



2018 - A Bad Year for Democracy

Human Rights in Israel - 2018 Situation Report

Introduction

A country's democratic nature cannot be reduced to a "yes" or "no" answer. A democracy may have varying degrees of separation of powers, with a spectrum ranging from broad and inclusive liberal political regime to an authoritarian, illiberal one in which the tyranny of the majority or power of despotic individuals is unchecked. Sometimes the transition from one political regime to another is not abrupt as in a revolution. Rather, legislation can gradually reduce the scope of action and powers of various authorities, and restrict the space granted to citizens to act and influence. The accumulation of such legislation harms liberal democracy and violates human rights — especially the closely interconnected right to equality, minority rights and freedom of expression. Are we headed down this slippery slope, and if so, where do we currently stand?

In recent years, the very disturbing trend of shrinking democratic space has been gaining momentum in Israel and appears to be a deliberate policy. Members of the government and Knesset have taken the initiative to advance [legislation that undermines basic democratic elements of governance](#): minority rights; freedom of expression; the operations of civil society organizations; the system of checks and balances among state authorities; and gatekeepers. Of particular concern is the fact that the Knesset, the heart of democracy in Israel, has been at the forefront of this legislation. Even if not all legislative initiatives end up as laws, they influence public discourse and the public's attitude toward democracy, human rights, minority groups (whether political, social or ethnic), the rule of law, and more.

This document, published to commemorate the **70th anniversary of International Human Rights Day**, focuses on this past year's legislative initiatives, which endanger human rights and democracy in Israel. Among these initiatives are harming the gatekeepers of democracy and the system of checks and balances among state authorities; advancing legislation aimed at damaging the status or rights of the Arab minority in Israel; infringing freedom of speech; blurring the legal boundary between the sovereign state of Israel and the occupied territories (which, in turn, negatively impacts democracy and human rights).

This anti-democratic process has been building up for several years. The implications for Israeli society are dramatic, even if it may be difficult to discern them in real time. In order to protect human rights and strengthen democracy, we must first recognize the danger lurking before us. If we do not stop the increasingly restricted and illiberal democratic

regime, practices of discrimination, violation of equality, limited freedom of expression, and preference for one ideology over another, will become more widespread — ultimately harming all citizens and residents of the country whose lives, faith, or affiliations do not conform with the agenda and values of the government.

Harm to gatekeepers and the system of checks and balances

Members of the government, especially those among the coalition, have repeatedly claimed that there has been a "lack of governance" in recent years. According to this conceit, the government is subject to restrictions that prevent it from implementing its policies, and thus various reforms are required in the realm of governance and administration in Israel to strengthen and expand the government's power to operate. Thus, the government justifies promoting legislative initiatives that threaten to harm the system of checks and balances, essential to the existence of a functioning democracy, thereby strengthening the political majority at the expense of proper administration, the rule of law, and human rights.

The government naturally requires the means to carry out its policies, which are supposed to reflect the will of the majority. However, even if a democratic country requires measures to improve governmental mode of work, measures should not be designed to harm the system of checks and balances, the very system that ensures the government will not act without restraint and restrictions. The checks and balances include free and fair elections; an independent court system, including the Supreme Court; systems of rule of law; the State Comptroller; professional and impartial public services; an active civil society; a free press; and overarching laws and in particular basic laws. The fine line between ensuring the government's range of options for action, and the critical restrictions required to ensure human rights, democracy, and the rule of law, sometimes appears to be vague and unclear. Yet its preservation is essential in ensuring basic values of democracy and human rights.

Thus, under the pretext of harm to governance, the government has in recent years launched attacks on various state institutions: against the Supreme Court, which dares to address government policies that violate human rights; the Israel Police Commissioner and the police, who dare to investigate or prosecute elected officials; the State Comptroller; the Attorney General and the Deputy Attorney General, whenever they do not automatically defend government policy; employees of the state attorney's office, the Ministry of Justice, and legal advisers in other government ministries, who are not willing to serve as lawyers for ministers and insist on fulfilling their duties as gatekeepers; government officials, who professionally refuse to blindly support or automatically promote all initiatives put forth by the government or individual ministers; and more. The government has promoted various reforms or bills aimed at curbing any administrative body it deems "disruptive", limiting their power and authority, in order that they remain subordinate to the government. Two such conspicuous legislative initiatives from the past year involve adding a "cessation

clause" to the Basic Law: Human Dignity and Liberty, and reforming the appointment process of legal advisors in government ministries.

The addition of the "cessation clause" to the Basic Law: Human Dignity and Liberty would enable the Knesset to re-enact laws that were rejected by the Supreme Court for contradicting basic laws and disproportionate violation of human rights. In addition to the legislative attempt to advance a general "cessation clause," this year a proposal was made to enact a "narrow cessation clause," which would enable the Knesset to circumvent the High Court of Justice's (HCJ) ruling on holding asylum seekers in detention. However, it is clear that even a limited "cessation clause" is merely the first step toward expanding it to include other issues, furthering the damage caused to democracy and human rights.

The "**cessation clause**" has been widely criticized, including by the outgoing Supreme Court President Miriam Naor, the current Supreme Court President Esther Hayut, the Attorney General, and many others. This is a dramatic blow to the separation of powers in Israel, eliminating one of the central elements of democracy — the constitutional protection of human rights in general and minority rights in particular, independently of political constellations. Basic laws in Israel serve as substitute for a nonexistent constitution, whose central role in many countries around the world is to protect against the tyranny of the majority and fundamental violations of democratic governance. The HCJ, which is currently authorized to serve as the Supreme Court, stands as a defender of democracy. Yet it will lose its power if the "cessation clause" passes, given that the Knesset will have the authority to re-enact decisions and laws that HCJ overturns for overturning basic laws and violating human rights. In other words, the political majority at any given time will be able to exploit its numerical advantage in order to harm the rights of the minority — whether they are women, the Arab citizens of Israel, women, the ultra-Orthodox, impoverished citizens, immigrants, Ethiopians, the LGBTQ or any other minority group.

The **Legal Counsel bill**, which passed its first reading in January 2018, is currently being discussed by the Constitution, Law and Justice Committee of the Knesset. The bill seeks to change the manner in which legal advisors are appointed to government ministries, such that rather than being selected through tenders as is the case with all civil servants, they will be appointed by a search committee within which the minister retains a majority, entailing selection by a political body. The bill's explanatory notes indicate that it is necessary "to increase governability and strengthen government ministries, so that they may implement the policy of the minister entrusted with them in an optimal and harmonious, as opposed to counterproductive and frustrating, fashion." Thus, the proposal expresses a perception according to which legal advisers within government ministries are considered members of the political echelon, and not gatekeepers whose job it is to warn of policy liable to violate the rule of law.

The bill intends to politicize an important aspect of the gatekeeper mechanism in Israel. It is liable to harm the independence and professionalism of civil service, as well as the struggle against governmental corruption, protection of the rule of law, and the credibility of

political echelons and the executive branch. Despite [widespread public criticism by senior jurists](#), retired government legal advisors, the current Attorney General, organizations, and others, the government has not retracted its support for the bill. In addition, it was reported that the Justice Minister is seeking to call off the search committee for the position of attorney general, and to replace it with a "decision committee" on behalf of the government. In her view, legal counsel must not limit the government; as mere consultants, they assume the same role of an attorney with regard to a client, as the government is the sovereign and decides on all matters regarding legislation.

Among the gatekeepers in a democratic country are civil society organizations whose role is to protect human rights, supervise government policy and activities, warn against human rights violations, and assist those harmed by them. In recent years, harassment of human rights organizations has intensified along with de-legitimization of their activities, creating a hostile atmosphere against them. This not only harms the most vulnerable populations represented by these organizations that constitute a voice for them, but also undermines the foundations of the democratic regime.

Throughout the 20th Knesset, the government promoted a number of legislative initiatives against civil society organizations. Over the past year, no significant legislative initiatives were taken to harm organizations. Yet a concerted de-legitimization campaign continues through various means. Thus, among other things, Prime Minister Benjamin Netanyahu acted to prevent the allocation of budgets to organizations, and the Attorney General was compelled to clarify that the government has no legal authority to gather information on non-profit organizations. Likewise, the Prime Minister, Minister of Culture, and other senior officials lashed out at the New Israel Fund and civil society organizations; during local elections candidates accused their opponents of ties to the New Israel Fund as a tool for political bashing. Finally, [political/human rights activists](#) were detained at the airport or summoned for "warning talks" by the Shin Bet Security Service. The campaign of incitement against civil society organizations intends to silence them and to deter others from cooperating with them, thereby preventing criticism of the government and censoring public discourse, such that only positions of the dominant political majority will be heard.

Violation of the rights of the Arab minority

One of the most important principles of democracy is to protect minorities from the tyranny of the majority. Minority status entails social, economic, gender-based, sexual, national, racial, political standing, etc. The majority always retains the power to disregard the needs and rights of minority groups, but that is precisely the role of democracy — to protect those who do not belong to the majority at any given moment. A democratic state is essentially pluralistic: it respects the differences among its citizens; provides increased protection for minorities at large, and national minorities in particular; and enables any group interested in preserving components of its identity, including heritage, culture, and nationality, to do so. A democratic state maintains equal rights for all its citizens, regardless of religion or nationality.

If there is one law that manifests the spirit of the recent violation of democracy and human rights, it is the **Nation-State Law** ([Basic Law: Israel - the Nation State of the Jewish People](#)). The law, which was approved in the plenum in July of 2018, places an emphasis on and preference for the Jewish characteristics of the state over democratic elements. The general message conveyed by the law is that the state is Jewish and only belongs to Jews. The law entirely disregards national minorities and their rights, and, in turn, clearly deems non-Jews especially the indigenous Arab minority, which constitutes 20% of the country's citizenry, second-class citizens. The law, which is in practice part of the future constitution of the State of Israel, does not address democracy or human rights: it does not guarantee human rights to all citizens, primarily the rights to equality, language and culture, and minority rights. It contains no basis for the rule of law, democratic institutions, and separation of powers. It provides a legal anchor for residential discrimination and racial segregation, violates the right to language, culture, and the identity of one-fifth of the country's citizenry, including many discriminatory provisions that open the door for widespread practices of racial discrimination in all walks of life. The law is not only declarative, but also violates the human rights of all citizens of the state.

Throughout the intensive legislative process, and even [after](#) it passed in the Knesset, the Nation-State Law aroused public controversy and was [widely criticized](#). Many petitions were submitted to the Supreme Court against the law, which are expected to be heard in January 2019. The underlying spirit of the law hovered over local elections in November 2018, accompanied by public statements and [campaigns against the Arab public](#) on behalf of various candidates, with the tacit agreement and backing of their parties represented in the Knesset.

The [Hebrew Jurisprudence Law](#), which passed this year in the Knesset, reflects a preference for the Jewish nation and raises concerns about the violation of minority rights. According to the original wording of the proposal, in the case of "non liquet" (no applicable law) among Israeli law, judges will be required to refer to Jewish law first. Following extensive criticism of violating equality, it was ultimately agreed that judges' referral to Jewish law would be conducted alongside references to Jewish heritage (including all sources of culture and

thought, including modern ones). In any event, it would be subject to principles of freedom, integrity, justice, and peace —, which intends to ensure the maintenance of principles and values of modern Israeli law. However, in the broader context over which the law precedes, it signals a moral orientation toward courts and society: preference to the orthodox Jewish religion over the democratic values of the State of Israel and the principled right to equality.

Another violation of the rights of the Arab minority was recorded this year when the HCJ rejected two petitions filed against the **Impeachment Law** passed by the Knesset in July of 2016. The bill is an amendment to the Basic Law: The Knesset, which allows 90 Knesset members to dismiss an incumbent member of Knesset (MK) if they believe that their actions explicitly or implicitly incite racism or support an armed struggle of an enemy state or terrorist organization against Israel. Such dismissal does not require the approval of a court. Although the law is phrased neutrally, it is clear that it is aimed first and foremost at members of Knesset among the Arab minority.

In May 2018, the Court ruled that the Impeachment Law violated the right to vote and to be elected, and even the freedom of MK's political expression, yet it refrained from its nullification. The court ruled that the law should be applied in a very limited manner, only in extreme cases of exceptional circumstances, and on the basis of "clear, unequivocal and convincing evidence." However, as with many laws and bills that limit democratic space, the very existence of the law, even if not implemented, creates a "chilling effect" that may reduce freedom of expression and action among Arab elected officials.

Violation of freedom of expression and pluralism

Freedom of expression is one of the most important elements of democracy. It allows for the expression of a variety of positions and opinions, government criticism, placing various issues on the public agenda, asking questions, and demanding explanations. Reducing the range of opinions heard in public discourse would prevent citizens from regularly reexamining the government in a genuinely informed manner.

Among various initiatives that have eroded freedom of expression and the legitimacy of diverse opinions in recent years, the most prominent is the [Loyalty in Culture Law](#). As part of Culture Minister Miri Regev's ongoing recurrent attempts to deny funding to institutions whose activities are incompatible with her positions, she promoted a bill this year that seeks to grant the Ministry of Culture the authority to prevent the allocation of budgets to cultural institutions that do not align with her political agenda. The bill includes a list of criteria that will enable the minister to determine whether a creative work is inappropriate and thus revoke government funding. The list of criteria includes matters that are already prohibited by criminal law (such as incitement to terrorism, racism or violence, support for terrorism, desecration of the flag, etc.) along with vague ideological criteria (such as negation of the state of Israel as Jewish and democratic, or the observance of Independence Day as a day of

mourning). In other words, the minister will have arbitrating power to determine whether the content of a cultural activity accords with her worldview and politics.

The implication of the proposal [gravely violates](#) artistic freedom of expression. For fear of compromising their budget, creators and institutions are wary of addressing controversial issues and expressing views that are unacceptable to the political majority. The promotion of this law has been recently halted, but the damage has already been done with the growing self-censorship. The bill also violates the right to equality, since only those perspectives that contradict or criticize the positions of the government will not receive funding. Minority groups are particularly affected, in particular Arab citizens, members of the LGBT community, refugees, various streams of pluralistic Judaism, and others.

Culture and art have always served as important central vehicles to address public discourse on a variety of social, political, economic, and other issues, especially those in dispute. Therefore, treating certain art and cultural activities as political and illegitimate severely violates freedom of expression. It is another means by which the political majority persecutes and silences its minority opponents.

Other legislation that violates freedom of expression and pluralism is an amendment to the State Education Law that intends to prevent certain organizations from lecturing in schools (informally known as the "**Breaking the Silence Law**"), which passed in the plenum in July 2018. The amendment grants the Minister of Education the authority to prevent organizations whose program vastly and significantly contradicts "educational goals" from entering schools, which has been added to the clause on "Education for meaningful or national service." It was also determined that the prosecution of soldiers abroad, along with the advancement of legal proceedings against Israel abroad, would be considered grounds for an organization's disqualification.

The bill was originally drafted to prevent the Breaking the Silence NGO from lecturing in schools (although the law does not in fact apply to this NGO), but the implications of the law are [much broader](#). Since educational aims are defined in a very general and declarative manner, the amendment allows the Minister of Education to censor content and disqualify any opinion, body, or activity that is incompatible with his political views. The amendment contravenes the educational goals defined in the State Education Law, which includes education for critical thinking, human rights, and active citizenship. It undermines pluralistic and critical education. One of the duties of a school principal is to enable students to have a free and informed debate on controversial issues, thereby exposing them to various opposing positions.

This year, Knesset members also discussed an **amendment to the "[Boycott Law](#),"** which came into effect in July 2011. It permits compensable legal action to be taken against anyone calling for a boycott of Israel and/or the occupied territories, and authorizes the Minister of Finance to impose economic sanctions on anyone who calls for a boycott or undertakes to participate in one. In April 2015, the Supreme Court rejected petitions

submitted against the law, including a petition by civil society organizations, which argued that the law was unconstitutional due to the violation of freedom of expression. The court ruled that the law does not harm the core freedom of expression, and that it is legitimate to prevent those calling for a boycott from receiving benefits from the state. However, the nine justices unanimously rejected clause 2(c) of the law, which determined compensation without proof of damage, deeming this section a disproportionate violation of freedom of expression, which also has a chilling effect on political freedom. All the same, this year the government promoted a legal amendment that seeks to re-enact the section that was disqualified, with small changes in wording that do not alter the problematic implications that the Supreme Court noted in its ruling. Despite the opposition of the Attorney General, the bill was approved in June 2018 by the Constitution, Law and Justice Committee in preparation for its first reading in the Knesset. The bill has yet to be brought before the plenum for a first reading.

This year, the House Committee also approved an amendment to the ethics rules for members of Knesset, which prohibits financing overseas travel for MKs by bodies listed among those organizations partaking in the boycott, as published by the Ministry for Strategic Affairs. On the basis of the positions or operations of the hosting bodies, the amendment would effectively limit MK's overseas travel. This violates freedom of expression and political freedom in Israel, the immunity of MKs (from all factions), and their ability to represent their constituents.

Attempts to apply the Knesset's sovereignty in the occupied territories

In the 20th Knesset, legislative initiatives aimed to promote the "legal annexation" of the West Bank by increasing the Knesset's sovereignty over the West Bank, and undermining the legal basis of the military regime that commenced in June 1967. The significance of this shift involves the establishment a regime of dual discrimination through annexation and occupation — **"annexcupation"**: on the one hand, Knesset legislation will expand settlements and strengthen their ties to the sovereign state of Israel; on the other, the military regime of occupation will continue to apply as if nothing changed. The initiators of the legislation even tie together equality, democracy, and human rights, as the overriding goal of their legislation — as long as these values relate solely to Israeli citizens.

In January of 2018, Minister of Justice Ayelet Shaked, and Minister of Tourism Yariv Levin began to implement the directive of the Ministerial Committee on Legislation. According to the directive, for every government bill brought before the Ministerial Committee on Legislation, the committee must discuss its potential application in the West Bank. This is done either through Knesset legislation, or by requiring the military commander to issue an order that will apply the same law. Additionally, Shaked established a special office in the Ministry of Justice to address issues of comparing legislation and law enforcement in the

occupied territories, with the aim of "accelerating the pace of establishing major general orders, and normalizing relations among residents of Judea and Samaria."

According to senior legal experts, including Deputy Attorney General Raz Nizri and Knesset Legal Advisor Eyal Yinon, the legal means of enacting legislation in the West Bank still requires the issuance of military orders and not direct Knesset legislation. However, since the 20th Knesset was sworn in, eight laws and legislative amendments have been enacted that apply directly to the West Bank. Some of them, most notably the **Regulation Law** passed by the Knesset in February 2017, significantly change the way Israel controls the occupied territories and directly affect the rights of Palestinians. Other laws do not relate to the manner of control over the occupied territories or the Palestinians, but express a transition to a mode of direct Knesset legislation over the occupied territories. In this document, we solely focus on legislative initiatives from the past year, but these merely indicate the culmination of an ongoing process.

In February 2018, the Knesset passed **an amendment to the Council for Higher Education (CHE) Law**, which abolished the separation that previously existed between the CHE in Israel and the CHE in Judea and Samaria, a body established by virtue of a military order. The amendment to the law actually extended the application of the CHE law to Israeli academic institutions in the occupied territories. The amendment prohibits the CHE from compromising the recognition already granted by the Judea and Samaria CHE to institutions and titles. The amendment also paved the way for the opening of a Faculty of Medicine in Ariel, for which a ceremony was held in August 2018.

In July 2018, the Knesset approved **an amendment to the Administrative Courts Law**, which transferred oversight of administrative petitions relating to the West Bank from the HCJ to the Jerusalem Administrative Court, in four areas: planning and construction; the Freedom of Information Law; entry and exit to, from, and within the West Bank; and military restraining and supervision orders.¹ The initiators of the law, including Justice Minister Shaked and MK Bezalel Smotrich, expect that the shift will lead to rulings more favorable of settlers, especially with regard to issues of planning and construction.

Alongside the laws and legislative amendments passed, the Knesset submitted a host of other bills relating to the West Bank that were not advanced among legislative processes. For example, in February of 2018, Knesset Members Yoav Kish and Bezalel Smotrich proposed a bill according to which "the law, jurisdiction, administration and sovereignty of the state of Israel will apply to all areas of settlement in Judea and Samaria." Another attempt to promote the annexation of settlements was made in late 2017 through two bills addressing settlements in the Jerusalem area.² The Interior and Environmental Protection Committee is currently discussing a bill that seeks to expand the authority of the minister of

¹ For ACRI's position, see the appeal to the Deputy Attorney General, 25.1.2018.

² Proposed Greater Jerusalem Law, 5767 - 2017, Proposed Jerusalem Law and its Offshoots, 5767 - 2017. For ACRI's position, see: [Establishment of a Separate Local Authority in the Neighborhoods Beyond the Wall in Jerusalem: Significance and Implications](#), November 2017.

the interior to distribute income among neighboring municipalities to Jewish settlements in the West Bank. **The Constitution, Law and Justice Committee** discussed a bill to privatize land management authorities in the rural sector of the occupied territories and transfer them to the Settlement Division.³

In the 20th Knesset, a sub-committee on Judea and Samaria was established within the Foreign Affairs and Defense Committee to address civil, non-security related issues with regard to the West Bank. Leaders and representatives of local and regional settlement councils regularly participate in deliberations, which require civilian and military authorities to solve various problems, such as improving the water supply to a particular settlement, or reinforcing safety measures at a dangerous junction. In these discussions, the absence of Palestinians who cannot send representatives to the Knesset from communities suffering from water shortages or demand the remodeling of dangerous junctions, is very salient. The annexation proposals seemingly seek to leave the discriminatory situation intact: settlers will live under the sovereignty of the Knesset and enjoy their rights as citizens of a democratic state, invited to participate and attend discussions at the Knesset with those who influence their lives. Meanwhile, Palestinians will continue to live under the sovereignty of the army and remain invisible.

Within this reality of "annexcupation" that the current government and Knesset are seeking to entrench, Palestinians are left defenseless: lacking rights and protections under both international law and Israeli law. "Annexcupation legislation," which is contrary to the principles of international law, has grave implications for Israel's standing as a democratic state, on the one hand, and intolerable consequences for the protection of human rights, on the other.

³ For ACRI's position, see the appeal to the Constitution, Law and Justice Committee, November 2018.