Yet today it is still unclear if this clause will pass. Unlike the nation-state law, it is supported by Yisrael Beitenu and the Haredi parties (who even drafted an own version of an override clause³⁵). It is especially the latter parties that are central in passing or blocking all questions of constitutional matters. Only Kulanu objects to its passing. Party leader Moshe Kahlon said in this regard: “We will not allow extreme elements to lead the daily agenda in the State of Israel.”³⁶

But even if the law will not pass in during this Knesset term, it will remain on the agenda of the right-winged parties. Yariv Levin of the Likud has put this very distinctly: “We will propose bills time after time, even if Kulanu vetoes them, because in the end, the public pressure will work, and we will pass these laws.”³⁷ After all, this strategy has proven very successful in shaping Israeli opinion for the last years in favor of the populist right of the Likud and the Jewish Home, even if there is currently still a societal majority against the override clause.³⁸ At the time of writing [May 2018], polls indicate that a right-winged majority without Kulanu would be possible.³⁹

Contextualization and Analysis

In order to understand how and why Israeli politics arrived at this point, it is important to look at a couple of background features and developments, even if I can allude to them only briefly.

- 1) The “constitutional revolution” and the subsequent enabling of judicial review were never entirely democratically sanctioned. While in principle it can be found

³⁵ Gafni, Moshe; Maklev, Uri. Proposed Amendment to the Basic Law Human Dignity and Liberty. 14.12.2009.

<http://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawsuggestionssearch&lawitemid=332180> Gafni, Moshe; Maklev, Uri; Asher, Yaakov. Proposed Amendment to the Basic Law Human Dignity and Liberty. 17.06.2013. <http://main.knesset.gov.il/Activity/Legislation/Laws/Pages/LawBill.aspx?t=lawuggestionssearch&lawitemid=481982> [both in Hebrew]

³⁶ Hay, Shahar. Knesset committee approves override power over High Court. Ynetnews, 06.05.2018. <https://www.ynetnews.com/articles/0,7340,L-5252771,00.html>

³⁷ Harkov. Lahav. Israel’s Fiercest Warrior Against Judicial Activism. The Jerusalem Post, 06.10.2017.

<https://www.jpost.com/Israel-News/The-fiercest-warrior-against-judicial-activism-506793>

³⁸ IDI Press Release. What is the Public’s Opinion on the Override Clause? Israel Democracy Institute, 29.04.2017. <https://en.idi.org.il/articles/23379>

³⁹ https://en.wikipedia.org/wiki/Opinion_polling_for_the_next_Israeli_legislative_election

in the basic law “Human Dignity and Freedom”,⁴⁰ the decision that it indeed judicial review was taken by the court itself, which it laid down in the ruling of the case “Bank Mizrahi”. Additionally, Chief Justice Aharon Barak interpreted a clause, which determines Israel as “Jewish and Democratic” in a way, that Judaism refers only to its enlightenment values and not to its religious tradition.⁴¹ Thus, in a coup de main, Barak tried to determine singlehandedly the most controversial domestic issue of Israel’s history in a certain direction. Therefore in the light of its critics, judicial review lacked democratic legitimacy and was always exercised “in the shadow of this ‘original sin’”⁴².

- 2) The changing political landscape and its shift to a right-winged majority is intrinsically linked to the ongoing conflict. With the failure of the peace process and the ongoing violence the Israel society turned inward, developed an ever growing mistrust and enmity towards the Palestinian society, a belief in the righteousness of its collective goals.⁴³ It is through this prism, that many Israelis feel that the right of Israel to exist is still up for discussion – even if the state seems to enjoy a greater closeness to Arab states than ever before. It is against this backdrop that the idea of a bill like “the Jewish nation state” was nurtured. While this is probably a natural development of a society in conflict, it is very particular for Israel, that the failure of the peace process – which is supported by the Israeli left – is intrinsically linked with liberal principles of government. As the vice-president of the Israeli Democracy Institute, Mordechai Kremnitzer, argues “The public identifies

⁴⁰ The clause in the law, on which judicial review is founded, reads: “There shall be no violation of rights under this Basic Law except by a law befitting the values of the State of Israel, enacted for a proper purpose, and to an extent no greater than is required”. Basic Law: Human Dignity and Liberty. https://www.knesset.gov.il/laws/special/eng/basic3_eng.htm

⁴¹ Barak, Aharon. A Constitutional Revolution Israel’s Basic Laws. Faculty Scholarship Series 3697, 1993. Yale University. http://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=4700&context=fss_papers

⁴² Sadurski, Wojciech. Constitutional Courts in Transition Processes: Legitimacy and Democratization. Sydney Law Legal Studies. Research Paper. 11/53. 2011. Quoted in: Mordechai, Nativ; Roznai, Yaniv. A Jewish and (Declining) Democratic State? Constitutional Regression in Israel. Maryland Law Review. Volume 77, Issue 1. P. 249.

⁴³ For a detailed explanation of the shifts due to the failed peace process in regard to Israeli politics and society see Lintl, Peter. Repercussions of the Unresolved Conflict on Israeli Power Constellations and Actor Perspectives. in: Peter Lintl (Ed.) Actors in the Israeli-Palestinian Conflict. Interests, Narratives and the Reciprocal Effects of the Occupation. SWP Research Paper 2018/RP 03, June 2018, 59 Pages. P. 7-20-

<https://www.swp-berlin.org/en/publication/actors-in-the-israeli-palestinian-conflict/>

values like democracy, liberalism and Human Rights with the left.”⁴⁴ And this happened not by chance. Rather one could argue it was the greatest success of the majoritarian and populist right to draw a connection between the left-winged liberal’s support of the peace process and liberal principles of government and to present both aspects as a general moral decay of liberalism.⁴⁵ And this is what we see today: Liberal values and liberal principles of government face a general suspicion of being supportive of the causes of the enemies of the state. On a side note: This is also the reason, why all the corruption charges Netanyahu faces do not harm him in polls, as also the principles of good governance became victim of this popular verdict.⁴⁶

- 3) The political stream that has always actively supported the majoritarian worldviews does still not have the majority today. But their success was that the liberal principles were substantively undermined. Today we see a situation, where roughly one third to half of the government (mostly members of the Jewish Home and parts of the Likud and Israel Beitenu), who are the main supports of the majoritarian system, are also the opinion leaders of the government. This was facilitated by Netanyahu’s turn to the right during the last election campaign. Realizing, that he will only stay Prime Minister if he can win over a decisive majority in the right wing, he turned more than ever to populist, right-winged slogans.⁴⁷ This opened up a dynamic between the parties Likud and the Jewish Home, about which is more “authentically right” and took politics and discourse to positions, which would have been years ago considered extreme. At the same time, these are

⁴⁴ Bochbut, Hagar. Is there a danger to Israeli Democracy? Ynet, 31.05.2016. <https://www.ynet.co.il/articles/0,7340,L-4803112,00.html> [Hebrew]

⁴⁵ Feinstein, Yuval; Ben-Eliezer, Uri. Failed peace and the decline in liberalism in Israel: A spiral model. In: Mediterranean Politics, 2018. pp. 1-24.

⁴⁶ Kershner, Isabel. In Israel’s Poorer Periphery, Legal Woes Don’t Dent Netanyahu’s Appeal. The New York Times, 17.03.2018. <https://www.nytimes.com/2018/03/17/world/middleeast/benjamin-netanyahu-israel-likud.html>

Additionally one could mention, that the milieu from which the Likud draws its votes, the Mizrahim, have been treated as second class citizens for the first decades of the state by liberal elites and this founded a very strong anti-liberalism among them. See: Mautner, Menachem. Liberalism in Israel Between the ‘Good Person’ and the ‘Bad Citizen’ In: Israel Studies Review. Volume 31, Issue 1, Summer 2016: 6–35.

⁴⁷ Lintl, Peter “Understanding Coalition Formation in Israel: Party Positions and Cleavages in Light of the 2015 Elections”, *Orient* 56, no. 3 (2015): 27–35.

- the people who are dominating the public discourse and the government's agenda today.
- 4) Supportive of these developments is also the international arena. While in the 1990s liberal principles seemed to be the last word (think of Fukuyama's "the end of history"⁴⁸), today majoritarianism and anti-liberalism are articulate voices also in the Western World.
 - 5) Lastly, looking into the future, one has to differentiate between short and long-term developments. Currently the situation for the majoritarian right is better than it was ever before: Trump as US president, a paralysis on the Palestinian front and a split in the European community are all in favor of the current Israeli constellation. The future will tell if it stabilizes or changes. Yet in the long run, even though newer studies don't foresee the dramatic changes prognosticated a few years⁴⁹, Israeli society will see a change with the demographical rise of the Haredi community. It is unclear where this will lead, but this community is certainly open for the weakening of liberal principles.

Consequences for the European-Israeli relations

The relations between the EU (and its legal predecessors) and Israel – which were from an early time on called "special relations" – are based on the economical level of development of both entities, but even more so on shared values and political principles. Thus, it was explicitly stated in the EU-Israel Association Agreement of 2000, that "particularly the observance of human rights and democracy [...] form the basis of the Association."⁵⁰ In that context, it was also agreed that these principles form a "framework of political dialogue"⁵¹

While it is certainly true, that differences between the EU and Israel were always existing – and therefore many clauses on political values and principals were kept rather vague in the different treaties between the EU and Israel⁵² – what we see in recent years is a growing estrangement in those fields. The forays undertaken by the current Israeli government as described above are likely to increase these tendencies. This is not necessarily, because the government attempts to change procedures of the democratic system. In a certain

⁴⁸ Fukuyama, Francis. *The End of History and the Last Man*. Free Press, 1992.

⁴⁹ Weinreb, Alex; Blass, Nachum. *Trends in Religiosity Among the Jewish Population in Israel*. Policy Paper, No. 02. 2018. http://taubcenter.org.il/wp-content/files_mf/trends_in_religiosity.pdf

⁵⁰ Euro Mediterranean Agreement. *Establishing an association between the European Communities and their Member States, of the one part, and the State of Israel, of the other part*. 21.06.2000. (my emphasis) https://eeas.europa.eu/sites/eeas/files/asso_agree_en.pdf

⁵¹ Ibid.

⁵² Pardo, Sharon; Peters, Joel. *Uneasy Neighbors. Israel and the European Union*. Plymouth, 2010. P.47-68.

view, the defenders of these attempts are correct: Strengthening the parliament at cost of the other branches of government renders it in a strictly technical sense more democratic. Yet, this is only true, when “democracy” is understood not in a substantial way, but in a pure procedural way. The general idea of the separation of powers is indeed to tame the legislative and to protect the rights of minorities. The ongoing attempts of wide parts of the Israel government of undoing the constitutional standing of the respective basic laws is – and often very explicitly so – intended to strengthen collective rights at cost of individual and minority rights. This becomes problematic from a liberal democracy point of view – which the EU still sees as normative – considering the fact that these advances are accompanied by a policy and rhetoric of wide parts of government, which clearly aims to delegitimize political opponents and certain minorities. In that context, the attempts to curb protection mechanisms combined with discriminating statements and policies is what appears to be especially troublesome. Additionally, as comparative literature on political systems that turn majoritarian and anti-liberal has shown, the respective countries are likely to strengthen discriminatory policies towards minorities.⁵³

While at this stage, the undoing of the “constitutional revolution” is debated and it is still very unclear if the respective bills will be passed, the differences in political culture and values between wide parts of the Israeli government and the self-understanding of the EU became rather apparent. The Israeli government joins in politics and rhetoric global political streams, which have been often described as right-winged populist. In countries, where those movements have a majority, one can observe a comparable phenomenon, even if, of course, scope and depth are varying. This holds true, for example, for Turkey, Hungary, Poland and other countries (some even point out to similarities in South American democracies⁵⁴) where ethno-nationalist governments are trying to curb liberal principles of governance, limit the responsibilities of the supreme courts and establish majoritarian political systems.⁵⁵

Yet, the very fact that these trends are taking hold also in Europe makes an EU policy towards Israel all the more complicated. This is not only a challenge in terms of the EU’s credibility, but also to the decision making process of the EU. The ideological proximity renders Visegrád States to natural allies of the Israeli government, sharing illiberal views, anti-Arab and even anti-EU sentiments. This has become manifest at several instances; the latest was the circumvention of an EU statement, condemning the US move of the embassy to Jerusalem and the partaking of several EU member states at the inauguration ceremony of the embassy. Overcoming the domestic split within the EU will be the most

⁵³ Zakaria, Fareed. *The Future of Freedom. Illiberal Democracy at Home and Abroad*. London, 2007.

⁵⁴ Mordechay, Nadiv; Roznai, Yaniv. *A Jewish and (Declining) Democratic State? Constitutional Regression in Israel*. *Maryland Law Review*. Volume 77, Issue 1. P. 264ff.

⁵⁵ Krastev, Ivan. *After Europe*. Penn University Press, 2017. Petersen, Felix; Yanaşmayan, Zeynep. *The Final Trick? Separation of Powers, Checks and Balances, and the Recomposition of the Turkish State*, *VerfBlog*, 2017/1/28, <https://verfassungsblog.de/the-final-trick-separation-of-powers-checks-and-balances-and-the-recomposition-of-the-turkish-state/>.

important challenge in the upcoming years for any EU policy towards Israel and the Israeli-Palestinian conflict.

In terms of recommendations for the EU, one can mention two points in this regard: *First:* The EU needs to differentiate between factors favoring such a political constellation, and the protagonists – especially parts of Likud and Jewish Home – pushing for a majoritarian system and combining it with discriminatory rhetoric and politics. The majority of Israelis today – with the obvious exception of Arab-Palestinian citizens – feels a necessity to define Israel legally as a Jewish state. This is primarily an act of self-assurance, following the ongoing failure of the of the peace process with the Palestinians. Yet, this in turn enables the protagonists of a majoritarian approach to push their agenda forward, tarnished as a matter of friend-foe choice with liberal principles supporting protecting the enemy and harming “the nation’s” interest. One of the tasks of the EU will be to continue to be in critical dialogue with Israel regarding the shared values and questions of discrimination, based on the mutually signed treaties.

Secondly, as the Israeli-Palestinian conflict is a core element contributing to the domestic developments, the EU should also continue to have a clear stance on that issue. While it needs to keep up the support of a two-state solution and be outspokenly critical of the occupation, it must be, first, sensitive towards the Israeli anxieties, even if they are for many Europeans hard to grasp. Secondly, while continuing the differentiation policy, it must be very clear on its condemnation of attempts of delegitimize Israel as a whole. Otherwise it will not only lose any influence it is still has, but also contribute to the feeling of a siege mentality and thus to anti-liberal sentiments.